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## Understanding Constitutional War Powers Today: Why Methodology Matters

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# Book Review

## Understanding Constitutional War Powers Today: Why Methodology Matters

*Presidential War Power.* By Louis Fisher. Lawrence: University Press of Kansas, 1995. Pp. xvi, 245. \$29.95 (hbk.), \$14.95 (pbk.).

Jane E. Stromseth<sup>†</sup>

In no part of the constitution is more wisdom to be found, than in the clause which confides the question of war or peace to the legislature, and not to the executive department. . . . [T]he trust and the temptation would be too great for any one man . . . .

—James Madison<sup>1</sup>

Admitting that we ought to try the novel and absurd experiment in politics of tying up the hands of government from offensive war founded upon reasons of state, yet certainly we ought not to disable it from guarding the community against the ambition or enmity of other nations.

—Alexander Hamilton<sup>2</sup>

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1. ALEXANDER HAMILTON & JAMES MADISON, LETTERS OF PACIFICUS AND HELVIDIUS ON THE PROCLAMATION OF NEUTRALITY OF 1793, at 89 (James Madison) (Washington, D.C., J. Gideon & G.S. Gideon 1845). Madison continued:

War is in fact the true nurse of executive aggrandizement. . . . The strongest passions and most dangerous weaknesses of the human breast; ambition, avarice, vanity, the honourable or venial love of fame, are all in conspiracy against the desire and duty of peace. Hence it has grown into an axiom that the executive is the department of power most distinguished by its propensity to war: hence it is the practice of all states, in proportion as they are free, to disarm this propensity of its influence.

*Id.* at 89–90.

2. THE FEDERALIST NO. 34, at 208 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Hamilton continued:

With the Cold War over, Americans have grown more introspective about the role of the United States in global affairs. It could hardly be otherwise. America's rise to military preeminence, its overseas commitments and priorities, and its basic sense of international purpose all were forged by circumstances of the past fifty years that have changed dramatically. The Soviet threat is gone; once shaky allies in Europe and Asia are now comparatively stable and prosperous; the specter of cataclysmic nuclear war has receded while regional conflicts, ethnic strife, and humanitarian emergencies have moved to center stage. Although the world is no less violent than it was before, the American public feels comparatively more secure. That fact alone has led many Americans to reassess what the international posture of the United States ought to be and what sacrifices they are prepared to make to advance American interests and values abroad. Moreover, in the absence of an overarching Soviet threat, the commitment of U.S. armed forces overseas has become a more divisive issue domestically, and the question of Congress's constitutional role in such decisions has taken on new significance.

During the Cold War era, successive presidents claimed broad authority as the Commander in Chief<sup>3</sup> to send American troops into combat, not only to defend American forces and citizens abroad but also to defend allies and to protect U.S. security interests as the President defined them.<sup>4</sup> Presidents often simply informed Congress of deployment decisions already made, or nominally consulted with some members, but rarely asked the full Congress to authorize combat operations. Congress, despite its constitutional power to "declare War,"<sup>5</sup> grew comfortable playing a reactive role during the Cold War years, "scolding" the President after the fact if military action went wrong,<sup>6</sup> but rarely insisting on advance approval even when doing so might have been possible.<sup>7</sup> This war powers pattern—reinforced by judicial abstention—was

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Let us recollect that peace or war will not always be left to our option; that however moderate or unambitious we may be, we cannot count upon the moderation, or hope to extinguish the ambition of others. . . . To judge from the history of mankind, we shall be compelled to conclude that the fiery and destructive passions of war reign in the human breast with much more powerful sway than the mild and beneficent sentiments of peace; and that to model our political systems upon speculations of lasting tranquillity would be to calculate on the weaker springs of the human character.

*Id.*

3. See U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . .").

4. See LOUIS FISHER, *PRESIDENTIAL WAR POWER* 185 (1995); see also ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 127–76 (1973) (discussing case of Korean War); FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, *TO CHAIN THE DOG OF WAR* at ix (2d ed. 1989) (noting claims of presidential war power since Korean War).

5. U.S. CONST. art. I, § 8, cl. 11.

6. See, e.g., JOHN HART ELY, *WAR AND RESPONSIBILITY* 54 (1993).

7. The Persian Gulf War was a notable exception to this pattern. See Jane E. Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 *GEO. L.J.* 597, 653–54 (1993).

heralded by many presidents as an appropriate and necessary response to the Cold War dangers confronting the United States.<sup>8</sup>

Strong arguments can be made that this pattern of presidential assertion and congressional passivity was never constitutionally sound.<sup>9</sup> Whatever its validity, however, the sense of national emergency that sustained this pattern has dissipated, with the result that American officials (and members of the public as well) now look at many current conflict situations in a dramatically different light. For example, the civil strife in Somalia and Haiti, which policymakers previously would have viewed through a strategic lens as part of the larger U.S.-Soviet struggle, are now seen mainly as humanitarian crises. At the same time, the range of conflicts inviting the possible deployment of armed forces for operations other than war has expanded. American troops are deployed abroad today not only to defend and reassure U.S. allies but also to contain the spread of conflict, as in Macedonia; to implement complex peace agreements, as in Bosnia; and to help build domestic stability, as in Haiti. Multilateral organizations, particularly the United Nations (UN) and the North Atlantic Treaty Organization (NATO), play a greater role in authorizing and fielding operations both in peacetime and in conflict situations. All these developments provide much grist for future struggles over war powers between Congress and the President.

In short, now that the pressures of the Cold War have receded and the United States enters a complex new era in international affairs, the age-old question of the constitutional division of war powers between Congress and the President should be reexamined. Louis Fisher's timely book, *Presidential War Power*,<sup>10</sup> is a helpful historical resource for beginning this effort. Fisher provides a concise survey of executive-legislative practice regarding the commitment of U.S. combat forces abroad, from the earliest days of the Republic to the recent involvement of U.S. forces in Somalia, Haiti, and Bosnia, presenting his analysis in an accessible case study format. Fisher not only examines the major war powers issues that have arisen since 1789 and the various claims advanced by presidents in favor of an expanded war powers role; he also ably integrates into his historical survey a discussion of seminal judicial decisions. The result is a readable and well-documented book of interest to the general public and use to scholars.

The overarching theme of Fisher's book is that a sharp tension exists between the Founders' original understanding of the constitutional allocation of war powers and most post-World War II practice. "The constitutional framework adopted by the framers is clear in its basic principles," Fisher

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8. See, e.g., *id.* at 633, 636-37 (discussing claims of President Truman); SCHLESINGER, *supra* note 4, at 187-90 (discussing claims of President Nixon).

9. For a particularly thoughtful argument, see S. REP. NO. 91-129, at 7-10, 30-32 (1969) [hereinafter NATIONAL COMMITMENTS REPORT].

10. FISHER, *supra* note 4.

argues.<sup>11</sup> The Founders gave Congress the authority “to initiate war”<sup>12</sup> or “to mount offensive actions,”<sup>13</sup> while the President, as Commander in Chief, “could act unilaterally only in one area: to repel sudden attacks” against the United States or American armed forces.<sup>14</sup> With limited exceptions, the two political branches largely adhered to this basic understanding, Fisher argues, from 1789 to the end of the nineteenth century. A few deviations occurred in the early twentieth century as the United States emerged as a global power. Since the end of World War II, however, “[t]he trend of presidential war power”<sup>15</sup> consistently has conflicted with “the constitutional framework adopted by the founding fathers,”<sup>16</sup> Fisher contends, and “[p]residents have regularly breached constitutional principles and democratic values.”<sup>17</sup> Fisher, in short, draws a striking contrast between the consistent practice of congressional authorization of war in the earlier years of the Republic and the often perfunctory, last-minute notice and consultations common today.

Fisher rejects the various claims advanced by modern presidents to justify war powers beyond repelling sudden attacks on American territory or forces.<sup>18</sup> These include claims based on expanded concepts of defensive war and on treaties such as the United Nations Charter. Fisher contends that neither America’s more significant global role nor changes in weapons technology since 1789 provide compelling reasons to understand the constitutional war powers of Congress and the President differently today. He concludes with specific proposals for restoring checks and balances, including a reinvigorated War Powers Resolution,<sup>19</sup> but above all he urges Congress to assert itself and use the tools at its disposal (especially the power of the purse) to fulfill its constitutional role.<sup>20</sup>

*Presidential War Power* is an urgent plea to politicians, scholars, and the American public to reexamine our Constitution, our history, and our current practice. Fisher’s fundamental point is compelling: The power to commence war was given to Congress under the Constitution and should remain there, notwithstanding executive claims or recent practice to the contrary. The Founders’ conviction that no one person should have such enormous power, but that the legislature as a whole should make the critical decision for war on behalf of the people whose lives and resources would be placed at risk,

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11. *Id.* at 11.

12. *Id.*

13. *Id.* at 13.

14. *Id.* at 7.

15. *Id.* at xi.

16. *Id.*

17. *Id.*

18. *See id.* at xi, 161, 185.

19. *See* War Powers Resolution of 1973, 50 U.S.C. §§ 1541–48 (1994).

20. *See* FISHER, *supra* note 4, at 199–206.

reflected republican principles and a view of human nature that have lost neither their contemporary relevance nor their normative appeal.<sup>21</sup>

Fisher's book is far less helpful, however, in addressing the Constitution's allocation of power with regard to small-scale military operations that do not clearly involve initiating "war" or mounting "offensive" action against another state. Examples include the deployment of U.S. forces to Somalia in "Operation Restore Hope" to help create a secure environment for humanitarian relief operations and U.S. military involvement in Bosnia, first to protect UN-designated "safe haven" zones and, currently, to implement the Dayton Peace Agreement. Yet these are precisely the kinds of scenarios likely to preoccupy the United States in the coming years.

Resolving war powers questions raised by cases such as these, and indeed more generally, requires a searching examination of fundamental methodological questions in constitutional interpretation: How clear is the "original understanding" of the Constitution's allocation of war powers, and to what extent should original intent guide constitutional interpretation today? Can the basic purposes the Founders sought to advance in their allocation of war powers be convincingly "translated" into our very different world and, if so, how?<sup>22</sup> What significance does historical practice under the Constitution from the Founding to the present hold for understanding the respective war powers of Congress and the President today? These are the critical questions that divide war powers scholars.

Yet Fisher's book, despite its other virtues, gives these questions less attention than they require if the debate over war powers is to move forward at all in the post-Cold War period. For example, while Fisher's account of the original understanding is persuasive in its essentials, his analysis would have been more compelling had he critically engaged the major competing scholarly accounts of original intent. Proponents of those alternative views raise important questions about the scope of the President's defensive war powers and the meaning of Congress's power to declare war that need to be taken seriously. In addition, given the primacy of arguments based on historical practice in the contemporary debate over war powers, the question of whether (and how) that practice affects the Constitution's meaning today merits a more extended discussion than Fisher's book provides. In particular, a more nuanced analysis of America's many small-scale military actions from the Founding to

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21. See ELY, *supra* note 6, at 5-9 (defending continued relevance of Founders' view that decision to commence war belongs to legislature, especially in light of standing army now at President's disposal, destructive power of modern weaponry, importance of public support for war, and lack of other effective checks on unilateral executive action).

22. On the question of translating the Founders' purposes and principles into circumstances they did not foresee, see CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 121 (1993); MARK TUSHNET, *RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 43-44 (1988); Lawrence Lessig, *Fidelity in Translation*, 71 *TEX. L. REV.* 1165 (1993); Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 *VA. L. REV.* 669, 714-17 (1991)

the present would be helpful in evaluating the respective authority of Congress and the President over the commitment of U.S. forces to limited military operations that do not necessarily commence "war." Indeed, translating the Founders' animating purposes into our world is a more complex endeavor than Fisher's book acknowledges, at least with regard to recent American involvement in a diverse array of UN-authorized military operations of varying size and scope. A fuller recognition of complexities such as these is essential to addressing the truly difficult war powers issues today. Finally, the question of reform—of restoring checks and balances—is critically important if Fisher is right (as I think he is) about the need to diminish the tension between the broad war powers asserted by recent presidents and the Founders' vision of legislative deliberation before the country commences war. Yet, because the underlying factors producing this tension are even more deep-seated and complex than those that Fisher identifies, his reform proposals are unlikely to bridge the gap.

This Book Review explores some of the rich methodological and substantive questions implicated by Fisher's book. Part I examines the question of the Founders' original understanding of constitutional war powers, contrasting Fisher's interpretation with the main alternative accounts and offering my own view. Part II discusses the patterns in historical practice that Fisher identifies and then explores the normative significance of that practice for the constitutional division of war powers today. Part III addresses the challenging question of how to understand Congress's power to declare war and the President's authority to repel sudden attacks in a modern world very different from the Founders'. Finally, Part IV examines the factors that have contributed to a diminished congressional war powers role during the Cold War years and explores whether, with the end of the U.S.-Soviet confrontation, that role will increase in the future.

## I. THE ORIGINAL UNDERSTANDING: BACK TO FIRST PRINCIPLES

Like other thoughtful war powers scholars, Fisher grounds his view of constitutional war powers in an understanding of the original purposes underlying the Constitution's text. The Founders, argues Fisher in his opening chapter, decisively rejected existing European models of government that placed the power to commence war in the hands of the monarch. In contrast to John Locke and William Blackstone, who viewed the power of war as an executive prerogative, the Founders "deliberately transferred the power to initiate war from the executive to the legislature."<sup>23</sup> Congress's war powers included not only the power to declare "perfect" or unlimited war, but also the

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23. FISHER, *supra* note 4, at 1.

power to authorize limited hostilities (or “imperfect” war).<sup>24</sup> The Founders’ decision to give these powers to Congress reflected the republican principle that such enormous power should rest not in a single set of hands but in the collective judgment of the legislature.<sup>25</sup> The Founders expected, moreover, that collective deliberation would make initiation of war more difficult. As James Wilson explained to the Pennsylvania ratifying convention, the system adopted

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 . . . .<sup>26</sup>

Although the President could not unilaterally declare or initiate war, the Founders recognized that emergencies could arise, such as an attack against the United States or its forces, that would require immediate defensive action and would allow no time for advance congressional approval. Thus they reserved to the President “the power to repel sudden attacks.”<sup>27</sup> They also agreed that once military action was begun—whether authorized by Congress or thrust upon the United States by attack—the President as Commander in Chief should direct the military operations. The Founders wanted not war by committee, but unity of command as well as ultimate civilian accountability.<sup>28</sup> At the same time, they gave Congress the power of the purse and the power to raise and support military forces, so that the means of carrying on a war would not be in the hands of the person who would conduct it. In short, Fisher argues, the Constitution’s basic allocation of war powers was clear, with the critical power of initiating war vested in Congress.

Fisher presents what I will call the “classical” view of the original understanding of war powers. This basic account is extremely persuasive in light of the primary sources available to us from the Constitution’s framing and ratification, including the Founders’ reflections on prior British and American experience. History taught the Founders that the executive was the branch of government “most interested in war” and “most prone to it”;<sup>29</sup> and

24. See *id.* at 2–3, 9; see *infra* text accompanying notes 49–51 (discussing difference between “perfect” and “imperfect” war).

25. See FISHER, *supra* note 4, at 1, 4.

26. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 528 (Jonathan Elliot ed., 2d ed., Washington, D.C., U.S. Cong. 1836) [hereinafter THE DEBATES IN THE SEVERAL STATE CONVENTIONS] (remarks of James Wilson).

27. FISHER, *supra* note 4, at 6 (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318 (Max Farrand ed., 1911)).

28. See *id.* at 9–10.

29. Letter from James Madison to Thomas Jefferson (Apr. 2, 1798), in 6 THE WRITINGS OF JAMES MADISON 312 (Gaillard Hunt ed., 1910); see also ELY, *supra* note 6, at 3–4 (noting that influential Framers regarded executives as more “warlike” than legislatures).



their views about human nature led them to fear that presidents, like kings before them, might be tempted to initiate war for reasons of personal "ambition" and "aggrandizement,"<sup>30</sup> more than for the good of the people.<sup>31</sup> Vesting the power to declare or commence war in the legislature as a whole, including the House of Representatives, would "clog[]"<sup>32</sup> the path to war and permit deliberation by a diverse group of people before the nation embarked on a course so full of risks.<sup>33</sup> It would also better ensure, in James Wilson's words, "that nothing but our national interest can draw us into a war."<sup>34</sup> Including the House in the decision to initiate war also ensured that the American people, who would bear the burdens of war, had a voice in that decision through their most immediate federal representatives.

Like Fisher, many other scholars who have steeped themselves in the original sources from the Founding period have come to similar conclusions about the original understanding. For example, Charles Lofgren concludes in a carefully documented article that the Constitution as originally understood "vested Congress with control over the commencement of war, whether declared or undeclared."<sup>35</sup> Taylor Reveley, in his thoughtful study, contends that "[t]he Constitutional Fathers' grant of authority to Congress to declare war and issue letters of marque and reprisal almost certainly was intended to convey control over all involvement of American forces in combat, except in response to sudden attack."<sup>36</sup> Francis Wormuth and Edwin Firmage's helpful historical examination of war powers likewise concludes that "Congress exclusively possesses the constitutional power to initiate war, whether declared or undeclared, public or private, perfect or imperfect, de jure or de facto," with

30. HAMILTON & MADISON, *supra* note 1, at 89 (James Madison).

31. See WORMUTH & FIRMAGE, *supra* note 4, at 298. Abraham Lincoln expressed it well:

The provision of the Constitution giving the war-making power to Congress, was dictated, as I understand it, by the following reasons. Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This, our convention understood to be the most oppressive of all Kingly oppressions; and they resolved to so frame the Constitution that *no one man* should hold the power of bringing this oppression upon us.

Letter from Abraham Lincoln to William H. Herndon (Feb. 15, 1848), in 1 THE COLLECTED WORKS OF ABRAHAM LINCOLN 451, 451-52 (Roy P. Basler ed., 1953).

32. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 27, at 317 (remarks of George Mason).

33. See ELY, *supra* note 6, at 3-4 (explaining that Founders understood war's dangers and sought to make entry into war difficult by requiring legislature's deliberation and concurrence).

34. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 26, at 528 (remarks of James Wilson).

35. Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 697 (1972); see also *id.* at 699 ("Congress' power 'to declare War' was not understood in a narrow technical sense . . .").

36. W. TAYLOR REVELEY III, *WAR POWERS OF THE PRESIDENT AND CONGRESS* 63-64 (1981). Reveley continues: "Most happily viewed for presidential prerogative, . . . the Framers' substitution of 'declare' for 'make' permitted executive response to ongoing physical attack on American territory—conceivably, also, preemptive strikes by the President against impending attack—until Congress can decide what further steps should be taken." *Id.* at 64; see also *id.* at 101-06 (discussing ratifiers' understandings of Congress's war powers and of President's powers as Commander in Chief).

the only exception being the President's power "to respond self-defensively to sudden attack upon the United States."<sup>37</sup> Abraham Sofaer, in his comprehensive study of the Founding and early practice relating to war powers, views some aspects of the allocation of those powers as more flexible and open-ended than Fisher does,<sup>38</sup> but still concludes that nothing in the framing and ratification debates suggests that the President, as Commander in Chief, possessed "an undefined reservoir of power to use the military in situations unauthorized by Congress."<sup>39</sup> Other scholars have reached similar conclusions.<sup>40</sup>

While Fisher's classical account is persuasive in its basic outline, his discussion of the original understanding of war powers would have been more convincing had he seriously engaged and analyzed the main alternative scholarly accounts. The two major competing accounts I will call the "offensive/defensive war" view of the original understanding and the "formal war/shared power" view. These alternative accounts raise a number of challenges to the classical view that warrant careful response.

The "offensive/defensive war" account of original intent recognizes that the President cannot initiate "offensive war" against another nation without congressional authorization, but views the President as empowered to engage in "defensive war" in circumstances beyond repelling attacks against the United States or its forces. Advancing the "offensive/defensive war" view, Robert Turner stresses that under the law of nations at the Founding, declarations of war were acts associated with initiating offensive hostilities, but defending against war initiated by another state did not require a declaration.<sup>41</sup> Invoking arguments advanced by Alexander Hamilton and other

37. WORMUTH & FIRMAGE, *supra* note 4, at 299; *see also id.* at 22 ("[O]nly in a state of war, whether initiated by hostile invasion or by congressional declaration, does the President have the right to go beyond self-defense and initiate offensive action.").

38. *See infra* notes 69, 85–90, 250 and accompanying text.

39. ABRAHAM D. SOFAER, *1 WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER* 36 (1976); *see also id.* at 4 ("The Constitution says Congress shall 'declare' war, and it seems unreasonable to contend that the President was given the power to 'make' undeclared war, especially since the Constitution gives Congress control of those types of military actions short of formal war commonly resorted to during that time."); *id.* at 48 (noting that Founders' debates over Commander in Chief's power "contained no hint of any authority based on this provision to use the armed forces without legislative approval")

40. *See, e.g.,* ELY, *supra* note 6, at 3 ("The power to declare war was constitutionally vested in Congress. The debates, and early practice, establish that this meant that all wars, big or small, 'declared' in so many words or not—most weren't, even then—had to be legislatively authorized.") (footnotes omitted); MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 80–84 (1990), LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS* 33 (1990) [hereinafter HENKIN, *CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS*]; LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 80–81 (1972) [hereinafter HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION*]; SCHLESINGER, *supra* note 4, at 4 ("What does seem clear is that no one wanted either to deny the President the power to respond to surprise attack or to give the President general power to initiate hostilities."); Arthur Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined*, 5 SETON HALL L. REV. 527, 608 (1974).

41. *See* Robert F. Turner, *War and the Forgotten Executive Power Clause of the Constitution: A Review Essay of John Hart Ely's War and Responsibility*, 34 VA. J. INT'L L. 903, 906–10 (1994)

Founders, moreover, Turner argues that Congress's power to "declare War" should be interpreted narrowly because it is an exception to the general grant of executive power to the President under Article II of the Constitution.<sup>42</sup> Congress's war-declaring power thus "pertains only to the authorization of such offensive initiation of military force as would have required a formal declaration of war at the time the Constitution was drafted," Turner contends.<sup>43</sup> The power of the President, as Commander in Chief and Chief Executive, in contrast, should be understood as including the power to commit American forces to defensive war, not only to defend the United States or its forces from attack, but also to defend other countries as well and to implement treaties,<sup>44</sup> even if ample time to obtain congressional approval exists.

The advocates of the "offensive/defensive war" view are right to look to the law of nations at the Founding for insights on the Founders' understanding of war powers.<sup>45</sup> Yet they ultimately interpret Congress's war powers too narrowly, in my view, in part by paying insufficient attention to the Marque and Reprisal Clause<sup>46</sup> and the question of limited war. The precise meaning of the power to issue letters of marque and reprisal evolved over a period of centuries.<sup>47</sup> By the time the Constitution was adopted, the expression had come "to signify any intermediate or low-intensity hostility short of declared war that utilized public *or* private forces, although the emphasis on the use of private forces remained."<sup>48</sup> When issued in peacetime, letters of marque and reprisal gave nations a means to resolve disputes with other nations short of resorting to full-scale war. Eighteenth-century statesmen and writers on the law of nations referred to reprisals, in particular, as acts of limited hostility or "imperfect war" that interrupted the public tranquillity only partially and that

42. See *id.* at 933–34, 947–49. Hamilton advanced this view in his famous colloquy with James Madison over President Washington's decision in 1793 to declare American neutrality in the war between Britain and France. Hamilton, in defending the President's action, took a pro-executive view of the conduct of foreign relations, contending that Article II's grant of executive power to the President included control of foreign relations. That executive power, Hamilton argued, was limited only by those powers expressly conferred upon Congress, such as the power to declare war and grant letters of marque and reprisal, and such "exceptions" should be narrowly construed. See HAMILTON & MADISON, *supra* note 1, at 10–14 (Alexander Hamilton).

James Madison took a more limited view of executive power over foreign affairs. The executive "may be a convenient organ of preliminary communications with foreign governments, on the subjects of treaty or war," Madison argued, but the war-making and treaty-making powers were "substantially of a legislative, not an executive nature, [and thus] the rule of interpreting exceptions strictly must narrow, instead of enlarging, executive pretensions on those subjects." *Id.* at 58 (James Madison).

43. Turner, *supra* note 41, at 914; see also J. Terry Emerson, *Making War Without a Declaration*, 17 J. LEGIS. 23, 30–31 (1990).

44. See Turner, *supra* note 41, at 914–15.

45. See, e.g., BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 27–29 (1967) (noting that Founders relied upon Emer de Vattel, Jean-Jacques Burlamaqui, and other writers on law of nations).

46. U.S. CONST. art. I, § 8, cl. 11 ("The Congress shall have Power To . . . grant Letters of Marque and Reprisal . . .").

47. See Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035, 1042–45 (1986).

48. *Id.* at 1045.

generally had the narrow objective of rectifying a specific injustice.<sup>49</sup> The Founding generation understood, however, that state reprisals could and often did lead to full-fledged or “perfect” war.<sup>50</sup> As Secretary of State, Thomas Jefferson wrote, “[T]he making of reprisal on a nation is a very serious thing. . . . [that] is considered as an act of war, & never yet failed to produce it in the case of a nation able to make war.”<sup>51</sup> Thus, “the right of reprisal [is] expressly lodged with [Congress] by the constitution, & not with the executive.”<sup>52</sup> In other words, the power to commence even limited acts of war against another nation belonged explicitly to Congress because of the potentially serious consequences, most notably the risk of escalation to a wider conflict.

The “offensive/defensive war” account also interprets the President’s defensive war powers more broadly than is firmly warranted by evidence from the Constitution’s framing and ratification or the subsequent practice of the Founding generation. To be sure, the distinction between “offensive war” and “defensive war” was a familiar one to the Founders,<sup>53</sup> and they clearly

49. See, e.g., 2 J.J. BURLAMAQUI, *THE PRINCIPLES OF NATURAL AND POLITIC LAW* 180 (photo reprint 1972) (Nugent trans., corrected 5th ed., n.p., Cambridge Univ. Press 1807); 2 HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* [THE LAW OF WAR & PEACE: THREE BOOKS] 626–28 (Francis W. Kelsey trans., 1925). The major writers on the law of nations familiar to the Founders defined “war” broadly as a state or condition in which force is used to resolve disputes. See, e.g., BURLAMAQUI, *supra*, at 157; GROTIUS, *supra*, at 33; EMER DE VATTEL, *THE LAW OF NATIONS* 291 (Joseph Chitty ed. & trans., Philadelphia, T. & J.W. Johnson & Co. 1867). They went on to draw distinctions between different types of “war,” such as “perfect” and “imperfect” war.

50. See, e.g., BURLAMAQUI, *supra* note 49, at 182 (“[R]eprisals are acts of hostility, and often the prelude or forerunner of a complete and perfect war.”); Lofgren, *supra* note 35, at 693

51. 6 THOMAS JEFFERSON, *Opinion on “The Little Sarah”*, in *THE WRITINGS OF THOMAS JEFFERSON* 257, 259 (Paul Leicester Ford ed., New York, G.P. Putnam’s Sons 1895).

52. *Id.* As Alexander Hamilton wrote in 1798: “Any thing beyond [repelling force with force] must fall under the idea of *reprisals* & requires the sanction of that Department which is to declare or make war.” Letter from Alexander Hamilton to James McHenry (May 17, 1798), in 21 *THE PAPERS OF ALEXANDER HAMILTON* 461, 462 (Harold C. Syrett ed., 1974).

53. According to the major international law treatises of the time, the distinction turned not on the justice of the cause but, more straightforwardly, on who struck first. In Emer de Vattel’s words: “He who takes up arms to *repel the attack* of an enemy, carries on a defensive war. He who is foremost in taking up arms, and attacks a nation that lived in peace with him, wages offensive war.” VATTEL, *supra* note 49, at 293 (emphasis added). Jean-Jacques Burlamaqui likewise wrote that “the first who takes up arms, whether justly or unjustly, commences an offensive war; and he, who opposes him, whether with or without a reason, begins a defensive war.” BURLAMAQUI, *supra* note 49, at 174. Alexander Hamilton’s analysis in the Pacificus/Helvidius debate follows this understanding of the distinction between offensive and defensive war. See HAMILTON & MADISON, *supra* note 1, at 17–18 (Alexander Hamilton). The Founders generally were familiar with the law of nations with regard to self-defense, as summarized in the writings of Grotius, Vattel, Burlamaqui, and Samuel Pufendorf. Each of these writers agreed that if the enemy had made clear his intention by attacking first, the defender did not need to give notice to the enemy by declaring war. Vattel, for example, wrote that “[h]e who is attacked and only wages defensive war, needs not to make any hostile declaration,—the state of warfare being sufficiently ascertained by the enemy’s declaration, or open hostilities.” VATTEL, *supra* note 49, at 316–17. According to Burlamaqui, “this declaration takes place only in *offensive wars*; for, when we are actually attacked, that alone gives us reason to believe, that the enemy is resolved not to listen to an accommodation.” BURLAMAQUI, *supra* note 49, at 187. Grotius viewed self-defense as part of the law of nature—or the natural impulse of self-preservation. According to Plato, wrote Grotius, “a war which is undertaken to *repel force* is proclaimed, not by a herald, but by nature.” GROTIUS, *supra* note 49, at 634 (emphasis added); see also 2 SAMUEL PUFENDORF, *DE JURE NATURAE ET GENTIUM*

distinguished between Congress's power to "commence" war and the President's power to "repel" it.<sup>54</sup> In affirming the President's power to "repel sudden attacks," or to "repel . . . war,"<sup>55</sup> however, the Founders gave no indication that such a power extended to the defense of countries other than the United States without Congress's authorization.<sup>56</sup> The contemporaneous concern with avoiding entangling alliances or involvement in "the commotions of Europe" suggests an intent to the contrary.<sup>57</sup> Even Alexander Hamilton, who later wrote that a congressional declaration of war was "nugatory" or "unnecessary" when "a foreign nation declares, or openly and avowedly makes war upon the United States,"<sup>58</sup> focused on the President's power to respond to aggression directed against the United States itself. In such cases, the enemy, by its own actions, had placed the United States in a state of war, and the President as Commander in Chief could respond accordingly.<sup>59</sup> But if another nation was attacked, the question whether the United States should respond by going to war was still open, a judgment that was for Congress to make.<sup>60</sup> While Hamilton strongly defended President Washington's decision

LIBRI OCTO [ON THE LAW OF NATURE AND NATIONS: EIGHT BOOKS] 1307 (C.H. Oldfather & W.A. Oldfather trans., 1934) (referring to Grotius).

54. See, e.g., 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 27, at 318 (reflecting remarks of Roger Sherman) ("The Executive shd. be able to repel and not to commence war.").

55. *Id.* (reflecting remarks of James Madison, Elbridge Gerry, and Roger Sherman).

56. See, e.g., Peter Raven-Hansen, *Constitutional Constraints: The War Clause*, in THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR 29, 42 (Gary M. Stern & Morton H. Halperin eds., 1994) ("There is utterly no support in the history of the framing and ratification of the War Clause for any claim that the framers intended the implied repel-sudden-attack power of the President to include attacks on other nations.").

57. As James Wilson told the Pennsylvania ratifying convention, "we . . . are not obliged to throw ourselves into the scale with any." 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 26, at 528.

58. 25 ALEXANDER HAMILTON, *The Examination: Number 1*, in THE PAPERS OF ALEXANDER HAMILTON 444, 456 (Harold C. Syrett ed., 1977).

59. See *id.* James Madison likewise argued, "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." Letter from James Madison to James Monroe (Nov. 16, 1827), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 600 (Philadelphia, J.B. Lippincott & Co. 1865). He stressed, however, that even then "it ought to be made known as soon as possible to the Department charged with the war power," as President Jefferson had done after Tripoli both declared and made war against the United States. See *id.*; see also *United States v. Smith*, 27 F. Cas. 1192 (C.C.D.N.Y. 1806) (No. 16,342) (holding that President has power to repel invasions by hostile forces but not to initiate war).

60. See 8 ALEXANDER HAMILTON, *Examination of Jefferson's Message to Congress of December 7, 1801*, in THE WORKS OF ALEXANDER HAMILTON 246, 249 (Henry Cabot Lodge ed., 1904) ("[I]t is the peculiar and exclusive province of Congress, when the nation is at peace, to change that state into a state of war; whether from calculations of policy, or from provocations or injuries received."). According to international law treatises familiar to the Founders, moreover, even a treaty entered into for defensive purposes did not automatically oblige one ally to come to the aid of another if the country under attack had itself committed an unjust action. An ally could also decline to respond if the risks to its own security were too great, suggesting at least some room for judgment about whether to go to war on an ally's behalf. See, e.g., Vattel, *supra* note 49, at 325-26. Hamilton analyzed the Treaty of Alliance between France and the United States with this understanding. See HAMILTON & MADISON, *supra* note 1, at 24-27 (Alexander Hamilton); see also Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771, 1783-84 (1968) (arguing that decision to defend another state from attack amounts to "commencing war" from viewpoint of United States and thus is for Congress to make).

in 1793 to declare neutrality in the war between Britain and France (and argued its consistency with the Treaty of Alliance between the United States and France),<sup>61</sup> he also agreed with Madison that the power to change the state of the nation from peace to war was Congress's alone: "[T]he legislature can alone declare war, can alone actually transfer the nation from a state of peace to a state of hostility . . . ."<sup>62</sup> In sum, while the evidence from the Founding admittedly is partial, on balance it points against a broad unilateral presidential power to engage in "defensive war" on behalf of allies or other friendly nations without congressional authorization.

The second alternative account of the original understanding of war powers, which I will call the "formal war/shared power" view, is really a family of views that emphasize several common themes. First, proponents of this account interpret Congress's power to "declare War" extremely narrowly as the power to place the nation in a formal legal state of war, which they define by reference to the law of nations at the Founding.<sup>63</sup> Second, proponents of the "formal war/shared power" view argue that the Founders intended no one procedure for deciding on war or the use of force more generally. The Founders instead gave overlapping war powers to Congress and

61. See HAMILTON & MADISON, *supra* note 1, at 24–28 (Alexander Hamilton)

62. *Id.* at 14 (Alexander Hamilton). In contrast, "[i]t is the province and duty of the executive to preserve to the nation the blessings of peace." *Id.* Hamilton acknowledged that Congress's power to declare war "include[d] the right of judging, whether the nation is or is not under [treaty] obligations to make war" *Id.* at 11. The President, as Chief "Executor of the laws," could also judge the country's treaty obligations. Hamilton argued, and, in the case at hand, declare neutrality, even though the consequences of such an act could affect the legislature's exercise of its power to declare war. While the legislature was "free to perform its duties, according to its own sense of them," Hamilton wrote, "the executive, in the exercise of its constitutional powers, may establish an antecedent state of things, which ought to weigh in the legislative decisions." *Id.* at 13.

James Madison took issue with Hamilton, fearing that his analysis of executive power might someday be used to argue that the President could "judge and conclude that the obligations of treaty impose war, as well as that they permit peace." *Id.* at 87 (James Madison). The American people should be watchful against the "new principles and new constructions" advanced by Hamilton, Madison warned. See *id.* If presidents in the future were not only to claim authority to *interpret* U.S. treaty obligations as imposing war but also to assert authority to "carry those obligations into effect," *id.* at 87, the executive could bring the country into war "notwithstanding the express provision in the constitution, by which the legislature is made the organ of the national will, on questions, whether there be or be not a cause for declaring war." *Id.* at 86. Madison "admonishe[d] the public" to adhere rigidly "to the simple, the received, and the fundamental doctrine of the constitution, that the power to declare war, including the power of judging of the causes of war, is *fully* and *exclusively* vested in the legislature." *Id.* at 89.

While Madison was prescient in his concern that presidents in the future might invoke treaty obligations as a basis for taking the country into war without congressional authorization, it is worth emphasizing that Hamilton did not advance that particular argument here. On the contrary, he agreed with Madison that "[t]he legislature alone can interrupt [the blessings of peace] by placing the nation in a state of war." *Id.* at 14 (Alexander Hamilton). They disagreed, however, over the President's authority to create "an antecedent state of things" affecting Congress's war powers.

63. See, e.g., *The Constitutional Roles of Congress and the President in Declaring and Waging War: Hearings Before the Senate Comm. on the Judiciary*, 102d Cong. 465–69 (1991) [hereinafter *Constitutional War Powers Hearings*] (statement of Gary Born); Philip Bobbitt, *War Powers: An Essay on John Hart Ely's War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath*, 92 MICH. L. REV. 1364, 1375–76 (1994); Eugene V. Rostow, "Once More unto the Breach": *The War Powers Resolution Revisited*, 21 VAL. U. L. REV. 1, 6 (1986); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 242–49 (1996).

the President and expected that they would both cooperate and struggle in a flexible system of checks and balances.

Eugene Rostow advances a particularly thoughtful version of the "formal war/shared power" view. Rostow stresses that he is more interested in the basic purposes and principles reflected in the Constitution—such as "checks and balances in the exercise of shared powers, and civilian control of the military"—than in the Founders' specific intent regarding the power to use armed force.<sup>64</sup> In dividing "the foreign affairs and war powers between Congress and the President," Rostow argues, "the great purpose of the Constitution is to fulfill [sic] the twin objectives of executive effectiveness and democratic responsibility: a strong, energetic President and a strong, energetic Congress."<sup>65</sup> Rostow stresses that the Founders were acutely aware of the dangers facing America and that they desired a strong national government, and a strong President in particular, to protect the young country from external threats.<sup>66</sup> Rostow also emphasizes that the Founders recognized that the future was unpredictable and they thus sought to create a system of government sufficiently flexible to adapt and endure in the face of changing conditions.

Even as he emphasizes broad principles, however, Rostow also contends that Congress's power to "declare War" had a very clear and specific meaning to the Founders, who understood it in terms of the law of nations. By giving Congress the power to declare war, Rostow argues, the Constitution vested in the legislature alone the power to place the United States in a legal "state of war"—which under the law of nations "contemplate[d] unlimited hostilities between the belligerents" and other far-reaching domestic and international consequences.<sup>67</sup> But all uses of force, "however bloody and extended," are not "war" in this formal legal sense, Rostow argues,<sup>68</sup> and the President, as Chief Executive and Commander in Chief, has constitutional authority to use force short of formal war in exercising U.S. rights under international law, absent valid legislation to the contrary.<sup>69</sup> More generally, Rostow argues, a

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64. Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 844 (1972). Indeed, Rostow questions whether twentieth-century observers can truly understand how the Founders perceived the world. *See id.*

65. Rostow, *supra* note 63, at 3–4.

66. *See* Rostow, *supra* note 64, at 844–46.

67. Rostow, *supra* note 63, at 6.

68. *See id.*

69. *See id.* at 10 (paraphrasing SOFAER, *supra* note 39, at 5). Rostow contends that, the President can use or threaten to use the armed forces without any action by Congress both in support of his diplomacy and in situations where international law justifies the limited and proportional use of force in times of peace in order to deal with forceful breaches of international law by another state.

Rostow, *supra* note 63, at 17; *see also id.* at 17–18 ("Thus military actions to preserve the nation's maritime rights, protect its citizens or other nationals abroad, or carry out its treaty obligations, do not require Congressional approval, before or after the event."). Abraham Sofaer agrees with Rostow that the Founders, as a general matter, expected the President to exercise the nation's rights under international law, but he views the President's power in that regard more narrowly than does Rostow. *See* Abraham D.

broad area of shared authority exists on an "arc" between the President's exclusive power to conduct diplomacy at one end and Congress's exclusive power to declare war at the other.<sup>70</sup> In this realm of concurrent power, the Founders expected the President to take the initiative in protecting America's security and foreign policy interests, while Congress ultimately possessed the "last word."<sup>71</sup> This flexible system, Rostow argues, furthers the Founders' broad goals of "effective government" and "democratic responsibility,"<sup>72</sup> while avoiding the tyranny of kings.

Rostow raises several very important points. He correctly emphasizes the diversity and range of military actions and force deployments that are a vital and integral part of foreign policy in a dangerous world, and he properly argues that not all of these are tantamount to commencing "war" for constitutional purposes. He also cogently stresses that the President must be able to make "credible threat[s] to use force as an instrument of deterrent diplomacy"<sup>73</sup> to protect America's interests and to prevent "confrontation[s] which might escalate."<sup>74</sup> The Founders undoubtedly understood the need for a President who could act decisively and flexibly to protect America's security in an unstable and uncertain world, as well as the need for an enduring system of checks and balances.

Yet my own reading of the sources from the Founding ultimately convinces me that Rostow's understanding of Congress's constitutional war powers is too narrow. Congress's power to "declare War," together with its power to "grant Letters of Marque and Reprisal," is best understood, as the classical view contends, as the power not only to place the nation in a legal state of "perfect" or unlimited war, but also to decide whether the country should commence "imperfect" or limited war against another state.<sup>75</sup> Many Founders likely viewed the "declare War" Clause by itself as vesting this power in Congress, as Justice Story suggests in his *Commentaries on the Constitution*.<sup>76</sup> Even if the "declare War" Clause is read more narrowly,

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Sofaer, *The Power Over War*, 50 U. MIAMI L. REV. 33, 50-51 (1995). Among other things, "such acts as reprisals and captures would be improper without legislative approval." *Id.* at 42.

70. See Rostow, *supra* note 64, at 871; see *id.* at 850, 864.

71. *Id.* at 865.

72. Rostow, *supra* note 63, at 48.

73. Rostow, *supra* note 64, at 838.

74. *Id.* at 896.

75. See *supra* text accompanying notes 23-26, 35-40, 46-52.

76. As Story wrote:

The power to declare war may be exercised by congress, not only by authorizing general hostilities, in which case the general laws of war apply to our situation; or by partial hostilities, in which case the laws of war, so far as they actually apply to our situation, are to be observed.

3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1169, at 62 (Boston, Hilliard, Gray, & Co. 1833); see also *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801) (Marshall, C.J.) ("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. It is not denied . . . that congress may authorize general hostilities . . . or partial hostilities . . ."); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) (Chase, J.)



however, the Marque and Reprisal Clause vested in Congress the power over reprisals, which were the most common form of limited and undeclared war at that time. Rostow says very little, however, about the Marque and Reprisal Clause, and instead seems to view congressional authorization of limited or “imperfect” war as a matter of prudence rather than as a constitutional requirement.<sup>77</sup> Yet the Constitution not only reflects the Founders’ broad goals of “effective government” and “democratic responsibility,” as Rostow contends; it also clearly and more specifically reflects the republican principle that no “one man” should possess the power to commence war against a country with which the United States is at peace,<sup>78</sup> whether the war is formally declared or limited, or to initiate acts of war, such as reprisals, that could easily escalate or lead to perfect war. In other words, the war powers given to Congress are more far-reaching, and the area of concurrent power is less expansive, than Rostow’s account would have it.

Other scholars advance a somewhat different version of the “formal war/shared power” view. John Yoo, for example, agrees that the Founders meant to establish a flexible system of overlapping war powers, but, within that structure, he interprets the President’s war powers more expansively and Congress’s war powers more narrowly than Rostow. Yoo argues that Congress’s power to declare war should be understood as a largely formal power to declare, usually after hostilities have already commenced, that a state of total war exists—a declaration whose primary purpose is not to “authorize” war but to clarify the rights and duties of U.S. citizens as well as foreigners in time of war.<sup>79</sup> Yoo further contends that the Founders largely embraced a

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(“Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects, and in time.”).

77. See Rostow, *supra* note 64, at 842, 847, 850–51, 864–66.

78. See *supra* note 1 and accompanying text.

79. See Yoo, *supra* note 63, at 242–50, 295; see also Bobbitt, *supra* note 63, at 1375–76 (“Textually, the one thing that the Declaration of War Clause cannot grant is the equivalent of the power to make war with the tactical role removed, because a declaration of war only comes after war has commenced.”). Likewise, Yoo understands Congress’s power to grant letters of marque and reprisal in a narrow technical sense. See Yoo, *supra* note 63, at 250–52. Yoo’s formalistic reading of the “declare War” and Marque and Reprisal Clauses does not square, however, with the powerful evidence that the Founders understood Congress to possess the power to decide whether the United States should initiate or *commence* war against another state with which the United States was at peace, whether it be a declared war or simply “imperfect” and limited hostilities. See *supra* notes 45–62 and accompanying text; *infra* notes 91–96 and accompanying text; see also REVELEY, *supra* note 36, at 63–64; Lofgren, *supra* note 35, at 680–81, 684–85, 694–97. Indeed, despite inserting the word “declare” in the Constitution, many Founders continued to use the words “declare” and “make” interchangeably when referring to the war powers of Congress. Roger Sherman of Connecticut, for example, wrote in a letter a few months after the Constitutional Convention that “[t]he power of making war” is “vested in Congress.” Letter from Roger Sherman to Unknown (Dec. 8, 1787), in SUPPLEMENT TO MAX FARRAND’S THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 286, 288 (James H. Hutson ed., 1987). Justice William Patterson of New Jersey, a prominent Framer, likewise later wrote in *United States v. Smith*, that “the power of making war . . . is exclusively vested in congress . . . .” 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342). Alexander Hamilton in 1798 referred to Congress as “that Department which is to declare or make war.” Letter from Alexander Hamilton to James McHenry, *supra* note 52, at 462. Nor is Yoo’s formalistic account fully consistent with the writings of major international scholars known to the Founders, such as Vattel and Burlamaqui, who argued that a declaration

Blackstonian view of executive power and intended the President to take the “initiative in war,” subject only to Congress’s power over funding and impeachment.<sup>80</sup> While Yoo is right to emphasize the importance of Congress’s power of the purse as its most powerful tool in restraining executive military action, his account is at odds with the ample evidence that the Founders decided quite deliberately to change the British system by transferring the power to *initiate* war (and not simply to formally “declare” it) from the executive to the legislative branch, believing that such power should not rest in the President’s hands alone.<sup>81</sup> Yoo also pays insufficient attention to the Founders’ distinction between Congress’s power to “commence” war and the President’s power to “repel” it—a distinction that both the classical and “offensive/defensive war” originalist accounts rightly regard as central.<sup>82</sup>

Still others who advance a “formal war/shared power” view of original intent regard the constitutional allocation of war powers as even more fundamentally indeterminate than do Yoo or Rostow.<sup>83</sup> Admittedly, the Constitution does leave much unsaid or unspecified in the broad realm of foreign affairs, even as it gives Congress substantial power.<sup>84</sup> But the war powers were allocated with more clarity, as the classical account contends—convincingly, in my view. At the most general level, the Founders’ concern to ensure that no “one man” be able to initiate war, but that the President be able to protect the country from attacks initiated by others, is hard to miss. The existence of some areas of uncertainty does not call the entire “classical” account into question.

While the “classical” view, in its essentials, is more persuasive than the alternative accounts of original intent, my dialogue with nonclassicist scholars and my study of the sources from the Founding have led me to a more

of war should *precede* the commencement of hostilities against an adversary because its primary purpose was to avert bloodshed by giving the enemy once last chance to do justice. See BURLAMAQUI, *supra* note 49, at 187–88; Vattel, *supra* note 49, at 315, 317.

80. See Yoo, *supra* note 63, at 174, 241.

81. See *supra* notes 23–26, 35–40, 46–52 and accompanying text; see also Turner, *supra* note 41, at 946–48.

82. Moreover, in drawing analogies to the powers of state governors, who were generally named commanders in chief of state militias at the time of the Constitution’s ratification, Yoo also understates the constraints on their ability to initiate military action beyond defending against attacks and aggressions initiated by others.

83. For example, Gary Born argues that beyond giving Congress the power to formally “declare” war and making the President “Commander in Chief,” the Founders intended no clear or unambiguous allocation of war powers at all. They instead deliberately created a fluid and open-ended system of shared powers, with regard both to foreign affairs and to war, that would allow the political branches to reach accommodations as they saw fit in response to particular exigencies and historical circumstances. See *Constitutional War Powers Hearings*, *supra* note 63, at 460, 482 (statement of Gary Born).

84. For a perceptive essay, drawing on the work of John Locke, that examines the inherent difficulty facing the Founders of allocating and categorizing foreign affairs powers, see Nathan Tarcov, *Principle, Prudence, and the Constitutional Division of Foreign Policy*, in *FOREIGN POLICY AND THE CONSTITUTION* 20 (Robert A. Goldwin & Robert A. Licht eds., 1990). See also Jack N. Rakove, *Making Foreign Policy—The View from 1787*, in *FOREIGN POLICY AND THE CONSTITUTION*, *supra*, at 1 (analyzing Founders’ expectation of Congress’s preeminent role in foreign affairs).

nuanced classical position than the strict classical account presented in Fisher's book.<sup>85</sup> Fisher argues, for example, that the Founders understood the President's defensive war powers as extending only to repelling attacks "either against the mainland of the United States or against American troops abroad."<sup>86</sup> Yet the Founders said very little about the scope of the President's authority to "repel sudden attacks," leaving no clear indication whether they understood it to include repelling imminent as well as actual attacks against the United States, or attacks against U.S. citizens and vessels abroad.<sup>87</sup> The Constitution's only explicit textual grant of power to repel attacks went to the states: They could not engage in war without Congress's consent "unless actually invaded, or in such imminent Danger as will not admit of delay."<sup>88</sup> It is completely plausible, in my view, that the Founders understood the President to possess a comparable power to act defensively to thwart imminent attacks upon the United States.<sup>89</sup> Whether the Founders meant to empower the President to rescue U.S. citizens under attack in a foreign country is not clear; certainly they gave the power to authorize reprisals or other acts of war to Congress. Yet some early presidents, such as Thomas Jefferson, viewed themselves as having power "to protect our citizens from violence . . . [and] when necessary, to repel an inroad, or to rescue a citizen or his property."<sup>90</sup> In short, I am not convinced, as Fisher seems to be, that the Founders understood the President's own defensive powers to be limited so strictly to repelling sudden attacks against the United States or its forces.

My best reading of the sources is that the Founders would have expected the President as Commander in Chief and Chief Executive to protect the United States in a dangerous and uncertain world by repelling actual or imminent attacks against the United States, its vessels, and its armed forces, but not, on his own, to go beyond this authority and effectively change the state of the nation from peace to war. Instead, "the organ intrusted with the power to declare war, should first decide whether it is expedient to go to war, or to continue in peace."<sup>91</sup> On the other hand, if an enemy by its own actions placed the United States in a state of war—by "declar[ing] or openly and avowedly mak[ing] war upon the United States,"<sup>92</sup> as by invading the country—the President as Commander in Chief would be expected to exercise

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85. My own view is particularly indebted to the thoughtful scholarship of SOFAER, *supra* note 39, and WORMUTH & FIRMAGE, *supra* note 4.

86. FISHER, *supra* note 4, at 7, 11.

87. See SOFAER, *supra* note 39, at 57.

88. U.S. CONST. art. I, § 10, cl. 3.

89. See SOFAER, *supra* note 39, at 4; Thomas M. Franck, *After the Fall: The New Procedural Framework for Congressional Control over the War Power*, 71 AM. J. INT'L L. 605, 608 (1977).

90. SOFAER, *supra* note 39, at 200 n.\* (quoting Jefferson); see also Raven-Hansen, *supra* note 56, at 37 (same).

91. *United States v. Smith*, 27 F. Cas. 1192, 1230–31 (C.C.D.N.Y. 1806) (No. 16,342).

92. HAMILTON, *supra* note 60, at 249.

the nation's fundamental right of self-defense.<sup>93</sup> As James Madison explained: "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 . . . ."<sup>94</sup> Even then, Madison emphasized, "it ought to be made known as soon as possible to the Department charged with the war power," as President Jefferson had done after Tripoli both declared and made war against the United States.<sup>95</sup> Moreover, "[i]f foreign danger merely threatened and time for deliberation still remained," as Arthur Bestor explains, "contemporaries never doubted that the power to determine on war belonged to Congress as it had from the beginning of the Revolution."<sup>96</sup>

One issue that neither the constitutional text nor the Founders clearly addressed, however, was the question of constitutional authority over peacetime troop deployments abroad—deployments in support of U.S. foreign policy that did not involve commencing hostilities against a state with which the United States was at peace. This power is best understood as a concurrent one. Congress, after all, was given the constitutional power to raise, support, maintain, and regulate the military forces,<sup>97</sup> authority that reasonably can encompass legislative restrictions on their overseas deployment. As a practical matter, moreover, in the early Republic presidents needed to obtain legislation from Congress to create a navy and an army in the first place. The President, on the other hand, was expected to have primary responsibility for diplomacy

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93. Early practice confirmed a distinction between the President's power to respond to limited "acts of war" by an aggressor, such as an attack on a U.S. vessel or a seizure of a ship or sailor (which did not necessarily give rise to a "state of war"), and the President's power to respond when a foreign nation produced an actual state of war by "declar[ing] or openly and avowedly mak[ing] war upon the United States." *Id.* See generally *Smith*, 27 F. Cas. at 1230–31 (discussing distinction); *WORMUTH & FIRMAGE*, *supra* note 4, at 21–25 (same). If a foreign state initiated limited hostilities that did not amount to commencing a de facto "state of war," the President could engage in acts of self-defense by "repell[ing] force by force." Letter from Alexander Hamilton to James McHenry, *supra* note 52, at 462. "Any thing beyond this," wrote Hamilton, "must fall under the idea of *reprisals* & requires the sanction of that Department which is to declare or make war." *Id.* If a foreign power, in contrast, actually commences war against the United States, such as by invading U.S. territory, the enemy has already made the decision to engage in war and the President as Commander in Chief could respond accordingly.

Years later, in the *Prize Cases*, the Supreme Court affirmed this theory of the President's authority to respond defensively when a de facto state of war is produced, whether by foreign invaders or domestic rebellion. The President, the Court wrote, "has no power to *initiate or declare a war* either against a foreign nation or a domestic State." 67 U.S. (2 Black) 635, 668 (1863) (emphasis added). But if war is thrust upon the United States, "the President is not only authorized but bound to resist force by force." *Id.* The Supreme Court thus upheld President Lincoln's unilateral naval blockade of the Confederacy because the President did "not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority." *Id.* Whether the insurrection rose to the level of a de facto war was a question for the President to decide, the Court held, but it also pointed to objective indications that a state of war existed. The Court noted that it could not ignore "the existence of a war, which all the world acknowledges to be the greatest civil war known in the history of the human race . . . ." *Id.* at 669 (discussing fact that England and other nations recognized Civil War's existence and had proclaimed neutrality).

94. Letter from James Madison to James Monroe, *supra* note 59, at 600

95. *Id.*

96. Bestor, *supra* note 40, at 612.

97. See U.S. CONST. art. I, § 8, cls. 12–14.

with foreign nations,<sup>98</sup> and peacetime deployments of military forces can be a vital instrument of diplomacy.<sup>99</sup> Beyond this, peacetime troop deployments by the President can also deter and protect the United States from foreign aggression and thus help to prevent war and preserve “the blessings of peace”—a clear goal of the Founders.<sup>100</sup> Historical practice and comity between the branches have largely governed the question of troop deployments in peacetime.<sup>101</sup> With these refinements, the “classical” view of the original understanding still accords better with the historical evidence than the major alternative accounts. But the Founders’ understanding of war powers and the purposes they sought to advance are only the starting point in understanding the Constitution’s meaning today.<sup>102</sup> Also important is the way that successive presidents and congresses have lived under the Constitution in the more than two centuries since its ratification,<sup>103</sup> an issue to which Fisher devotes the lion’s share of his book. Indeed, given the relative scarcity of judicial decisions addressing war powers, historical practice holds even greater practical significance than it otherwise might.

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98. Both Madison and Hamilton agreed on this point in their debate over President Washington’s declaration of neutrality. *See supra* notes 42, 62.

99. *See, e.g.*, BARRY M. BLECHMAN & STEPHEN S. KAPLAN, *FORCE WITHOUT WAR: U.S. ARMED FORCES AS A POLITICAL INSTRUMENT* 1–4 (1978); Rostow, *supra* note 64, at 839, 890, 896.

100. *See* HAMILTON & MADISON, *supra* note 1, at 14 (Alexander Hamilton).

101. *See* SCHLESINGER, *supra* note 4, at 310.

102. Whether the Founders’ understanding of the Constitution should be our understanding today, and how their animating purposes should be translated into our very different world are critical questions in constitutional interpretation. I address some of these issues with regard to war powers in Part III. For a helpful discussion of “translation” as a method of maintaining fidelity with the Constitution’s original meaning, see Lessig, *supra* note 22. On originalist approaches to constitutional interpretation in general, see SUNSTEIN, *supra* note 22, at 96–113. For a discussion of the merits of originalism, see Perry, *supra* note 22, at 714–18. *But see* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 205–24 (1980) (discussing limitations of originalism). Although Brest is critical of originalist approaches to constitutional interpretation, he nevertheless views “moderate originalism,” which looks to the Founders’ basic purposes rather than their specific intentions, as a coherent but incomplete approach. *See id.* at 223, 229, 231, 237–38. In addition, he argues that originalism should be given presumptive weight in interpreting the Constitution. *See id.* at 237. For a perceptive critique of the dilemmas and limitations of originalism, see TUSHNET, *supra* note 22, at 23–45. Tushnet does, however, suggest the possibility of a “hermeneutic originalism,” which would “lead us not to despair over the gulf that separates the framers’ world from ours but rather to the crafting of creative links between their ideals and our own.” *Id.* at 43–44. “The task,” he continues, “is to think through the implications of our continued dedication to the large abstractions when the particulars of the world have changed so drastically.” *Id.* at 44.

103. James Madison, writing in 1830, stressed the importance of the “evils & defects” the Constitution was designed to address, as well as the understandings of the document’s ratifiers, in interpreting the Constitution. *See* Letter from James Madison to M.L. Hurlbert (May 1830), in 9 *THE WRITINGS OF JAMES MADISON* 370, 371–72 (Gaillard Hunt ed., 1910). He also recognized the significance of historical practice:

That in a Constitution, so new, and so complicated, there should be occasional difficulties & differences in the practical expositions of it, can surprize [sic] no one; and this must continue to be the case, as happens to new laws on complex subjects, until a course of practice of sufficient uniformity and duration to carry with it the public sanction shall settle doubtful or contested meanings.

*Id.* at 372 (emphasis added). In stressing the role of consistent, continued practice sanctioned by the American people, however, Madison cautioned against “constructions adapted on the spur of occasions, and subject to the vicissitudes of party or personal ascendencies.” *Id.*

## II. HISTORICAL PRACTICE AND CONSTITUTIONAL POWER

While executive-legislative practice since the Founding undoubtedly is important in understanding the Constitution's meaning today, both the substantive patterns and the normative significance of that practice remain divisive issues in war powers scholarship. Not surprisingly, different attitudes toward history are linked to differing views about original intent. Scholars who take a broad view of presidential war powers tend to invoke history as largely vindicating their approach, citing over two hundred instances in which presidents allegedly have used force unilaterally.<sup>104</sup> Those who take the "classical" view also see history as largely consistent with their position, at least until the Korean War and the subsequent Cold War period.<sup>105</sup> Is there any common ground? What patterns emerge from history, and what is their normative significance? After reviewing Fisher's substantive account of historical practice, I will turn to these hard questions and offer my own view, which charts a middle course within the broad spectrum of views about the constitutional significance of historical practice.

### A. *The Patterns of History*

Fisher devotes six of the nine chapters of his book to a historical survey of congressional-presidential practice regarding the commitment of U.S. forces to hostilities from 1789 to 1995. In each chapter, he focuses on the question of the President's legal authority to take the military actions in question. Fisher's overarching concern is to determine the extent to which presidents and congresses lived up to the original expectation that the legislative branch authorize the initiation of war, on whatever scale.

What patterns emerge from Fisher's historical survey? Most notably, for the first few decades after the Constitution's ratification—while the Founding generation held the reins of power—and throughout most of the nineteenth century as well, presidents acted consistent with the original understanding that "[t]he decision to go to war or to mount offensive actions was reserved to Congress."<sup>106</sup> President George Washington, for example, took defensive measures to protect frontier inhabitants from various Native American tribes after Congress authorized him to call up the militia for this purpose.<sup>107</sup> Washington did not view himself as possessing authority to go beyond this and undertake an offensive expedition unless Congress specifically authorized such

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104. See, e.g., Emerson, *supra* note 43, at 23.

105. See, e.g., ELY, *supra* note 6, at 10.

106. FISHER, *supra* note 4, at 13.

107. See *id.* at 13–15.

action.<sup>108</sup> President John Adams sought congressional authorization for the quasi-war with France from 1798 to 1800, and Congress obliged by enacting numerous statutes supporting military action by the President.<sup>109</sup> President Thomas Jefferson took measures to protect the United States and its vessels from attacks initiated by others, most notably the Barbary powers, but he viewed Congress's approval as essential for "offensive" military actions.<sup>110</sup> President James Madison, in the events leading up to the War of 1812 with Great Britain, sought legislation from Congress to augment the U.S. armed forces, and Congress subsequently formally declared war for the first time in U.S. history.<sup>111</sup> Congress in 1815, however, declined Madison's request for a declaration of war against Algiers, choosing instead to authorize more limited military action at sea.<sup>112</sup>

By the mid-1800s, however, with more substantial military forces now at their disposal, presidents became more assertive in using military force. In 1846, President James Polk essentially precipitated war with Mexico by deploying U.S. troops into disputed territory along the Texas-Mexico border, triggering a Mexican military response.<sup>113</sup> Polk then sought and obtained a declaration of war from Congress, but many legislators criticized the President for stimulating the war.<sup>114</sup> In 1861, at the beginning of the Civil War, President Abraham Lincoln unilaterally ordered a blockade against the seceding states and suspended the writ of habeas corpus while Congress was in

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108. *See id.* at 15. In 1793, Washington proclaimed American neutrality in the war between Britain and France, but he asked Congress to endorse that position and to enact legislation prohibiting violations by private citizens. *See id.* at 20–22.

109. *See id.* at 17–18.

110. *See id.* at 26–27. After Congress authorized a "naval peace establishment" in 1801, Jefferson sent a squadron to the Mediterranean with orders to protect U.S. commerce and "chastise" the Barbary powers in the event they declared war against the United States. *See id.* at 24–25. American forces took action, however, only after Tripoli had both declared war against America and attacked U.S. vessels. Jefferson, moreover, sought Congress's authorization for "offensive" military action against the Barbary powers. In other conflicts during his administration, Jefferson likewise was careful not to go beyond defensive operations without congressional sanction. *See id.* at 25–27. While Jefferson believed that the country's self-preservation, in cases of absolute necessity, would take precedence over the written law, Fisher contends that Jefferson viewed such situations as limited to "emergencies that threatened the survival of the nation, after which he would seek congressional approval." *Id.* at 27.

111. *See id.* at 28–29.

112. *See id.* at 27–28. That Congress was the body with the power to commence war or initiate hostilities, whether declared or undeclared, was a view shared not only by presidents and congresses; it also was affirmed by the courts in numerous judicial decisions of the early Republic, including those growing out of the undeclared war with France. As Justice Chase wrote in 1800, "Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects, and in time." *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) (Chase, J.). The Supreme Court also held that statutory limits imposed by Congress in authorizing hostilities took precedence over contrary orders from the President. *See FISHER, supra* note 4, at 19 (discussing *Little v. Barreme*, 6 U.S. (2 Cranch) [170], 179 (1804)).

113. *See FISHER, supra* note 4, at 31–32.

114. Among his critics was Representative Abraham Lincoln, who wrote that the Framers designed the Constitution so that "no one man should hold the power of bringing this oppression [war] upon us." Letter from Abraham Lincoln to William H. Herndon, *supra* note 31, at 452.

recess.<sup>115</sup> “Aside from Polk’s initiatives in Mexico and Lincoln’s emergency actions during the Civil War,” concludes Fisher, “the power of war in the nineteenth century remained basically in the hands of Congress.”<sup>116</sup> Moreover, neither “exception” represented a repudiation of the constitutional scheme: Not even Polk claimed legal authority to commence war against Mexico, and Lincoln sought retrospective authorization from Congress for his emergency measures responding to internal rebellion.

If “war” is understood as initiating hostilities against a sovereign state, Fisher’s conclusion regarding the nineteenth century seems correct. Practice during that period was a bit more complicated, however, with respect to a range of limited uses of force directed primarily at entities other than governments. Fisher’s account of the years from 1789 to 1900 focuses primarily on major military conflicts; he says little about the many smaller-scale military operations undertaken by U.S. forces during this time. Yet, as other scholars have documented,<sup>117</sup> U.S. forces in the nineteenth century engaged in numerous and diverse small-scale military actions, sometimes on the order of the President, sometimes on the order of individual military commanders. Examples include “police” actions in pursuit of pirates and bandits, and limited naval landings on foreign coasts to protect American citizens in situations of instability and risk, some of which were authorized by statute.<sup>118</sup> Fisher, to be sure, emphasizes that presidents (during the nineteenth and twentieth centuries) sent U.S. troops abroad on many occasions “to protect American life and property.”<sup>119</sup> But by highlighting the notorious bombing of Greytown, Nicaragua in 1854<sup>120</sup> (which involved an extreme and much-criticized reprisal in response to an affront to an American diplomat)<sup>121</sup> and neglecting the more representative naval landings, Fisher leaves the impression that virtually all the military actions undertaken to protect

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115. Lincoln, however, acted in an emergency situation of internal rebellion and he sought (and obtained) retroactive authorization from Congress. See FISHER, *supra* note 4, at 38–39. Lincoln explained that the actions he had taken, “whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity, trusting then, as now, that Congress would readily ratify them.” *Id.* at 38 (quoting 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 3225 (James D. Richardson ed., n.p., U.S. Cong. 1898)). In the *Prize Cases*, the Supreme Court upheld Lincoln’s defensive naval blockade. See *supra* note 93.

116. FISHER, *supra* note 4, at 41.

117. See, e.g., HENRY BARTHOLOMEW COX, 2 WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER 51–63, 299–331 (1984); SCHLESINGER, *supra* note 4, at 50–54; WORMUTH & FIRMAGE, *supra* note 4, at 145–63; Raven-Hansen, *supra* note 56, at 37–39.

118. Congress authorized naval operations against pirates in 1819. See Raven-Hansen, *supra* note 56, at 38–39. In 1862 Congress authorized the Secretary of the Navy to make regulations governing naval landings to protect Americans at risk abroad. See WORMUTH & FIRMAGE, *supra* note 4, at 156–60.

119. FISHER, *supra* note 4, at 35.

120. See *id.* at 35–36, 46.

121. That incident, Arthur Schlesinger explains, was regarded as an embarrassing and unfortunate mistake by virtually everyone at the time, and the court that upheld it stretched the facts in order to do so. See SCHLESINGER, *supra* note 4, at 55–56.



Americans abroad were pretextual and illegitimate.<sup>122</sup> A fuller and more differentiated account of past actions to protect and rescue Americans abroad would provide a sounder historical basis for assessing presidential claims of such authority today.

If practice during the nineteenth century was largely faithful to the original understanding of war powers, the Constitution came under strain at the turn of the century, Fisher argues, as the United States became a global power.<sup>123</sup> In a chapter entitled *America Steps Out: 1900 to 1945*, Fisher shows how presidents during the first half of the twentieth century began to assert power to commit U.S. forces to hostilities abroad without congressional authorization, particularly against comparatively weak states in the Caribbean and Latin America. Examples include Theodore Roosevelt's intervention in Colombia in 1903 to secure control of the Panama canal, William Howard Taft's interventions in Nicaragua beginning in 1906, and Woodrow Wilson's decision in 1915 to occupy Haiti.<sup>124</sup> When the United States went to war against European powers in the first half of the twentieth century, in contrast, presidents sought declarations of war from Congress. Fisher discusses how both President Woodrow Wilson prior to America's entry into World War I and President Franklin Delano Roosevelt prior to entry into World War II took actions that moved the country decisively toward war. In the face of the Neutrality Acts in the 1930s, for example, Roosevelt set the stage for U.S. entry into war through his "destroyers for bases" deal with Britain, his commitment of U.S. forces to Greenland and Iceland, and his authorization of military action against German submarines in the Atlantic. Yet neither Wilson nor Roosevelt claimed authority to commit the United States to war without Congress's approval.

The Korean conflict inaugurated a different pattern. President Harry S. Truman did not seek congressional authorization either before or after he sent American forces into combat to repel North Korea's invasion of South Korea.<sup>125</sup> Fisher views Korea as a turning point in the assertion of war

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122. Military actions to protect "American life and property," contends Fisher, have been based "not on legislative authority," FISHER, *supra* note 4, at 35, but rather on claims of executive authority, and they "always served some larger purpose of American foreign policy," *id.* at 46. Fisher does discuss the 1868 "Hostage Act," however, which authorizes the President to use such means "not amounting to acts of war" as he deems necessary to obtain release of Americans being wrongfully deprived of their liberty by a foreign government. *See id.* at 37; *see also* Raven-Hansen, *supra* note 56, at 39-40.

123. As a result of the Spanish-American War, declared by Congress in 1898, the United States emerged as a world power with interests in the Pacific as well as the Caribbean. *See* FISHER, *supra* note 4, at 41-45. Spain ceded the Philippines, Puerto Rico, and Guam to the United States at the war's conclusion.

124. More extended analysis of these early twentieth-century cases would have been helpful. Fisher mentions several of the interventions only briefly (e.g., William Howard Taft's intervention in Honduras and Cuba, *see id.* at 49, and Woodrow Wilson's intervention in Haiti and the Dominican Republic, *see id.* at 51-52), leaving the reader without a full sense of the legal authority invoked by presidents for deploying U.S. forces or the reactions to the presidents' claims in Congress.

125. Congress did, however, enact legislation appropriating funds for Korea, *see* Stromseth, *supra* note 7, at 630, and extending the draft, *see id.* at 626. Fisher strongly criticizes Truman for relying on UN

powers by presidents,<sup>126</sup> and in fundamental ways it was. Although trends of increasing presidential war power were already well in place earlier in the twentieth century,<sup>127</sup> Korea represented a significant expansion in presidential claims of authority. Truman asserted power as Commander in Chief to send U.S. forces into combat on a major scale, without congressional authorization, to protect “the broad interests of American foreign policy”—including preserving the effectiveness of the United Nations and responding to threats to the UN Charter as they arose.<sup>128</sup> More generally, Fisher discusses how a growing array of U.S. global commitments, reflected in various mutual security treaties, led presidents to view themselves as possessing broad authority to use force in defense of American interests and allies around the world.<sup>129</sup>

Truman’s expansive conception of presidential war power was not shared by all of his successors in the White House, however. In fact, the one professional soldier who has served as President in recent times, Dwight D. Eisenhower, understood the importance of congressional approval when American soldiers are asked to risk their lives in combat for their country. During his tenure in office, Eisenhower stated, there would be “no involvement of America in war unless it is a result of the constitutional

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Security Council resolutions as a basis for committing U.S. troops to battle. Fisher stresses, among other things, that Truman ordered U.S. naval and air forces into combat before the Security Council had formally authorized military action, and that the United Nations Participation Act (UNPA) of 1945 was premised on congressional approval of U.S. military commitments to the United Nations. See FISHER, *supra* note 4, at 80–81, 84–88. Truman’s action was, as Fisher contends, in tension with the clear expectation of legislative-executive collaboration that informed the Senate’s approval of the United Nations Charter and Congress’s adoption of the UNPA. See Stromseth, *supra* note 7, at 604–06, 614–18. Fisher goes too far, however, when he claims that Truman’s action “violated the UN Charter.” FISHER, *supra* note 4, at 88, and the “unambiguous statutory language . . . of the UN Participation Act.” *id.* at 84–85. On the contrary, Truman’s decision to send U.S. forces to Korea was fully consistent with the Security Council’s earlier resolution calling on member states for assistance in Korea, and diplomatic soundings indicated that the Council would soon explicitly authorize military actions to repel the attack as well. See Stromseth, *supra* note 7, at 624–25. Moreover, while the UNPA requires that “special agreements” committing U.S. forces to the United Nations be approved by Congress in advance, the statute does not prohibit the commitment of U.S. forces by the President in individual cases in the absence of a special agreement. The authority of the President to commit forces in such cases would depend on the circumstances and on the scope of the President’s constitutional power to repel attacks. In short, the constitutional default rules would apply. Nevertheless, I agree with Fisher’s more specific conclusion that Truman was constitutionally required to obtain Congress’s authorization, as soon as possible, for his commitment of U.S. forces to combat in Korea. See *id.* at 638–39, 660–64.

126. See FISHER, *supra* note 4, at 100–01 (quoting STAFF OF HOUSE COMM. ON FOREIGN AFFAIRS, 82D CONG., BACKGROUND INFORMATION ON THE USE OF UNITED STATES ARMED FORCES IN FOREIGN COUNTRIES 1 (Comm. Print 1951)).

127. See NATIONAL COMMITMENTS REPORT, *supra* note 9, at 14–15; see also *id.* at 31 (“Only in the [twentieth] century have Presidents used the Armed Forces of the United States against foreign governments entirely on their own authority, and only since 1950 have Presidents regarded themselves as having authority to commit the Armed Forces to full-scale and sustained warfare.”)

128. See *Authority of the President to Repel the Attack in Korea*, DEP’T ST BULL., July 3, 1950, at 173, 174, 176–77. This State Department memorandum did not invoke Article 51 of the UN Charter or the concept of collective self-defense.

129. See FISHER, *supra* note 4, at 92–101, 187–88. American security, in short, increasingly was understood in global terms: A threat anywhere in the world might affect U.S. national security. The sense of emergency that pervaded the Cold War period reinforced this view. See SCHLESINGER, *supra* note 4, at 163–65.

process that is placed upon Congress to declare it.”<sup>130</sup> When the Chinese Communists threatened Formosa in 1955, Eisenhower sought authorization from Congress for possible U.S. military action. He likewise sought a resolution in 1957 in response to communist threats in the Middle East. Fisher commends Eisenhower, quite properly, for his appreciation both of the constitutional need for, and practical benefits of, obtaining congressional approval before committing U.S. forces to combat.<sup>131</sup> Yet the broad “area resolutions” passed by Congress in 1955 and 1957—important statements of resolve and cooperation on the part of Congress and the President—also delegated enormous power to the President to decide whether or not force was necessary.<sup>132</sup>

The war powers role of Congress declined significantly, Fisher argues, during the administrations of Presidents Kennedy, Johnson, and Nixon.<sup>133</sup> Congressional deference to the President during the 1950s and 1960s culminated in the 1964 Gulf of Tonkin Resolution, an open-ended congressional delegation of power modeled after the 1957 Middle East Resolution. Adopted after only limited debate and based on information

130. FISHER, *supra* note 4, at 104 (quoting Eisenhower news conference). Fisher notes that Eisenhower viewed covert operations differently and was willing to act unilaterally in that area. *See id.* at 104, 169.

131. *See id.* at 103–04, 110–11.

132. In that respect, they represented a diminution in the real participation of Congress in decisions to use force. *See* SCHLESINGER, *supra* note 4, at 159–63; JAMES L. SUNDQUIST, *THE DECLINE AND RESURGENCE OF CONGRESS* 114–16 (1981). The Formosa Resolution authorized the President “to employ the Armed Forces of the United States as he deems necessary” in defense of Formosa and other territories in the area. Joint Resolution of Jan. 29, 1955, Pub. L. No. 84-4, 69 Stat. 7, 7, *reprinted in* 50 U.S.C. app. at 12,269 (1970) (repealed 1974). The 1957 Middle East resolution stated that “if the President determines the necessity thereof, the United States is prepared to use armed forces” to assist Middle Eastern nations “against armed aggression from any country controlled by international communism . . .” 22 U.S.C. § 1962 (1994). When Eisenhower subsequently deployed 5000 U.S. marines to Lebanon in 1958 (after consulting with congressional leaders), debate ensued over whether that deployment fell within the terms of the 1957 resolution. *See* H. DOC. NO. 85-422 (1958) (Eisenhower’s message to Congress); 104 CONG. REC. 14,548 (1958) (remarks of Vice President Nixon); Felix Belair Jr., *Eisenhower Sends Marines into Lebanon; President Says More Troops Will Go if They Are Needed*, N.Y. TIMES, July 16, 1958, at 1; Arthur Krock, *Law and Intervention*, N.Y. TIMES, July 16, 1958, at 8.

133. *See* FISHER, *supra* note 4, at 111–25. Fisher sharply criticizes President Kennedy for taking military action without congressional authorization during the Cuban Missile Crisis, but members of Congress did not share these criticisms at the time. At the beginning of the missile crisis (probably the most dangerous emergency to threaten the United States during the Cold War era), Congress passed a resolution to express the nation’s determination “to prevent in Cuba the creation or use of an externally supported military capability endangering the security of the United States.” Joint Resolution of Oct. 3, 1962, Pub. L. No. 87-733, 76 Stat. 697, 697. While the Resolution did not expressly authorize the use of force, almost all the members of Congress who spoke during the accompanying congressional debate indicated that they believed the President should make the critical decisions about how best to respond to the threat. *See, e.g.*, 108 CONG. REC. 20,027 (1962) (remarks of Sen. Saltonstall) (“The main purpose of the resolution is to indicate . . . that the people of the United States are actively supporting the President of the United States in whatever action he deems it necessary to take . . .”); *id.* at 20,033 (statement of Sen. Cooper) (“[T]he greatest meaning and value of the resolution is to back up the President of the United States in whatever action he may deem it advisable to take.”); *id.* at 20,877 (remarks of Rep. Selden) (“[M]ost will agree that [the resolution] represents congressional recognition of the need for action and our support of the President in any efforts he may make to meet this need.”); *see also id.* at 20,901 (statement of Rep. Stratton) (“This resolution makes it clear that this House will firmly support the President in whatever action he does take.”); *id.* at 20,880 (remarks of Rep. Ellsworth) (expressing similar support).

subsequently shown to be highly suspect,<sup>134</sup> the Tonkin Gulf Resolution declared that the United States was “prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.”<sup>135</sup> President Johnson, not surprisingly, read the Resolution as broad authority to expand U.S. military operations in Vietnam.<sup>136</sup> President Nixon later secretly expanded the war to Cambodia, without congressional authorization or even notification, and he resisted subsequent congressional efforts to limit American military involvement in Southeast Asia.

Congress’s willingness to tolerate broad presidential control over matters of war and peace did not last forever, however. Gradually, as dissent over the Vietnam War mounted, many members of Congress came to regret their abdication of a more active and discerning role in decisions to commit U.S. forces abroad. Fisher examines the gradual resurgence of Congress from the 1969 National Commitments Resolution, to the subsequent cut-off of funds for the war in Indochina, to the adoption of the War Powers Resolution in 1973 over President Nixon’s veto. In a separate chapter, Fisher documents Congress’s gradual assumption of greater oversight for covert operations.

Fisher brings his historical survey to a close in a chapter that examines two decades of U.S. military actions spanning the Ford to Clinton administrations. These include President Carter’s aborted attempt to rescue U.S. hostages in Iran; President Reagan’s intervention in Grenada and bombing of Libya; President Bush’s intervention in Panama and his commitment (with congressional authorization) of U.S. forces to the Gulf War; and President Clinton’s deployment of U.S. combat forces to Somalia, Haiti, and Bosnia. During this period, Fisher argues, the War Powers Resolution has served as a limited constraint on presidents—not over the initial decision to commit forces unilaterally but instead on the duration of the military involvement: “Even if the clock does not tick on the sixty-to-ninety-day deadline, executive officials *behave* as though it does. Military operations in Grenada and Panama were conducted as though the sixty-day limit was enforceable—if not legally, then politically.”<sup>137</sup> At the same time, Fisher is critical of the tendency of presidents in recent years to provide only last-minute notice to Congress and engage in cursory consultations before committing American forces abroad.<sup>138</sup> Fisher asserts that in only one case since World War II—President

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134. See FISHER, *supra* note 4, at 116–17.

135. Joint Resolution of Aug. 10, 1964, Pub. L. No. 88-408, § 2, 78 Stat. 384, 384, *reprinted in* 50 U.S.C. app. at 9499 (1964) (repealed 1971).

136. For a trenchant analysis of the Tonkin Gulf Resolution and subsequent congressional actions with regard to the war in Indochina, see ELY, *supra* note 6, at 15–46, 75–76.

137. FISHER, *supra* note 4, at 133.

138. See *id.* at 161, 185.

Ford's evacuation of U.S. citizens and foreign nationals from Vietnam—was the President justified in acting “in the absence of congressional authority.”<sup>139</sup> More generally, he contends that “[t]he framers’ design, deliberately placing in Congress the decision to expend the nation’s blood and treasure, has been radically transformed” since World War II.<sup>140</sup>

### B. *The Normative Significance of History*

Fisher's overview of executive-legislative practice under the Constitution raises a fundamental question: Should we understand the Constitution's division of war powers between Congress and the President any differently today in light of this historical practice? After devoting the majority of his book to history, Fisher says surprisingly little about this crucial issue. Fisher, to be sure, rejects the argument that history has given or can give the President the power to initiate “war” without congressional authorization.<sup>141</sup> Beyond this fundamental point, however, Fisher does not explore in any depth whether historical practice has something to teach us about how to understand the constitutional allocation of war powers in the late twentieth century. This is a missed opportunity both because Fisher's historical research puts him in a good position to address the question of history's significance with more subtlety, and because arguments based on historical practice are so central to contemporary war powers debates.

Presidents and their advisers regularly invoke historical practice as a means of validating presidential power to commit U.S. forces to hostilities. Before the Persian Gulf War, for instance, Defense Secretary Richard Cheney appealed to history in arguing that President Bush did not need congressional approval to send American troops into battle against Iraq: “[I]n the more than 200 times that U.S. military force has been committed over the history of the Nation, there are only five occasions in which the Congress of the United States voted a prior declaration of war.”<sup>142</sup> Likewise, scholars who contend that the

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139. *Id.* at 186. By analyzing all post-Vietnam interventions in only one brief chapter, Fisher inevitably ignores some important nuances, particularly in the recent cases of U.S. military involvement in Somalia and Bosnia. The efforts of Congress early in the Clinton Administration to authorize U.S. military operations in Somalia go unmentioned, see Jane E. Stromseth, *Collective Force and Constitutional Responsibility: War Powers in the Post-Cold War Era*, 50 U. MIAMI L. REV. 145, 168–69 (1995), as does Congress's enactment of statutory language that implicitly accepted a U.S. military role in protecting “safe haven” and “no-fly” zones in Bosnia, see Department of Defense Appropriations Act, 1994, Pub. L. No. 103-139, § 8146, 107 Stat. 1418, 1474 (1993) (allowing for use of funds for operations initiated on or before October 20, 1993, including provision of humanitarian assistance).

140. FISHER, *supra* note 4, at 185.

141. See *id.* at 191.

142. *Crisis in the Persian Gulf: Sanctions, Diplomacy and War: Hearings Before the House Comm. on Armed Services*, 101st Cong. 589 (1990) [hereinafter *Persian Gulf Hearings*] (statement of Richard Cheney, Secretary of Defense). President Clinton, in deploying U.S. forces to Haiti without congressional authorization, likewise argued that he was simply following the historical practice of his predecessors who committed U.S. forces to Panama and Grenada without congressional approval. See President William J. Clinton, President's News Conference with President Jimmy Carter, General Colin Powell, and Senator Sam

President has broad unilateral authority to commit U.S. forces to combat appeal to the pattern of history. The "historical development of our institutions has settled the legitimacy of 'inherent' presidential power to commit the armed forces to hostilities," Henry Monaghan argues.<sup>143</sup> "A practice so deeply embedded in our governmental structure should be treated as decisive of the constitutional issue."<sup>144</sup>

Arguments invoking historical practice play such a central role in modern debates over war powers in part because so few judicial decisions (or at least so few recent ones)<sup>145</sup> exist in this area. "Lawyers like to reason by means of precedents," notes one scholar, "and nonjudicial precedents seem to be better than no precedents at all."<sup>146</sup> But is historical practice authoritative in determining the respective constitutional war powers of Congress and the President, and, if so, why and with what qualifications? These questions, not surprisingly, elicit quite different responses from the various war powers scholars who have addressed them, responses that fall at various points along a wide spectrum.

At one end of that spectrum are those strict classicists, like Fisher, who view the original understanding of the Constitution as so clear that history has little to add or teach us. Their focus is primarily to judge the consistency of historical practice with the original understanding of war powers, and they view appeals to historical practice by proponents of executive power primarily as attempts to amend the Constitution by usage.<sup>147</sup> At the other end of the spectrum are those, like Henry Monaghan, who argue that history is all-important and that the original understanding matters little, if at all.<sup>148</sup>

Nunn on Haiti, 1994 PUB. PAPERS 1574, 1576 (Sept. 19, 1994) [hereinafter Haiti News Conference]. Executive branch lawyers, moreover, must regularly render opinions regarding the President's authority to commit U.S. forces to hostilities in concrete situations, and much of their analysis involves characterizing past practice and assessing its relevance for current decisions. See, e.g., Letter from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, to Senators Robert Dole, Alan K. Simpson, Strom Thurmond, and William S. Cohen (Sept. 27, 1994), in 89 AM. J. INT'L L. 122 (1995) [hereinafter OLC Haiti Opinion].

143. Henry P. Monaghan, *Presidential War-Making*, 50 B.U. L. REV. 19, 31 (Special Issue 1970).

144. *Id.* For some additional examples of scholars who emphasize the importance of historical practice, see Emerson, *supra* note 43, at 39-42; W. Michael Reisman, *War Powers: The Operational Code of Competence*, 83 AM. J. INT'L L. 777, 782-84 (1989), and Peter J. Spiro, *War Powers and the Sirens of Formalism*, 68 N.Y.U. L. REV. 1338, 1355-64 (1993) (book review).

145. The courts played a more substantial role in addressing the respective war powers of Congress and the President in the early years of our history, a contrast that Fisher underscores. See FISHER, *supra* note 4, at 18-20, 22-24, 34-36, 38; see also Harold Hongju Koh, *Judicial Constraints: The Courts and War Powers*, in THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR, *supra* note 56, at 121, 128 n 7.

146. Gerhard Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV. 463, 478 (1976); see also Spiro, *supra* note 144, at 1355 ("It is rather the 'court of history,' an accretion of interactions among the branches, that gives rise to basic norms governing the branches' behavior in the [war powers] area.").

147. See, e.g., Raoul Berger, *War-Making by the President*, 121 U. PA. L. REV. 29, 54-58 (1972) (criticizing notion of constitutional "adaptation by usage").

148. See Monaghan, *supra* note 143, at 21; see also Reisman, *supra* note 144 (emphasizing importance of "operational code of competence" reflected in historical practice and deemphasizing importance of original understanding).

Whatever the Founders may have intended, Monaghan argues, today “the military machine has simply become an instrument for achieving presidential foreign policy objectives.”<sup>149</sup> Monaghan is unconcerned whether historical practice is consistent with the Founders’ intent in allocating the war powers as they did, although he does contend that his view of the President’s historically accrued war-making power is not “inconsistent” with the text or structure of the Constitution.<sup>150</sup>

Between these poles are those scholars, like myself, who care about the Founders’ original understanding of war powers—particularly at the level of basic animating purposes—but who view that understanding as open-ended in at least some respects and thus give some weight to history as a basis for interpreting the constitutional allocation of war powers today. Methodologically, scholars in this group agree that history cannot simply preempt the original understanding and principles reflected in the Constitution—for good reason, as John Ely explains: “The most archaic-sounding provisions of our founding document, their purposes intelligently unpacked, generate commands of complete contemporary relevance.”<sup>151</sup> But because these scholars differ dramatically over how open-ended the original understanding of war powers is, they also differ in their view of the meaning and significance of historical practice. Those who adhere to the “formal war/shared power” account of the original understanding, for example, view the Constitution as establishing only broad markers in a large area of concurrent power. They thus tend not to focus upon identifying specific patterns or categorizing cases but instead draw more general conclusions from history. Most broadly, for instance, they argue that the diverse accommodations between congresses and presidents over the course of American history are

149. Monaghan, *supra* note 143, at 31; *see also id.* at 27.

150. *See id.* at 32; *see also id.* at 21–22.

151. ELY, *supra* note 6, at 5. Ely shares the classical view of the original understanding; but even war powers scholars who interpret the Constitution and the Founders’ original understanding differently still view that understanding as placing limits on what the President can claim today by virtue of historical practice. *See, e.g.*, Emerson, *supra* note 43, at 60 (recognizing that President cannot initiate offensive war); *id.* at 41 (“[R]epeated violation of the Constitution cannot make constitutional what was once unconstitutional . . .”). Robert Turner also recognizes limits on modern presidential war powers based on his “offensive/defensive war” account of original intent. *See* Turner, *supra* note 41, at 920 n.76. John Yoo, given his view of the original understanding, holds that advocates of broad presidential war power can have their history and their originalism too. *See* Yoo, *supra* note 63, at 175. Eugene Rostow looks not to the specific intent of the Founders but to the broad goals reflected in the Constitution:

We should not be trying to guide the evolution of our constitutional practice closer to what we imagine to be “the classic intent” of the Founding Fathers. Even if we could define that goal—and we cannot—it would not in itself be a relevant or appropriate objective for policy. The policy goals of the Constitution—effective government and democratic responsibility—should of course continue to govern the growth of our constitutional law of foreign relations. That is the essence of the process through which any body of law grows. . . . The problem facing the nation is to fashion and refashion the Presidency and Congress as responsible and cooperative institutions capable of carrying out a foreign policy adequate to the security needs of our times and of the foreseeable future. That is an entirely different matter.

Rostow, *supra* note 63, at 48–49.

both “rooted in the nature of things”<sup>152</sup> and also “result[] directly from the Framers’ conscious design.”<sup>153</sup>

If the Constitution’s allocation of war powers were as open-ended as the “formal war/shared power” view contends, historical practice—including the varying accommodations reached by diverse presidents and congresses—probably would be the best guide to understanding the respective war powers of Congress and the President. However, because I think the refined classical view of the original understanding accords better with the sources from the Founding, I see a less expansive role for history in limited areas of uncertainty and ambiguity. Yet, as I will explain below, I also believe that Fisher’s strict classical view gives too little weight to history as a basis for understanding the President’s constitutional war powers.

### 1. *Judging History*

Fisher largely rejects appeals to historical practice as a basis for interpreting presidential war powers more broadly today than in 1789. He acknowledges that both Justices Jackson and Frankfurter, in their concurrences in the *Youngstown* case,<sup>154</sup> recognized that practice and custom may have an impact on constitutional power. As Frankfurter wrote:

Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on “executive Power” vested in the President by § 1 of Art. II.<sup>155</sup>

Jackson, in his famous tripartite analysis, wrote that “there is a zone of twilight” in which the President and Congress have concurrent power or the distribution of power is uncertain, and in which “congressional inertia, indifference or quiescence” may “enable, if not invite, measures on

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152. Rostow, *supra* note 64, at 864; *see also* Rostow, *supra* note 63, at 10, 16

153. Yoo, *supra* note 63, at 305; *see also* *Constitutional War Powers Hearings*, *supra* note 63, at 501 (statement of Gary Born).

154. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (invalidating President Truman’s seizure of steel factories during Korean War).

155. *Id.* at 610–11 (Frankfurter, J., concurring).



independent presidential responsibility.”<sup>156</sup> Fisher contends, however, that these seemingly “innocent” observations provide an incentive for “presidential raids of power, done with the knowledge that the additional power seized will be successful and permanent unless Congress effectively defends itself.”<sup>157</sup> While struggles between Congress and the President were an expected part of the constitutional system of checks and balances, Fisher argues, “[p]residential acts of war can never be accepted as constitutional or as a legal substitute for congressional approval.”<sup>158</sup> In other words, because the constitutional text and original understanding clearly indicate that the power to initiate war belongs to Congress, the President by practice cannot acquire that power. “Illegal and unconstitutional actions, no matter how often repeated, do not build a lawful foundation,” he stresses.<sup>159</sup>

Fisher’s basic point is surely right. As the Supreme Court has made clear in other contexts, “[t]hat an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date.”<sup>160</sup> Because I share Fisher’s “classical” view that the Constitution and the basic purposes it reflects clearly give Congress the power to commence war, I also share his conclusion that the President cannot, by virtue of historical practice, appropriate that power.<sup>161</sup> To argue otherwise would be to claim, in effect, that the President alone or with congressional acquiescence can “amend” the Constitution in contravention of the document’s explicit amendment provisions. Yet where the constitutional text is genuinely ambiguous or silent, as it is regarding issues such the President’s power as Commander in Chief to deploy forces abroad for foreign policy purposes in peacetime or the precise scope of the President’s authority to “repel sudden attacks,” longstanding and consistent historical practice can shed light on how we should understand the President’s constitutional power today.

Fisher, to be sure, rightly criticizes those who invoke indiscriminately an historical laundry list to claim broad presidential power to commence hostilities even on a major scale.<sup>162</sup> The more than two hundred cases often cited as

156. *Id.* at 637 (Jackson, J., concurring). Any test of power in this area, he continued, “is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.” *Id.* (Jackson, J., concurring).

157. FISHER, *supra* note 4, at 191.

158. *Id.*

159. *Id.*

160. *Powell v. McCormack*, 395 U.S. 486, 546–47 (1969) (arguing that even consistent congressional practice of excluding congresspersons would not make exclusion of Rep. Adam Clayton Powell constitutional); *see also INS v. Chadha*, 462 U.S. 919 (1983) (striking down legislative veto as violation of Constitution’s lawmaking requirements, notwithstanding its inclusion in 196 different statutes in previous half-century).

161. *See also ELY*, *supra* note 6, at 9–10. As previously noted, even war powers scholars who interpret the Founders’ original understanding differently still view it as constraining what the President can claim from historical practice. *See supra* note 151.

162. *See FISHER*, *supra* note 4, at 188. To reach any sound conclusions, as Fisher correctly contends, “[w]e need to examine the specific instances” and scrutinize with care the actions taken and the claimed authority for those actions. *Id.*

establishing a “practice of presidential ‘war-making,’”<sup>163</sup> vary tremendously in scope and significance.<sup>164</sup> Almost seventy of the cases, for instance, involved small, relatively low-risk, and self-contained naval landings to protect or rescue American nationals overseas, which are a far cry from committing U.S. forces to a major and sustained combat operation.<sup>165</sup> At least eight of the cases involved limited military actions against pirates.<sup>166</sup> Many of the cases on the lists, moreover, were in fact authorized by Congress by statute or were taken pursuant to regulations authorized by statute.<sup>167</sup> The lists do not include cases in which presidents refrained from using force because they knew Congress would oppose it or because they were unsuccessful in obtaining congressional authorization. Nor do the lists generally examine whether Congress was presented with a *fait accompli* that made it practically impossible for it to object or whether Congress protested the action after the fact. In sum, the lists themselves do not tell the whole story.

While Fisher is properly critical of those who invoke these “two hundred cases” to make broad claims of presidential war power without adequately differentiating among them, he commits a similar error in reverse. He himself indiscriminately lumps the cases together in categorically dismissing their current relevance. In his words:

Defenders of presidential war power point to more than two hundred instances in which Presidents have used military force without an authorization from Congress. Those actions were minor adventures done in the name of protecting American lives or property, taken at a time when U.S. intervention in neighboring countries was considered routine and proper. Today, such invasions violate international law and regional treaties.<sup>168</sup>

Fisher’s description is apt for some of the cases, but as other scholars have shown, the instances of unilateral presidential military action are far more diverse than he suggests. The more updated lists, for example, include not only the U.S. interventions in Latin America and the Caribbean during the early

163. Monaghan, *supra* note 143, at 31.

164. For an illuminating discussion of attempts to catalogue instances of unilateral executive action, see WORMUTH & FIRMAGE, *supra* note 4, at 135–51. See also ELLEN C. COLLIER, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798–1989 (Congressional Research Serv. No. 89-651 F, Dec. 4, 1989) [hereinafter 1989 CRS REPORT]; ELLEN C. COLLIER, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798–1993 (Congressional Research Serv. No. 93-890 F, Oct. 7, 1993) [hereinafter 1993 CRS REPORT]. Some of these supposedly unilateral actions were in fact authorized by Congress. See WORMUTH & FIRMAGE, *supra* note 4, at 153–60 (discussing naval landings approved by Congress). While relatively few of the cases involved major or sustained combat operations, a number of the twentieth-century interventions included sometimes prolonged excursions in the Caribbean and Central America. See *id.* at 146.

165. See WORMUTH & FIRMAGE, *supra* note 4, at 145–46.

166. See *id.*

167. See *id.* at 144–45; Raven-Hansen, *supra* note 56, at 38–39.

168. FISHER, *supra* note 4, at 188.

twentieth century and during the subsequent Cold War years.<sup>169</sup> They also include the rescue and evacuation operations in Southeast Asia during the Ford Administration (which Fisher himself views as legitimate unilateral actions)<sup>170</sup> and President Carter's attempt to rescue U.S. hostages in Iran.<sup>171</sup> "None of the 200 incidents," contends Fisher, "comes close to justifying military actions of the magnitude and risk of Korea in 1950, Panama in 1989, Iraq in 1990, or Bosnia and Haiti in 1994."<sup>172</sup> This is certainly true for Korea and Iraq, which involved combat on a major scale, but the story is, at the very least, more complex regarding Bosnia and Haiti. In short, Fisher himself overlooks distinctions among too many unlike cases and offers little discussion of whether practice, at least with regard to the diverse array of small-scale military actions, might be relevant in interpreting the Constitution's war powers provisions.<sup>173</sup>

## 2. *Evaluating History: Between Judgment and Validation*

Although historical practice is not self-validating,<sup>174</sup> it is still of considerable importance in interpreting the Constitution and understanding the President's war powers today.<sup>175</sup> The Supreme Court has not addressed this issue in a war powers case, but it has provided general guidance on the use of historical practice in constitutional interpretation in separation of powers cases. In its most recent major case touching on this question, *Dames & Moore v. Regan*,<sup>176</sup> the Court relied heavily on the longstanding executive practice of

169. See, e.g., 1989 CRS REPORT, *supra* note 164, at 16–19; 1993 CRS REPORT, *supra* note 164, at 17, 19, 21.

170. See FISHER, *supra* note 4, at 186.

171. See 1989 CRS REPORT, *supra* note 164, at 17; 1993 CRS REPORT, *supra* note 164, at 18.

172. FISHER, *supra* note 4, at 188.

173. Nevertheless, Fisher's own methodical survey of historical practice (which includes many of the cases on the often invoked list of over two hundred presidential actions) is a useful tool for demonstrating that the patterns of history are more subtle than his cursory dismissal of those cases suggests, and that the various uses of force can be categorized at least to some degree. At the broadest level, Congress authorized or declared major wars (except for Korea), but not most lesser wars. I examine the question of "little" wars below. See *infra* text accompanying notes 202–08. For a thoughtful discussion of these conflicts, see Jules Lobel, "Little Wars" and the Constitution, 50 U. MIAMI L. REV. 61 (1995).

174. As the Supreme Court recognized in *Dames & Moore v. Regan*, "[p]ast practice does not, by itself, create power." 453 U.S. 654, 686 (1981). See also *United States v. Midwest Oil Co.*, 236 U.S. 459, 473–74 (1915) (arguing that decisions upholding executive action based on historical practice do not "mean that the Executive can by his course of action create a power").

175. A number of scholars have addressed the question of the significance of historical practice with regard to both separation of powers and war powers, although they differ significantly in their approaches and conclusions. See, e.g., GLENNON, *supra* note 40, at 55–69, 78–80 (finding concepts drawn from customary international law useful in identifying "constitutional custom"); HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION 70–71 (1990) (discussing "quasi-constitutional custom" and its role in national security affairs); Raven-Hansen, *supra* note 56, at 31–32 (relying on Supreme Court decisions, particularly *Dames & Moore*, to identify "customary law"); Reisman, *supra* note 144, at 782–84 (identifying "operational code" reflected in war powers practice of Congress and President); Spiro, *supra* note 144, at 1355–57 (drawing on customary international law concepts, but concluding that single "incident" can create custom).

176. 453 U.S. 654 (1981).

settling claims with foreign nations by executive agreement—a practice that Congress had acquiesced in and never resisted—in holding that the President possessed the authority to suspend claims pending against Iran in U.S. courts as part of the agreement settling the hostage crisis.<sup>177</sup> In so doing, the Supreme Court embraced Justice Frankfurter's approach in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>178</sup> which sets a high standard for viewing past practice as authority in constitutional interpretation.<sup>179</sup>

Frankfurter's *Youngstown* approach seems to me a promising one if applied thoughtfully to the war powers context.<sup>180</sup> It has several components. First, practice cannot "supplant" a clear constitutional requirement.<sup>181</sup> As Frankfurter wrote in another case, "[i]llegality cannot attain legitimacy through practice."<sup>182</sup> The President thus cannot by practice appropriate Congress's power to declare or commence war. Practice is relevant, however, to those aspects of the division of war powers, such as the power of the President as

177. See *id.* at 686–88. While Congress had not directly authorized the suspension of claims by statute, the Court emphasized that Congress could not be expected to "anticipate and legislate with regard to every possible action the President may find it necessary to take" in foreign affairs. *Id.* at 678. The lack of statutory authority, the Court reasoned, should not be taken to imply legislative disapproval, particularly when "there is a history of congressional acquiescence in conduct of the sort engaged in by the President." *Id.* at 678–79. The Court then examined that history, which included eighty executive agreements to settle claims between 1817–1917, and at least 10 since 1952. See *id.* at 679 & n.8, 680 & n.9. In concluding that Congress had "implicitly approved" of that practice, the Court pointed to Congress's enactment of legislation establishing procedures for distributing funds from claims settlements, which Congress had regularly amended in light of new developments, thereby indicating its "continuing acceptance of the President's claim settlement authority." *Id.* at 680–81. The Court also emphasized that Congress had never objected to or questioned the President's authority to enter into claims settlements in general, see *id.* at 681, 682 n.10, nor had it expressed disapproval of the specific agreement with Iran, see *id.* at 687–88. As the Court wrote: "We are thus clearly not confronted with a situation in which Congress has in some way resisted the exercise of Presidential authority." *Id.* at 688.

178. See *id.* at 686 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring)).

179. Justice Frankfurter joined Justice Black's majority opinion in *Youngstown*, which saw no need to examine historical practice because it viewed President Truman's seizure of steel mills as contrary to the clear language of the Constitution, which vested in Congress, not the President, the power to make law. As Justice Black wrote:

It is said that other Presidents without congressional authority have taken possession of private business enterprises in order to settle labor disputes. But even if this be true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution "in the Government of the United States, or any Department or Officer thereof."

*Youngstown*, 343 U.S. at 588–89 (Frankfurter, J., concurring). Frankfurter wrote separately, however, to explain why "the considerations relevant to the legal enforcement of the principle of separation of powers seem[ed] . . . more complicated and flexible" to him. *Id.* at 589. Frankfurter stressed the importance of historical practice in giving meaning to the Constitution: The practical operation of government in our system of separated but overlapping powers would, he wrote, "give[] essential content to undefined provisions in the frame of our government." *Id.* at 610. Even regarding more open-ended constitutional provisions such as the Executive Power Clause, however, Frankfurter set a high standard for giving practice authoritative weight in constitutional interpretation. As he wrote, "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II." *Id.* at 610–11.

180. His approach, which I hope to apply more fully to war powers in future writing, is sketched only briefly here. For a helpful analysis along the same lines, see Raven-Hansen, *supra* note 56, at 31–32.

181. *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring).

182. *Inland Waterways Corp. v. Young*, 309 U.S. 517, 524 (1940).

Commander in Chief over peacetime troop deployments, which are not explicitly addressed in the constitutional text or Founding debates.

Second, the practice must be "systematic," "unbroken," and "long pursued."<sup>183</sup> In the war powers context, the requirement of a "systematic" practice means that one must differentiate between types of actions. Cases in which the President has used limited force to rescue or protect American citizens, for instance, cannot be used to claim executive authority to commit American forces unilaterally to major hostilities. The further requirement that an executive practice be "long pursued" and "unbroken" provides at least some assurance, to use James Madison's words, that it does not represent simply "constructions adapted on the spur of occasions, and subject to the vicissitudes of party or personal ascendencies."<sup>184</sup>

Third, the executive practice must be "long pursued to the knowledge of the Congress and never before questioned."<sup>185</sup> Congress, in other words, must not only be on notice of an executive practice and accompanying claim of authority to act; it also must accept or acquiesce in that practice and claim of authority.<sup>186</sup> Assessing whether Congress can fairly be said to have done

183. *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring). Frankfurter found no such practice in the *Youngstown* case. He differentiated some past cases, finding them not comparable to Truman's seizure of the steel mills. For instance, he viewed as distinct Lincoln's seizure of railroads during the Civil War, which occurred in territory where armed hostilities were underway and which subsequently was ratified by Congress. See *id.* at 611 (Frankfurter, J., concurring). He also distinguished President Wilson's eleven seizures of industrial facilities during World War I because Wilson "acted, or at least purported to act, under authority granted by Congress" and his seizures thus could not "be adduced as interpretations by a President of his own powers in the absence of statute." *Id.* at 612 (Frankfurter, J., concurring). Moreover, "[o]f twelve seizures by President Roosevelt prior to the enactment of the War Labor Disputes Act in June, 1943, three were sanctioned by existing law, and six others were effected after Congress, on December 8, 1941, had declared the existence of a state of war." *Id.* at 612-13 (Frankfurter, J., concurring). Frankfurter found only three "executive assertions of the power of seizure in circumstances comparable" to Truman's, each of which took place "in the six-month period from June to December of 1941." *Id.* at 613 (Frankfurter, J., concurring). As Frankfurter concluded:

We need not split hairs in comparing those actions to the one before us, though much might be said by way of differentiation. Without passing on their validity, as we are not called upon to do, it suffices to say that these three isolated instances do not add up, either in number, scope, duration or contemporaneous legal justification, to the kind of executive construction of the Constitution revealed in the *Midwest Oil* case.

*Id.* (Frankfurter, J., concurring). In *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915), the Court upheld the President's authority to withdraw public lands from private acquisition based on a longstanding executive practice involving more than 252 actions over a period of 80 years. See 236 U.S. at 469-70.

184. Letter from James Madison to M.L. Hurlbert, *supra* note 103, at 370, 372. In *Dames & Moore*, for example, the Court referred to over 90 executive claims settlement agreements during a period of over 180 years. See 453 U.S. at 679-80, 684. In *Midwest Oil*, the Court cited an executive practice spanning 80 years and involving 252 instances of executive action. See 236 U.S. at 469-70. Michael Glennon argues that six factors are relevant in determining whether a custom exists—consistency, numerosity, duration, density, regularity, and normalcy, with consistency being the one absolute requirement. See GLENNON, *supra* note 40, at 55-59.

185. *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring).

186. This requirement of congressional acquiescence in an executive action *and* accompanying claim of authority bears some resemblance to the notion of "opinio juris" in customary international law. Only those practices followed by states out of a sense of legal obligation, and not simply habit, are deemed to be customary "law." See RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 1 cmt. c (1965); ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW

so raises many complex and difficult issues of interpreting legislative intent, particularly in the war powers context. For one thing, inferring congressional acceptance of an executive practice and claim of power can be highly speculative in cases where Congress as a body has not directly spoken.<sup>187</sup> In addition, the provisions of the War Powers Resolution must be factored into any plausible account of congressional acquiescence in recent executive military action. Among other things, the Resolution makes clear that a statute, including an appropriations act, should not be construed to authorize introduction of U.S. forces into hostilities unless it expressly states such an intent.<sup>188</sup> In *Dames & Moore*, the Court relied *both* on collateral legislation

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74-87 (1971). Applying the concept of "opinio juris" to the separation of powers context, Michael Glennon argues that "a custom possessed of *opinio juris* must have been intended by both political branches to represent a juridical norm." GLENNON, *supra* note 40, at 59. "It is thus mistaken," he points out, "merely to string out bare references to historical incidents with no indication of the posture of the other branch." *Id.*

187. Inferring any sort of collective intent on the basis of inaction is problematic when we are dealing with a large and complex institution like the Congress, made up of two houses and many diverse individuals. For a perceptive discussion of this issue in the statutory context, see William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 95-98 (1988). In the war powers context, there are additional reasons to be particularly cautious about interpreting congressional silence or failure to protest a particular action after the fact as acceptance of a President's authority to act. First, the basic structural tendencies toward inaction are heightened when a President presents Congress with a military *fait accompli*, especially if the deployment is politically popular. Exactly what Congress should be understood as acquiescing to may not always be clear. Moreover, congressional acquiescence may be tied to very specific and unique circumstances, as in the case of Grenada, for instance. Both houses of Congress passed resolutions designed to start the War Powers Resolution's 60-day time clock following President Reagan's commitment of U.S. forces to Grenada. See H.R.J. Res. 402, 98th Cong. (1983); Senate Amendment 2462 to H.R.J. Res. 308, 98th Cong. (1983), 129 CONG. REC. S29,829 (daily ed. Oct. 28, 1983), see also 129 CONG. REC. S29,838 (passage of Senate amendment). (The Senate defeated the amended bill subsequently, however, and another version of the bill later passed without the Grenada Resolution. See Joint Resolution of Nov. 21, 1983, Pub. L. No. 98-161, 97 Stat. 1012.) Congress also sent a fact-finding mission to Grenada. When that mission ultimately concluded that the risk to American citizens on the island had been a real one, Congress took no further action. See Hedrick Smith, *O'Neill Now Calls Grenada Invasion 'Justified' Action*, N.Y. TIMES, Nov. 9, 1983, at A1 ("Speaker Thomas P. O'Neill Jr., who criticized President Reagan for 'gunboat diplomacy' in the invasion of Grenada, said today that a House fact-finding mission had convinced him the action was 'justified' to rescue endangered Americans."). Congressional acquiescence, in short, seemed to depend directly on the perception of an imminent threat to American lives. In citing Grenada as a "precedent" in support of his authority to send U.S. forces to Haiti without congressional authorization, President Clinton did not acknowledge a qualification such as this, however.

188. See 50 U.S.C. § 1547(a)(1) (1994); see also *id.* § 1547(a)(2) (providing that authorization cannot be inferred from treaty in absence of implementing legislation expressly stating that it constitutes specific authorization under War Powers Resolution). In addition, section 2(c) of the Resolution can be read as expressing Congress's judgment that the President's authority to commit U.S. forces into hostilities (or imminent hostilities) is limited to situations where Congress has provided authorization, or where "a national emergency [is] created by attack upon the United States, its territories or possessions, or its armed forces." *Id.* § 1541(c). However, most members of Congress today would probably view 2(c) as incomplete by virtue of its failure to include the President's authority to rescue U.S. citizens abroad whose lives are in imminent danger. See Thomas M. Franck, *Rethinking War Powers: By Law or by "Thaumaturgic Invocation"?*, 83 AM. J. INT'L L. 766, 772 (1989). Legislation to expand the categories of 2(c) along these lines has been introduced. See, e.g., S. 564, 104th Cong. (1995). Senator Biden's bill to reform the War Powers Resolution recognizes the President's authority "to extricate citizens and nationals of the United States located abroad from situations involving a direct and imminent threat to their lives." *Id.* § 101(a)(3). Section 8(d)(1) of the War Powers Resolution, moreover, provides that nothing in the Resolution "is intended to alter the constitutional authority of the Congress or of the President . . ." 50 U.S.C. § 1547(d)(1).

that indicated legislative acceptance of a longstanding executive practice<sup>189</sup> and on the fact that successive congresses “consistently failed to object . . . even when [they] had an opportunity to do so.”<sup>190</sup>

### 3. *Examples of Historical Validation*

With respect to war powers, only two categories of historical practice seem to me clearly to meet the Frankfurter standard embraced in *Dames & Moore*. The first is the longstanding presidential practice of peacetime troop deployments abroad—deployments in support of U.S. foreign policy that do not involve commencing hostilities. A recent example is President Bush’s decision to send substantial American combat forces to Saudi Arabia following Iraq’s invasion of Kuwait to deter further Iraqi aggression. The Constitution does not clearly allocate this power, and successive congresses generally have accepted or acquiesced in this executive practice. By accepting broad presidential latitude in making peacetime troop deployments, congresses over the years have recognized the value of presidential discretion and flexibility in the fluid and often dangerous realm of foreign affairs. Yet Congress has not thereby given up its own authority over such troop deployments. Instead, as Louis Henkin argues, paraphrasing Justice Jackson’s opinion in *Youngstown*, “what history seems to have given the President is concurrent authority in a twilight zone in which the President can act when Congress is silent.”<sup>191</sup>

The second category of historical practice that meets the Frankfurter standard, in my judgment, is the longstanding presidential practice of using limited force to rescue American citizens abroad whose lives are in imminent danger.<sup>192</sup> Neither the constitutional text nor the original debates clearly address executive authority in this context. The practice is well established historically, although presidential claims of authority have changed somewhat over time.<sup>193</sup> Congress, moreover, generally has accepted or acquiesced in such protective actions involving “low risk of sustained hostilities or

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On balance, the War Powers Resolution rejects an expansive view of the President’s authority to commit U.S. forces to hostilities unilaterally, although Congress’s actions under that statute (particularly its reluctance, in a wide variety of cases, actually to start the 60-day time clock) admittedly have been far more ambiguous. See *infra* note 207 and accompanying text (discussing Justice Department’s argument regarding 60-day clock).

189. See 453 U.S. at 680–81.

190. *Id.* at 682 n.10.

191. HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS, *supra* note 40, at 29; see also SCHLESINGER, *supra* note 4, at 309 (discussing Jackson’s “zone of twilight”). Under the War Powers Resolution, the President must report to Congress within 48 hours when U.S. forces are introduced abroad “while equipped for combat.” 50 U.S.C. § 1543 (a)(2). These deployments do not, however, trigger the 60-day time clock, although the subsequent onset of hostilities could do so.

192. For a thoughtful discussion of this practice, see Raven-Hansen, *supra* note 56, at 37–40.

193. Early presidents were more likely to invoke statutory or international law authority to justify their actions, see *id.* at 38, while recent presidents have made broader claims about their inherent powers as Commander in Chief. Protection of American “property,” moreover, is no longer invoked by presidents (or likely to be accepted by Congress) as a basis for defensive military action.

escalation,"<sup>194</sup> and has, in the "Hostage Act" of 1868,<sup>195</sup> provided statutory authorization for certain actions that do not amount to acts of war.<sup>196</sup> So long as military actions do not go beyond limited defensive measures designed to evacuate or otherwise secure the safety of citizens in imminent danger, and so long as they are unlikely to escalate or lead to sustained hostilities, they should not encroach on Congress's war powers. Of course, this does not mean that the President can rely upon threats to American citizens as a pretext for unilaterally commencing hostilities against another state.<sup>197</sup>

Historical practice has not given the President the legal authority to commence war against another country, however, whether the war be large or small. Both Fisher and I agree that the Constitution gives this power unambiguously to Congress. Furthermore, of the dozen major wars in American history, five were formally declared by Congress and six were authorized by other legislative measures.<sup>198</sup> Although some presidents took steps that made American involvement in war likely (for example, Polk before the war with Mexico, Wilson before World War I, and Roosevelt before World War II), they did not claim authority to take the country into war without congressional authorization. Of the three wars since World War II, both the Vietnam War (with the exception of Nixon's "secret war" in Cambodia) and the Persian Gulf War were legislatively authorized.<sup>199</sup> Only in Korea did the President send American forces to war without seeking Congress's approval.<sup>200</sup> In short, there is no longstanding practice of presidents unilaterally commencing what are, in virtually everyone's view, "real wars."<sup>201</sup>

194. *Id.*

195. 22 U.S.C. § 1732 (1994).

196. *See id.*; *see also* Raven-Hansen, *supra* note 56, at 39 (discussing details of congressional acquiescence in this practice, including statutory enactments such as "Hostage Act")

197. Professor Raven-Hansen put it well:

The rescue/protection authority . . . [is] confined to cases of actual or reasonably imminent risk to Americans. In addition, its logical limit is its immediate object: rescue and protection. Once American nationals are evacuated out of harm's way or otherwise secured, the authority is exhausted. Neither customary law, as demarcated by the practice that Congress understood and acquiesced to, nor international law as incorporated into the Hostage Act, permits the President to order reprisals on his own initiative.

Raven-Hansen, *supra* note 56, at 39–40.

198. The five declared wars are the War of 1812, the Mexican-American War of 1848, the Spanish-American War of 1898, World War I, and World War II. The wars authorized by other legislative measures include the Naval War with France (1798–1800), the First Barbary War (1801–1805), the Second Barbary War (1815), the Civil War, the Vietnam War, and the Persian Gulf War. The Korean War stands alone as the only major war not expressly authorized by Congress. *See generally* JAMES GRAFTON ROGERS, *WORLD POLICING AND THE CONSTITUTION* 45–55 (1945) (discussing various wars); WORMUTH & FIRMAGE, *supra* note 4, at 55–70 (same).

199. On the war in Indochina, *see* ELY, *supra* note 6, at 15–17, 68–97. On the Persian Gulf War, *see* Stromseth, *supra* note 7, at 649 & n.293.

200. *See* Stromseth, *supra* note 7, at 621–35. Congress did, however, enact legislation to provide funds for Korea and to extend the draft. *See id.* at 626, 630.

201. Spiro, *supra* note 144, at 1348; *see also* ELY, *supra* note 6, at 10; WORMUTH & FIRMAGE, *supra* note 4, at 151.



Historical practice with respect to "little wars" is a different story, however. As Fisher's book shows, beginning in the early twentieth century, presidents invaded and occupied a number of countries in the Caribbean and Latin America without authorization from Congress. These particular interventions, some of which involved prolonged occupation by U.S. forces, went beyond any immediate need to protect the lives of American citizens; presidents launched them primarily to secure American foreign policy goals, especially order in the southern hemisphere on U.S. terms. Some presidents at the time even called these interventions police actions to maintain law and order, rather than wars.<sup>202</sup> Admittedly, these military actions involved limited risk of escalation or sustained hostilities due to the power disparity between the United States and the invaded country. They are still best viewed as "little wars," however. Occupying sovereign states and toppling or imposing governments are acts of war under international law even if combat is limited, and such actions are best understood as war for constitutional purposes as well.<sup>203</sup> During the Cold War years, presidents again deployed American combat forces against sovereign states in our hemisphere without advance congressional authorization, including in the Dominican Republic in 1965, Grenada in 1983, and Panama in 1990.<sup>204</sup>

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202. See FISHER, *supra* note 4, at 52–54. President Taft seemed to recognize later the difficulties with this approach, however, when he suggested that different rules of international law applied to the interventions in our hemisphere. See WILLIAM HOWARD TAFT, *OUR CHIEF MAGISTRATE AND HIS POWERS* 95 (1925).

203. John Bassett Moore expressed it well when he wrote:

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

5 JOHN BASSETT MOORE, *THE COLLECTED PAPERS OF JOHN BASSETT MOORE* 196 (1944). The constitutionally relevant factors, in other words, include not only the combat risks and escalatory potential of a military action, but its purposes as well. Even if an adversary is weak, an intervention for the purpose of deposing a government in power and occupying territory has the character of war, whereas a limited rescue mission to free American hostages does not, even if the number of casualties would be roughly the same in each case. As Professor Henkin has argued:

President Carter's attempt to rescue hostages held in Iran . . . was not designed to fight a war and was not likely to engage Iranian forces or threaten the independence or territorial integrity of Iran—the relevant test under international law. The invasion of Grenada, by contrast, whatever motivated it, sought to topple a government and occupy a territory. It was widely seen as an act of war for international purposes, and it would seem to have had the character of war for constitutional purposes. Good fortune kept deaths few on both sides, and as a result the action won popular acclaim. But would the people have supported it had it proved costly? It is not, I think, the kind of action the Constitution and our dual democracy intend to be undertaken by the President on his own authority.

HENKIN, *CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS*, *supra* note 40, at 40 n.\*.

204. One scholar has argued recently that military actions such as the U.S. interventions in Grenada and Panama form part of a pattern of small-scale "strike operations" that do not "qualify as 'war' in either the common or the constitutional sense" because they "do not involve sustained sacrifice on the home front or significant infliction of casualties on other peoples." Spiro, *supra* note 144, at 1353. Other scholars view these actions as part of a broader pattern of presidential "war-making": "To dismiss American interventions in Latin America as 'minor,'" argues Henry Monaghan, "amounts to recognition of presidential power to

Even if this pattern of unilateral executive action in "little wars" can be characterized as a "systematic" and "longstanding" practice (which is at least open to question given the different circumstances of the various interventions), it is in tension with the Constitution's clear language and intent, vesting the power to commence even limited or "imperfect" wars in Congress alone. Nor can congressional acquiescence in a presidential "little war" power be confidently claimed on the historical record.<sup>205</sup> What has developed, as Jules Lobel cogently argues, is a practical tension between the de jure standards of the Constitution and the de facto "operational code" represented by recent practice.<sup>206</sup> The War Powers Resolution in practice has tended to reinforce a de facto "short war" power in the President, even though its language clearly does not authorize it.<sup>207</sup> In other words, "the President

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wage war against weak opponents for limited purposes." Monaghan, *supra* note 143, at 27. Yet Monaghan ultimately argues that the President has acquired just such power through practice. *See id.* at 31. Spiro, in my view, includes in his "strike operation" category actions that should be differentiated into separate categories, namely, actions against "insubstantial foes" such as in Panama and Grenada, on the one hand, and rescue operations characterized by "discrete, self-limiting objectives" such as the Iran Hostage rescue operation. *See* Spiro, *supra* note 144, at 1353.

205. The cases during the Cold War era, for instance, do not support a conclusion that Congress acquiesced in a presidential claim of authority to commence war against "insubstantial foes." Instead, in each case, the President essentially confronted the Congress with a *fait accompli* and argued that emergency military action was needed to protect American lives at risk. Even if the President clearly had broader objectives in mind as well, Congress was understandably cautious about second-guessing a President who claimed to be protecting endangered U.S. citizens. *See, e.g.*, J. WILLIAM FULBRIGHT, *THE ARROGANCE OF POWER* 49 (1966) (discussing U.S. intervention in Dominican Republic). Nevertheless, many members of Congress criticized President Reagan for failing to consult with Congress before invading Grenada, and both Houses of Congress passed separate resolutions to trigger the 60-day war powers clock. The record of Congress's response in that case suggests that Congress at most acquiesced in President Reagan's claim that American citizens were at risk and required immediate rescue. *See supra* note 187

206. *See* Lobel, *supra* note 173, at 71–72 (quoting W. MICHAEL REISMAN & JAMES E. BAKER, *REGULATING COVERT ACTION* 24 (1992)).

207. The War Powers Resolution cannot be read as *authorizing* short wars because the Resolution makes clear that none of its provisions "shall be construed as *granting* any authority to the President with respect to the introduction of United States Armed Forces into hostilities" which he or she would not otherwise have in the Resolution's absence. 50 U.S.C. § 1547(d) (1994) (emphasis added). Moreover, section 2(c) of the War Powers Resolution, while preambular and legally unenforceable, expresses Congress's view that the President's power unilaterally to introduce U.S. forces into hostilities is limited to certain emergency situations. *See id.* § 1541(c); Lobel, *supra* note 173, at 71. The Justice Department recently has argued, however, that the "structure" of the Resolution (particularly its 60-day time clock provision) *presupposes* presidential authority to deploy U.S. forces into hostilities in situations beyond those declared in section 2(c). *See* OLC Haiti Opinion, *supra* note 142, at 123–25. For a thoughtful critique of this argument, see Lori Fisler Damrosch, *The Constitutional Responsibility of Congress for Military Engagements*, 89 AM. J. INT'L L. 58, 63–67 (1995).

Other plausible interpretations of the "structure" of the Resolution are also possible, however, which reconcile section 2(c) and the 60-day provision. For one, the 60-day clock applies not only when U.S. forces are introduced into hostilities, but also when they are introduced into situations involving an imminent likelihood of hostilities. *See* 50 U.S.C. § 1543(a). This provision thus could be viewed not as presupposing presidential authority to introduce U.S. troops into hostilities but as mapping "the twilight zone" in a broader array of cases. The 60-day clock could also be viewed as providing a procedural framework for limiting the sustained deployment of U.S. forces overseas "where hostilities have erupted . . . because another party has attacked U.S. troops deployed . . . in a noncombatant or defensive posture." Damrosch, *supra*, at 64. Even if the Justice Department's interpretation is adopted as the most plausible, however, the Resolution should not be understood as "presupposing" presidential authority that is clearly inconsistent with the Constitution. To give an example, the War Powers Resolution should not be read to "presuppose" that President Bush had constitutional authority to commence the Persian Gulf War without

seems to be conceded the power . . . to start short wars," although this "is not what the drafters of the Constitution had in mind."<sup>208</sup> The existence of this tension requires a direct response to the question of the obsolescence of original intent: Do the purposes and values that led the Founders to give Congress the power to commence war, including limited wars and armed reprisals, still apply with the same force in our world?

### III. CONSTITUTIONAL WAR POWERS TODAY

#### A. *Original Purposes in the Modern World*

Advocates of expanded presidential war powers often invoke America's role as a global superpower and changes in weapons technology since 1789 as justifications for their position. "The best that can be argued in support of presidential war power after World War II," writes Fisher, "is that the language of the Constitution, the intent of the framers, and the republican values operating at that time are no longer relevant, having been superseded by twentieth-century conditions and pressures."<sup>209</sup> Fisher clearly and emphatically rejects such claims. Neither the dangers of the post-World War II period, nor changes in the role of the United States, nor treaty commitments, nor the existence of nuclear weapons, he contends, have altered how we should understand the Constitution's basic allocation of war powers.<sup>210</sup> The Founders understood the need for prompt defensive action in emergency situations, he emphasizes, and they responded appropriately by agreeing that the President could "repel sudden attacks" against the United States.<sup>211</sup>

Fisher is right to focus on the basic purposes underlying the Founders' allocation of war powers and to remind us that they, like us, lived in dangerous times. They understood the need for an energetic executive who could protect "the community against foreign attacks"<sup>212</sup> and guard against "the ambition or enmity of other nations" in an uncertain world.<sup>213</sup> At the same time, they also understood the dangers of concentrating too much power in one person's hands, particularly power to initiate war against another nation, with all the risks and sacrifices that would entail.<sup>214</sup> As Madison explained,

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the authorization of Congress, even though that conflict was completed well within 60 days. Compliance with the procedural requirements of the War Powers Resolution, in short, does not by itself assure compliance with the Constitution.

208. Franck, *supra* note 89, at 626–27.

209. FISHER, *supra* note 4, at xii–xiii.

210. *See id.* at 185–88.

211. *See id.* at 185.

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

213. THE FEDERALIST NO. 34, at 208 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (discussing powers of national government).

214. *See* HAMILTON & MADISON, *supra* note 1, at 89–90 (James Madison).

“the trust and the temptation would be too great for any one man.”<sup>215</sup> Instead, the legislature—the branch most directly representative of the American people—was given the power to commence war.

Like Fisher, I find the republican values that led the Founders to place the crucial decision to go to war in Congress’s hands to be equally compelling today, especially with regard to the initiation of large-scale hostilities.<sup>216</sup> Then as now, decisions of such grave significance should be made not by the President alone but by the collective deliberation of the people’s elected representatives in Congress. If anything, twentieth-century developments—such as the existence of a powerful standing army at the President’s disposal and the greater destructiveness of modern day warfare—reinforce the arguments against vesting the power to initiate war in a single set of hands. Congressional authorization of war as an expression of the people’s support remains vitally important today, moreover, for a number of reasons: to ensure American combat forces that the country is behind them; to convey American resolve to adversaries as well as allies; and to reduce the chances that Congress will precipitously undercut a deployment in the face of adversity because the country was unprepared for the risks ahead.

Yet the world has changed markedly since 1789, and the United States now plays a global role larger than anything the Founders could have foreseen. For one thing, the United States is the most powerful member of the United Nations, an organization empowered to respond collectively, with force if necessary, to threats to international peace and security. Translating the Founders’ fundamental purposes regarding war powers into a time when American forces participate in UN “peace enforcement” and “peacekeeping” operations<sup>217</sup>—as in Haiti, Somalia, and Bosnia—is more complex than Fisher’s book acknowledges. Whether recent presidential commitments of force in cases such as these are akin to commencing “war” or “reprisals” and thus require prior congressional approval is not so clear.<sup>218</sup> Moreover, whether the President’s defensive power to “repel sudden attacks” applies only in cases of

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215. *Id.* at 89.

216. The case has been made compellingly by John Ely, who rejects claims that the original understanding of the Constitution’s war powers provisions is obsolete. See ELY, *supra* note 6, at 5–9. For a similar argument with respect to “little wars,” see Lobel, *supra* note 173, at 72–75. With respect to certain UN-authorized military actions, see Stromseth, *supra* note 139, at 156–60.

217. “Peacekeeping” operations are undertaken with the consent of the parties to a conflict and generally only involve the use of force in self-defense. “Peace enforcement” operations, in contrast, may be undertaken without the consent of the parties and may involve the use of force under Chapter VII of the United Nations Charter to achieve a range of objectives. While they go beyond traditional peacekeeping, such operations still generally stop short of major combat action. See PAMELA L. REED ET AL., HANDBOOK ON UNITED NATIONS PEACE OPERATIONS 2, 4–5 (1995).

218. Cf. FISHER, *supra* note 4, at 160 (claiming that NATO air strikes in Bosnia involved “tak[ing] the nation to war” and that Clinton Administration’s peacekeeping policy would diminish, or extinguish, “the constitutional role of Congress in matters of going to war”). In a more recent article, Fisher suggests that the President needed congressional approval to send U.S. forces to Bosnia to implement the Dayton Peace Agreement. See Louis Fisher, *What Power to Send Troops?*, N.Y. TIMES, Dec. 2, 1995, at 21.

actual attack against U.S. territory or forces, as Fisher seems to suggest,<sup>219</sup> or should be understood more broadly today warrants fuller analysis. Particularly in light of the practical tension that has developed between the strict classical view Fisher defends and much post-World War II practice, he needs to say more in order to persuade (or even fully engage) those on the other side.

In this Part, I will explore some of the challenges involved in translating the Founders' concerns into contemporary circumstances, first by addressing the President's authority as Commander in Chief to "repel sudden attacks," and then by examining how Congress's power to declare war and authorize reprisals should apply to the commitment of U.S. military forces to UN-authorized military operations along a spectrum from the Persian Gulf War, to Haiti, to Bosnia. In developing a refined classicist position, my goal is to engage those who take opposing views more seriously than does Fisher in order to stimulate a richer dialogue about how to understand the Founders' animating purposes in our world.

### B. *The President's Defensive War Powers*

Contemporary war powers scholars differ sharply over how broadly to interpret the President's defensive war powers. Everyone agrees, citing James Madison's notes of the Constitutional Convention, that the President has "the power to repel sudden attacks."<sup>220</sup> While nonclassicists view this phrase as merely illustrative of broader power,<sup>221</sup> scholars in the classicist school tend to regard it as a crystallization of the basic understanding of the Founders.<sup>222</sup> Even fellow classicists disagree, however, over how to understand the President's power today in light of modern technology and America's more significant global role. John Ely, for example, argues that actions not amounting to actual attacks on American territory may threaten the security of the United States today more obviously than in the Founders' day.<sup>223</sup> Thus he interprets the President's authority to repel sudden attacks as applying not only to attacks on U.S. territory but also to extend "functionally" to "other situations where a clear danger to our national security has developed so

219. See FISHER, *supra* note 4, at 7, 185–88.

220. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 27, at 318–19.

221. See, e.g., Rostow, *supra* note 63, at 22–23.

222. The phrase in Madison's notes does, in fact, accord with other sources from the Constitution's ratification, as I argued in Part I. Still, one must be cautious about placing too much reliance on Madison's notes alone without further confirmation from other sources. As Leonard Ratner writes, Madison's "explanatory clause was not included in the constitutional text nor given the scrutiny of proposed inclusion. That clause thus recognized, but did not authoritatively delineate, the warmaking authority of the President, implied by his role as executive and commander-in-chief . . ." Leonard Ratner, *The Coordinated Warmaking Power—Legislative, Executive, and Judicial Roles*, 44 S. CAL. L. REV. 461, 466–67 (1971).

223. See ELY, *supra* note 6, at 6–7. Examples cited by Ely include imminent attacks on the United States, or a Soviet invasion of Canada or Mexico.

unexpectedly, and immediate military response is so imperative, that advance congressional authorization to respond militarily simply cannot be awaited."<sup>224</sup> In such cases, though, Ely argues that the President must request congressional authorization "at the latest, simultaneously with the issuance of the order dispatching the troops."<sup>225</sup>

Most other classicists view the President's authority more narrowly. Many contend that the President can only commit U.S. forces to combat unilaterally to repel actual attacks against the United States or its armed forces.<sup>226</sup> This seems to be Fisher's view as well.<sup>227</sup> As explained previously, however, I am not convinced that even the Founders understood the President's authority so narrowly.<sup>228</sup> At the very least, they likely viewed the Chief Executive and Commander in Chief as having power, comparable to that of the states, to take military action without prior authorization from Congress if the country was "actually invaded" or "in such imminent Danger as will not admit of delay."<sup>229</sup> Thus the President possesses the power not only to "repel" attacks but also to forestall imminent attacks against the United States and its armed forces.<sup>230</sup> In addition, as practice has confirmed, the President has the authority to take limited military action to rescue American citizens in imminent danger abroad.<sup>231</sup> While the Founders gave no clear indication of this power, "underlying the Constitutional language and [Madison's] explanatory clause is a long-range purpose that authorizes the President to protect Americans from external force in an emergency."<sup>232</sup>

Beyond this point, Ely is right to argue that the President possesses constitutional authority to respond unilaterally with force in cases where a genuine and serious threat to the security of the United States "has developed so unexpectedly, and immediate military response is so imperative, that advance congressional authorization to respond militarily simply cannot be awaited,"<sup>233</sup> with the clear understanding that he or she present the matter to Congress as soon as possible. The Founders understood how dangerous and

224. *Id.* at 6.

225. *Id.* Ely argues further that the U.S. military response must be "discontinued if such authorization is not promptly forthcoming." *Id.*

226. See, e.g., WORMUTH & FIRMAGE, *supra* note 4, at 299; Berger, *supra* note 147, at 43-45. Lobel includes sudden attacks against American citizens as well. See Lobel, *supra* note 173, at 77 & n.62.

227. See FISHER, *supra* note 4, at 7, 185-88.

228. See *supra* notes 85-96 and accompanying text.

229. U.S. CONST. art. I, § 10, cl. 3; see Bestor, *supra* note 40, at 611-12; Franck, *supra* note 89, at 608. The most prominent "imminent" dangers of their day included threatened attacks on U.S. territory by Indian tribes, various European powers, or pirates, as well as possible internal rebellions.

230. This is essentially the position taken in the original Senate version of the War Powers Resolution. See S. REP. NO. 93-220, at 22 (1973). The Senate bill also recognized the President's power to "rescue United States citizens and nationals abroad and on the high seas" in certain circumstances. *Id.* at 23. For a discussion of the negotiations between the House and Senate that led to the War Powers Resolution ultimately adopted, see Franck, *supra* note 89, at 611-14.

231. See *supra* notes 90, 192-97 and accompanying text.

232. Ratner, *supra* note 222, at 467.

233. ELY, *supra* note 6, at 6.

unpredictable the world was even in 1789, and it is hard to imagine that they would not have expected the President as Commander in Chief and Chief Executive to protect the country from serious external threats in emergency situations, with force if necessary, so long as he or she sought guidance from Congress at the earliest opportunity.<sup>234</sup> The nature of modern military technology, which confronts us with threats incomparable in their speed and potential destructive power to those faced in 1789, only reinforces such an understanding.

Does this view of the President's defensive war powers open the floodgates and potentially allow the President to commit the country to war whenever he or she thinks that "national security interests" so dictate? Not if the qualifications the Founders envisioned are taken seriously today—namely, that the President should come to Congress as soon as possible in cases that go beyond repelling force with force and should avoid changing the state of things, or moving the country into war, unless war is thrust upon the nation by an attacker. While the President ultimately has

the power to judge in the first instance whether a given event constitutes an imminent threat to our survival and demands a response which leaves no time to seek Congress' acquiescence in that judgment, such limited discretion falls far short of authorizing assumption of his defensive war-making powers whenever the interest jeopardized is labeled a "vital security interest."<sup>235</sup>

In the end, what fundamentally divides classicists is not whether, in an emergency, the President should be able to send U.S. forces into hostilities in response to a sudden and urgent threat to the country's security short of a direct attack; rather it is whether that power should be understood as within, or as outside, the law.<sup>236</sup> Invoking a theory of "executive prerogative" accepted by some of the Founders, Fisher contends:

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234. See Ratner, *supra* note 222, at 488 ("An accommodation of presidential and congressional warmaking power accords the President authority to defend the national security, provided he requests congressional authorization as soon as possible—before combat, if time is available, otherwise promptly thereafter.").

235. Note, *supra* note 60, at 1784.

236. Jules Lobel argues, for example, "Today, as in 1787, the reality is that American national security can be adequately served if the President's power to use American forces in combat unilaterally is reserved to repelling sudden attacks on American troops, territory, and citizens." Lobel, *supra* note 173, at 77. Lobel acknowledges, however, that some other contingencies might still exist in which we would want the President to be able to act unilaterally—for example, to destroy preemptively a chemical weapon after receiving compelling evidence that a terrorist nation had imminent plans to detonate it over New York City. Such instances, he argues, are best handled as emergencies outside the law—an approach taken by many of the Founders who "believed that the problems associated with creating a constitutional basis for the exercise of emergency power outweighed the dangers of allowing the President to act extra-constitutionally and unlawfully in extreme crisis situations." *Id.* at 78; see also Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1392–97 (1989) (discussing liberal paradigm of emergency power based on doctrine of prerogative). The President, in short, should take the necessary action, even though it is not lawful; he or she should later seek post hoc ratification from Congress.

In a genuine emergency, a President may act without congressional authority (and without express legal or constitutional authority), trusting that the circumstances are so urgent and compelling that Congress will endorse his actions and confer a legitimacy that only Congress, as the people's representatives, can provide.<sup>237</sup>

This is what Lincoln did at the beginning of the Civil War in imposing a naval blockade against the seceding southern states.<sup>238</sup> When Congress returned, Lincoln sought its authorization, explaining that the actions he had taken, "whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity, trusting then, as now, that Congress would readily ratify them."<sup>239</sup> Fisher views Lincoln's invocation of "prerogative" followed by congressional ratification as "the model for all Presidents."<sup>240</sup> Such an approach, he argues, is less likely to lead to unrestrained executive action than modern expansive conceptions of defensive presidential war power.<sup>241</sup>

My own view differs from Fisher's more in metaphysics than in spirit. On the one hand, I view the President's core defensive power to "repel sudden attacks" more broadly than he does.<sup>242</sup> On the other hand, in cases beyond repelling or forestalling attacks against the United States, its forces, and citizens, I share his view that the President should come to Congress at the earliest opportunity if he or she concludes that American forces must be sent into combat in response to a sudden and urgent threat to the country's security. Yet unlike Fisher, I think the President's ability to respond with force in such emergency situations should be understood as within, not outside, the law. Indeed, as I read Madison and Hamilton, it is hard for me to conceptualize such power as "outside" the law.<sup>243</sup> Moreover, today, even more than at the

237. FISHER, *supra* note 4, at 87.

238. *See id.* at 187.

239. *Id.* at 38 (quoting 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1987, *supra* note 115, at 3225).

240. FISHER, *supra* note 4, at 187. Fisher also commends Jefferson, who likewise endorsed this approach. *See id.* at 27.

241. The "prerogative" approach, Fisher argues, would result in ratification by Congress retrospectively in individual cases, rather than in precedent-setting claims of emergency power. *See* FISHER, *supra* note 4, at 187; *see also* NATIONAL COMMITMENTS REPORT, *supra* note 9, at 32; Lobel, *supra* note 173, at 78-79 (noting cogency of Justice Jackson's concern that "emergency powers . . . tend to kindle emergencies" (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson, J., concurring))

242. *See supra* text accompanying notes 85-93.

243. Madison in the *Pacificus/Helvidius* debate was critical of Locke's discussion of "prerogative." *See* HAMILTON & MADISON, *supra* note 1, at 56 n.\* (James Madison) ("The chapter on prerogative shows, how much the reason of the philosopher was clouded by the royalism of the Englishman.") There are risks, moreover, in conceptualizing the President's power to "repel sudden attacks" too narrowly and thus creating a need to act outside the law too often. As Madison argued in another context: "It is in vain to oppose constitutional barriers to the impulse of self-preservation. It is worse than in vain; because it plants in the Constitution itself necessary usurpations of power, every precedent of which is a germ of unnecessary and multiplied repetitions." THE FEDERALIST NO. 41, at 257 (James Madison) (Clinton Rossiter ed., 1961) Hamilton likewise argued:



Founding, the Lockean “prerogative” argument—namely, “I acted outside or beyond or even against the law, but necessity required it”—is hard even to articulate comfortably within our modern constitutional discourse. Still, the various classicist approaches agree on the presumption that the President, in cases beyond repelling sudden or imminent attacks against the United States or its citizens, should come to Congress as soon as possible to seek its authorization if American forces are sent into combat against another state. It is this presumption, recognized by our earliest presidents, that is too often forgotten by presidents today who claim inherent authority to send American troops into combat in a broad array of situations beyond repelling or forestalling attacks against the United States or its citizens, even when time and circumstances clearly would allow for authorization by Congress. What has changed most since 1789 is not the wisdom of the Founders’ basic approach—which recognized presidential authority to act in an emergency in response to external force but not to initiate war—but the willingness of presidents to acknowledge the qualifications they intended.

Nonclassicists, of course, view the President’s defensive war powers more broadly. Some contend that the President can make war short of formally declaring it, subject only to Congress’s power of the purse.<sup>244</sup> Others argue that the President can forcibly exercise U.S. rights under international law short of placing the country in a legal “state of war.”<sup>245</sup> Still others contend that the President can commit U.S. forces to a “defensive war,” even if the United States or its forces have not been attacked and even if time permits congressional approval.<sup>246</sup> I explained in Part I why these are less persuasive accounts of the original understanding of war powers than the refined classical view.<sup>247</sup>

At the same time, these accounts do raise several issues that merit greater attention by scholars of the classicist school. First, they correctly stress the diversity and range of military actions, from peaceful troop deployments to limited uses of force of various kinds, that are a vital and integral part of foreign policy; and they properly emphasize that not all of these are tantamount to commencing “war” for constitutional purposes. Strict classicists too often equate almost any use of force abroad with “war” without explaining why that should be so.<sup>248</sup> Second, the nonclassicists look to the law of

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Wise politicians will be cautious about fettering the government with restrictions that cannot be observed, because they know that every breach of the fundamental laws, though dictated by necessity, impairs that sacred reverence which ought to be maintained in the breast of rulers towards the constitution of a country, and forms a precedent for other breaches where the same plea of necessity does not exist at all, or is less urgent and palpable.

THE FEDERALIST NO. 25, at 167 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

244. See, e.g., Yoo, *supra* note 63, at 174, 241, 266–67, 295–96.

245. See, e.g., Rostow, *supra* note 63, at 6, 10, 16–17.

246. See, e.g., Turner, *supra* note 41, at 914–15.

247. See *supra* text accompanying notes 45–62, 75–100.

248. Fisher shares this tendency. See *supra* note 218.

nations at the time of the Founding (and subsequently) as an important source of insight on the allocation of war powers.<sup>249</sup> Professor Abraham Sofaer, whom I regard as within the classicist school broadly defined, likewise has suggested ways in which the law of nations, together with patterns of historical practice, can help illuminate the scope of the President's war powers.<sup>250</sup> The question of what is "war" for constitutional purposes, and the significance of international law in addressing that issue, deserves more attention from scholars today. It has taken on new urgency in the post-Cold War era as the United States participates in a wide range of military operations authorized by the UN Security Council to protect international peace and security.

### C. "War" and Multilateral Military Action: Three Case Studies

How then should we understand Congress's power to "declare War and grant Letters of Marque and Reprisal" today? Translating the Founders' purposes for giving Congress the power to commence war into a very different world in which the United States plays the most powerful military role in the United Nations system is a challenging endeavor, particularly when the military actions at issue involve relatively limited uses of force in pursuit of collectively authorized objectives. For one thing, the Founders did not contemplate a collective security arrangement like the United Nations when they allocated war powers between Congress and the President.<sup>251</sup> They also thought in very different terms: "War" and "Reprisals," rather than collective "enforcement actions" or "peacekeeping" operations, were on their minds. Moreover, the changes in international law since the Founding have been profound. Initiating "offensive war" is no longer a right of sovereign states. The UN Charter speaks not of "war" but of the "use of force," and it provides that forcible action is legal under international law if authorized by the Security Council<sup>252</sup> or if undertaken in self-defense.<sup>253</sup>

Fisher reasonably rejects the claim that Security Council authorization by itself, pursuant to the UN Charter, gives the President the power under the

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249. A few classicist scholars have also examined the law of nations to help shed light on the Founders' understanding of war powers. Charles Lofgren, for example, examines international law treatises known to the Founders in his piece on the original understanding. See Lofgren, *supra* note 35, at 689–97. Jules Lobel thoughtfully explores the issue of imperfect war and letters of marque and reprisal. See Lobel, *supra* note 47.

250. See Sofaer, *supra* note 69, at 37, 42, 50–51.

251. Traditional balance-of-power alliances were the predominant security arrangement of the time. See Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 839, 845 (1989).

252. See U.N. CHARTER arts. 39, 41–42.

253. See *id.* art. 51. For helpful discussions of the law of the UN Charter, see ANTHONY CLARK AREND & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE* (1993), and Louis Henkin, *Use of Force: Law and U.S. Policy*, in *RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE* 37 (2d ed. 1991).

Constitution to commit U.S. troops to hostilities.<sup>254</sup> But that is only the beginning of the analysis. Hard questions of how to understand the Founders' purposes in the UN context remain, even under the classical view. Operations ranging in nature and scope from major combat in Korea and the Persian Gulf, to "peace enforcement" in Haiti, Somalia, and Bosnia, to "peacekeeping" in Macedonia, clearly are not all constitutionally equivalent.<sup>255</sup> Instead, as I have argued elsewhere,<sup>256</sup> the President's authority to commit American forces to multilateral operations without advance congressional approval varies depending on the nature and circumstances of each operation. The moderate classical view that I defend is more nuanced than Fisher's view. It also comes to very different conclusions than either the "offensive/defensive war" or the "formal war/shared power" views on how to understand the respective war powers of Congress and the President today. These differences are highlighted most clearly in the case of the Persian Gulf War, but they can be seen in the cases of Haiti and Bosnia as well.

### 1. *The Persian Gulf War: Liberating Kuwait After the Iraqi Invasion*

The American-led combat operation to expel Iraqi forces from Kuwait in early 1991 was the most substantial military action authorized by the UN Security Council since the Korean War.<sup>257</sup> This collective military action was in direct response to Iraq's unlawful invasion of Kuwait and its subsequent refusal to withdraw, despite months of diplomacy and economic sanctions. President George Bush, commendably, obtained authorization from Congress before sending American forces into battle against Iraq.<sup>258</sup> Before and after the War, however, he contended that he did not need Congress's authorization under the Constitution to "kick Saddam Hussein out of Kuwait" once the Security Council had approved the action.<sup>259</sup> The Bush Administration invoked historical practice as support for this claim.<sup>260</sup> A majority of Congress disagreed, however. The House of Representatives adopted a resolution affirming that any offensive military action against Iraq required

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254. See FISHER, *supra* note 4, at 70. I examine this issue in Stromseth, *supra* note 139, at 160–66.

255. Fisher's book, however, seems to treat many of them as such in several places. See FISHER, *supra* note 4, at xii, 160–61.

256. See Stromseth, *supra* note 139, at 160–66.

257. See Stromseth, *supra* note 7, at 598–99, 640, 644.

258. See Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3, 4 (1991), reprinted in 50 U.S.C. § 1541 note at 175–76 (1994).

259. President George Bush, Remarks at the Texas State Republican Convention in Dallas, Texas, 1992 PUB. PAPERS 993, 995 (June 20, 1992).

260. See, e.g., *Persian Gulf Hearings*, *supra* note 142, at 590 (statement of Richard Cheney, Secretary of Defense) (invoking Korea as precedent for presidential authority to send U.S. forces into combat against Iraq without congressional approval). Cheney neglected to observe any distinction between Truman's emergency deployment of American forces to stop the immediate onslaught of North Korean troops and the situation in the Persian Gulf, where allied forces had been amassing for several months before ultimately taking military action to liberate Kuwait.

prior and explicit congressional approval.<sup>261</sup> Senator after senator likewise argued that the commitment of over 400,000 Americans to combat against Iraq “would plainly be war” and that the Constitution thus required Congress’s approval.<sup>262</sup>

Was congressional authorization required under the Constitution before the President sent American forces into battle to expel Iraq from Kuwait? Under the classical view, the answer is clearly yes. While President Bush undoubtedly had the authority to deploy American forces to Saudi Arabia to deter and protect against further Iraqi aggression, as he promptly did in August 1990 following Saddam Hussein’s invasion of Kuwait, the decision to initiate combat against Iraq to reclaim Kuwait is a different question. It was effectively a decision to commence war for constitutional purposes because of the nature and circumstances of the military operation and the magnitude of the risks involved. American forces were sent into sustained combat to defeat a powerful adversary. While the casualties were thankfully fewer than expected,<sup>263</sup> the risks were enormous. The commitment of American forces to military action on this scale involved hazards and sacrifices of the sort that led the Founders to give Congress the power to declare war. Moreover, the long diplomatic prelude to military action against Iraq provided ample time for a judgment by Congress whether the interests at stake were worth going to war.<sup>264</sup>

Nonclassicists reach a different conclusion on the Gulf War and view it as an easy case for presidential war power. Some argue that the President can make war with the military forces available to him, subject only to Congress’s exercise of its power of the purse.<sup>265</sup> Under this view, President Bush would have acted well within the Constitution had he attacked Iraq without congressional authorization.<sup>266</sup> This view, however, does not accord with the

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261. See H.R. Con. Res. 32, 102d Cong. (1991). The vote was 302 to 131. See 137 CONG. REC. H405 (daily ed. Jan. 12, 1991).

262. See, e.g., 137 CONG. REC. S101 (daily ed. Jan. 10, 1991) (statement of Sen. Mitchell); see also Stromseth, *supra* note 7, at 650–53 (discussing congressional views during Persian Gulf War debates).

263. According to Pentagon reports, 148 Americans were killed and 467 were wounded in action during the Persian Gulf War. See *Pentagon Increases Figure on Casualties from American Fire*, N.Y. TIMES, Aug. 14, 1991, at A8.

264. Of course, the President must be able to defend the nation when war is thrust upon it, and to repel sudden attacks against the United States, its forces, and citizens. The President also has well-established authority to order peacetime troop deployments in support of U.S. foreign policy and to protect U.S. security interests, as President Bush did in sending American forces to Saudi Arabia to thwart further aggression by Saddam Hussein. Under the classical view, the President also can respond with force in other emergencies where a sudden and serious threat to the country’s security requires urgent military response and time does not permit advance authorization from Congress. This was not the situation in the Persian Gulf, however. War was not thrust upon the United States by an adversary, leaving no time for legislative deliberation.

265. See, e.g., *Constitutional War Powers Hearings*, *supra* note 63, at 481 (statement of Gary Born); Yoo, *supra* note 63, at 174, 241, 268, 295.

266. Professor Rostow’s view is more nuanced: The President can exercise U.S. rights under international law, including rights of self-help and self-defense, short of placing the nation in a formal “state of war,” as that term is understood in international law. See Rostow, *supra* note 63, at 6, 10, 16–17.

fundamental republican principle reflected in the Constitution that the decision to expose the country to the hazards of war, if war had not already been thrust upon us by an adversary, should not be made by the President alone; rather, the decision should reflect the deliberation and judgment of the legislature—the branch most directly representative of the American people, whose lives and resources will be placed on the line.<sup>267</sup>

In the case of the Gulf War, Professor Rostow argued that the President did not need congressional authorization to send American forces into battle against Iraq because he was not placing the United States in a “state of war” but rather was taking care that U.S. treaty law, namely the UN Charter, was faithfully executed.<sup>268</sup> The treaty execution argument advanced by Rostow warrants fuller examination than space permits here. It is doubtful, however, that the war powers vested in Congress as a whole by the Constitution can be superseded by a treaty approved by the Senate alone, as I have argued more fully elsewhere.<sup>269</sup> Nor did the UN Charter attempt to preempt Congress’s war powers. Although states are legally obligated to carry out the “decisions” of the Security Council,<sup>270</sup> Chapter VII of the Charter (in particular Article 43) reflects an understanding that the Security Council cannot order or require a state to commit its forces to military action in the absence of an Article 43 agreement ratified according to that state’s “constitutional processes.”<sup>271</sup> In practice, moreover, the Security Council has never required states to use force; it has simply authorized or recommended that they do so. Thus the President has never been legally obligated to “execute” the Charter by committing U.S. forces to combat in a specific case.<sup>272</sup> In sum, the treaty execution argument does not prevail in the case of the Gulf War.

Of course, as Rostow properly emphasizes, the UN-authorized combat operation against Iraq was fully consistent with international law and the right of collective self-defense recognized in the UN Charter.<sup>273</sup> Consistency with international law, however, is not dispositive under the classical view in determining whether congressional authorization is required under the Constitution. After all, at the Founding, “declaring War” and issuing “Letters

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267. See text accompanying notes 25–26, 29–34, 91–96.

268. See *Constitutional War Powers Hearings*, *supra* note 63, at 229–33 (statement of Prof. Eugene Rostow).

269. See Stromseth, *supra* note 139, at 153–56.

270. See U.N. CHARTER arts. 25, 48.

271. *Id.* art. 43, para. 3; see also Stromseth, *supra* note 139, at 155. The Senate approved the UN Charter with this understanding as well. See Stromseth, *supra* note 7, at 604–05. No Article 43 agreement has been concluded by the United States. See *id.* at 620.

272. Under the War Powers Resolution, moreover, authority to introduce U.S. forces into hostilities “shall not be inferred . . . from any treaty” unless the treaty is implemented by legislation that specifically authorizes introducing U.S. forces into hostilities. See 50 U.S.C. § 1547(a)(2) (1994).

273. See *Constitutional War Powers Hearings*, *supra* note 63, at 229–30 (statement of Prof. Eugene Rostow).

of Marque and Reprisal” were sovereign rights under the law of nations,<sup>274</sup> but the domestic constitutional authority was given to Congress.

The constitutional purposes to be served by legislative deliberation remain relevant, moreover, even when the Security Council has authorized military action.<sup>275</sup> The Security Council, for example, does not provide the kind of check on unilateral presidential action that the Founders sought from Congress. While a variety of viewpoints generally are represented on the Council, U.S. presidents have been able to exert considerable influence and obtain authorizing resolutions when they wanted to take military action, as they did in Korea, the Persian Gulf, and Haiti. Furthermore, the democratic concerns that led the Founders to give the power to declare war to Congress are not satisfied by the vote of a body that neither represents the American people as a whole nor is politically accountable to them. Security Council authorization—which would not be possible if the United States exercised its veto—provides a reason to consider seriously committing American forces to collective military action. However, it is not a compelling reason to short-circuit congressional deliberation over whether U.S. forces should be sent into combat.

Proponents of the “offensive/defensive war” view argue that the President did not need authorization from Congress to send U.S. forces into battle against Iraq because it was a “defensive war.”<sup>276</sup> Robert Turner, the leading exponent of this view, acknowledges that translating the Founders’ purposes into current circumstances involves some uncertainty.<sup>277</sup> Yet he ultimately views Congress’s power to declare war very narrowly and the President’s powers broadly. Whether Congress’s power to declare war is implicated today in a given case depends, for Turner, on whether “offensive war” of the sort that would have required a prior declaration of war at the Founding is involved.<sup>278</sup> By this he means a war of aggression of the kind that is now prohibited under international law.<sup>279</sup> Under this view, so long as the President is responding to a war initiated by someone else, he or she can send American forces to battle unilaterally, even if time permits congressional approval and even if the United States or its forces have not been attacked. In the case of the Persian Gulf, Turner contended:

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274. See, e.g., VATTEL, *supra* note 49, at 285 (“It belongs . . . to sovereigns alone to make and order reprisals . . .”); *id.* at 292 (“[T]he sovereign power alone is possessed of authority to make war”).

275. For a contrary view, see Thomas M. Franck & Faiza Patel, *UN Police Action in Lieu of War “The Old Order Changeth”*, 85 AM. J. INT’L L. 63, 74 (1991).

276. See, e.g., Emerson, *supra* note 43, at 30 n.51.

277. See *Constitutional War Powers Hearings*, *supra* note 63, at 424 (statement of Robert F. Turner, Professor, University of Virginia School of Law).

278. See Turner, *supra* note 41, at 914, 917.

279. See *id.* at 915–16; see also Emerson, *supra* note 43, at 30 (arguing that defensive actions do not require congressional approval).

When the President decides to risk the use of armed force in cooperation with the United Nations or other treaty partners in an effort to restore peace and end armed aggression, he is not "initiating" a "war" but defending the rule of law. No "declaration of war" is necessary or appropriate in such circumstances.<sup>280</sup>

Although congressional authorization would be prudent and desirable, it is not, for Turner, constitutionally required.

There are several problems with this view. First, the evidence from the Founding calls into question such a narrow reading of Congress's war powers and such an expansive conception of presidential war powers.<sup>281</sup> In modern circumstances, moreover, to view Congress as merely possessing a "veto" over a war of "aggression" initiated by the President means that Congress's constitutional war power has little current significance.<sup>282</sup> Yet the very purposes that Turner admits were behind this congressional "veto" over aggressive war—such as "prevent[ing] the Commander in Chief from endangering the lives of America's youth and the solvency of the national treasury by launching painful and costly wars over political, diplomatic, or economic grievances"<sup>283</sup>—are still relevant in cases where war has not been thrust upon the United States by an enemy. If the United States or its forces are not under attack, and if time for legislative deliberation exists, why should the President alone decide whether the United States should enter war at the behest of another state? In the case of the Gulf War, the fact that combat to expel Iraqi forces from Kuwait was a "defensive" response to Iraq's prior aggression does not automatically vitiate the constitutional purposes to be served by legislative deliberation, particularly when months for deliberation existed. This was not a situation, like that facing the NATO alliance during the Cold War years, where a sudden attack against West Germany by the Soviet Union would also literally have been an attack against the forces of the United States stationed there.<sup>284</sup> Turner, in the end, does not explain *why* we should understand Congress's power as narrowly and the President's power as broadly today as he suggests.

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280. *Constitutional War Powers Hearings*, *supra* note 63, at 426 (statement of Robert F. Turner, Professor, University of Virginia School of Law).

281. *See supra* text accompanying notes 45–62.

282. Turner acknowledges this. *See Turner, supra* note 41, at 919–20.

283. *Id.* at 914.

284. The real key to making the U.S. commitment to NATO credible, as the Europeans long understood, was not a treaty provision declaring that an attack on one was an attack on all, but rather American willingness to place American soldiers on the front line in Western Europe to demonstrate that any Soviet attack against Western Europe was also an attack against the United States. In authorizing the stationing of substantial American forces in Europe for over 40 years, moreover, Congress understood that deterrence depended on a credible threat that the President would "repel sudden attacks" against them. For a more complete discussion, see JANE E. STROMSETH, *THE ORIGINS OF FLEXIBLE RESPONSE: NATO'S DEBATE OVER STRATEGY IN THE 1960S* (1988).

Nor does historical practice support such an open-ended view of presidential war power. Of the cases in which presidents have committed U.S. forces to combat on a major scale—cases that are widely viewed as “wars”—only Korea was not expressly authorized by Congress.<sup>285</sup> Presidents, as noted above, have taken other defensive actions in support of allies in crisis situations, but none involved committing U.S. forces to hostilities on the scale of the Gulf War.<sup>286</sup> In sum, given the nature and risks of the action against Iraq, the time available to secure congressional authorization, and the lack of long-standing historical practice to the contrary, prior approval from Congress was required under the Constitution.

## 2. *Haiti: Deploying Forces to Restore Democracy*

Haiti presents a more complex case, raising war powers issues that warrant a more subtle analysis than Fisher’s book provides.<sup>287</sup> President Clinton dispatched U.S. troops to Haiti in September 1994, with Security Council authorization,<sup>288</sup> to remove the military regime of General Raoul Cedras and restore President Jean Bertrand Aristide to power. By the time U.S. forces actually landed in Haiti, an American negotiating team had achieved a last-minute diplomatic breakthrough with General Cedras, who agreed to relinquish power voluntarily. American forces thus landed with the consent not only of President Aristide, Haiti’s lawfully elected leader, but also of the de facto Haitian government in circumstances (and with a peacekeeping mission) hardly tantamount to commencing war. The more difficult constitutional question, however, is whether the President’s initial decision to send U.S. combat forces to Haiti to remove the Cedras regime by force and return President Aristide to power required prior approval from Congress.

The President had ample time to seek congressional authorization before ordering U.S. forces to Haiti; the deployment was not an emergency action to repel a sudden attack. President Clinton, however, did not seek authorization from Congress and contended that he was not constitutionally required to do so. Instead, executive branch lawyers argued that the “nature, scope and duration” of the deployment, including the limited risk of hostilities, meant that it was not “war” in the constitutional sense.<sup>289</sup>

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285. See *supra* note 198.

286. See Raven-Hansen, *supra* note 56, at 42–43.

287. See FISHER, *supra* note 4, at 154–57.

288. See S.C. Res. 940, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/940 (1994)

289. See OLC Haiti Opinion, *supra* note 142, at 122, 125. This was one of three factors which, in “combination . . . provided legal justification for the planned deployment.” *Id.* at 122. The OLC Opinion also argued that the deployment “accorded with the sense of Congress” expressed in section 8147 of the Department of Defense Appropriations Act, 1994, *id.* at 122–23, and that the War Powers Resolution “recognize[d] and presuppose[d]” unilateral presidential authority, *id.* at 123, to commit U.S. forces in cases such as Haiti “where the risk of sustained military conflict was negligible,” *id.* at 125. For thoughtful critiques of these arguments, see Damrosch, *supra* note 207, at 61–63. Michael J. Glennon, *Too Far Apart:*



Did the deployment of American combat forces to Haiti amount to commencing "war" under the Constitution, such that the authorization of Congress was required? If we examine the nature and objectives of the operation, and the purposes underlying the constitutional allocation of war powers, the better argument is that the deployment as originally planned would have constituted a commencement of "war" or an armed "reprisal" against the Cedras government for constitutional purposes, notwithstanding the authorization of the United Nations and the consent of President Aristide. Even if the hostilities and risks were expected to be far smaller in Haiti than in a major combat operation such as the Gulf War, the objective of the action was a far-reaching one: to remove an existing government by force. Moreover, while the purposes behind legislative deliberation are most compelling in cases involving major and sustained combat, they still are relevant in cases of lesser hostilities as well. That the Founders wanted the commencement of even limited hostilities or "imperfect war" to be authorized by Congress is reinforced by the Marque and Reprisal Clause, which gave Congress control over the limited uses of force, such as reprisals, common in that day.<sup>290</sup> The Founders understood that initiating reprisals against another state could easily escalate and lead to war, and they vested this power in Congress because of the potentially serious consequences of committing the country to such action.<sup>291</sup>

The risks of escalation were admittedly low in the case of Haiti, given the disparity of power between the countries involved. At the same time, however, the United States was not facing a "sudden attack" or some other urgent threat to its security that required immediate presidential action. Instead, ample time and opportunity for legislative deliberation existed before the President decided to commit American combat forces to Haiti to remove the Cedras regime. In these circumstances, the question whether U.S. interests were worth the risks involved in commencing hostilities is, for a classicist, best understood as a judgment for the legislature to make.

Even some nonclassicists find Haiti to be a close case. Robert Turner acknowledges, for instance, that whether the contemplated U.S. intervention in Haiti could be viewed as "defensive" action is by no means certain under

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*Repeal the War Powers Resolution*, 50 U. MIAMI L. REV. 17, 22-27 (1995), and Letter from Professors Bruce Ackerman et al. to Walter Dellinger, Assistant Attorney General, Office of Legal Counsel (Oct. 14, 1994), in 89 AM. J. INT'L L. 128 (1995) [hereinafter Letter from Professors to Dellinger]. For a rejoinder, see Walter Dellinger, *After the Cold War: Presidential Power and the Use of Military Force*, 50 U. MIAMI L. REV. 107 (1995).

290. As Abraham Sofaer persuasively argues, "[t]he Constitution says Congress shall 'declare' war, and it seems unreasonable to contend that the President was given the power to 'make' undeclared war, especially since the Constitution gives Congress control of those types of military actions short of formal war commonly resorted to during that time." SOFAER, *supra* note 39, at 4; see also Lobel, *supra* note 47, at 1040-47, 1059-61, 1089-94 (discussing significance of Marque and Reprisal Clause); Lobel, *supra* note 173, at 66-70 (same); Lofgren, *supra* note 35, at 695-97, 699-700 (same).

291. See *supra* text accompanying notes 50-52.

his analytic framework because “there was not even a suggestion that General Cedras and his associates had planned, threatened, or engaged in the use of armed force against another state.”<sup>292</sup> In the end, however, he concludes that “[t]he better view is probably that the existence of U.N. Security Council authorization and the President’s duty and power to see the laws faithfully executed provide ample independent legal authority for the President to act with whatever military resources the Congress has seen fit to place at his disposal.”<sup>293</sup> For those who adhere to the “formal war/shared power” view of war powers, however, Haiti is not a hard case at all. The President and the Congress should respond as they think the exigencies of the situation require, short of the President unilaterally placing the United States in a formal state of war, just as they have over the course of American history.

Presidents admittedly often have acted unilaterally in taking military action of the scale contemplated in Haiti, in contrast to combat of the magnitude involved in the Gulf War. Thus, not surprisingly, the Clinton Administration appealed to past executive interventions in the southern hemisphere in contending that the President did not require congressional authorization to commit American combat forces to Haiti. President Clinton invoked Panama and Grenada as precedents.<sup>294</sup> The Justice Department cited past cases of two types to bolster its argument that the contemplated military action in Haiti did not amount to “war” for constitutional purposes: those in which the government of a state invited U.S. military action, and early twentieth-century interventions by the United States in the Caribbean to promote “order.”<sup>295</sup> As in these cases, the Justice Department argued, there was only a “limited antecedent risk that United States forces would encounter significant armed resistance or suffer or inflict substantial casualties” in Haiti.<sup>296</sup>

Assessing arguments from history in a case such as this is less straightforward than in the case of major wars. Yet each of the strands of “precedent” invoked by the executive branch is problematic, in varying degrees, as support for unilateral action in Haiti. Unlike the interventions in Grenada and Panama,<sup>297</sup> no imminent threat to the lives of American citizens

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292. Turner, *supra* note 41, at 916 n.58. Instead, “[t]he apparent reason for U.N. intervention was the promotion of democracy.” *Id.*

293. *Id.* at 920 n.76.

294. See Haiti News Conference, *supra* note 142, at 1576 (“[A]ll my predecessors in both parties have clearly maintained that they . . . did not have to have congressional approval for every kind of military action. . . . There was not congressional approval in advance of the actions in Panama and Grenada.”).

295. See OLC Haiti Opinion, *supra* note 142, at 125 & 126 n.6.

296. *Id.* at 126.

297. Congress’s reaction to the Grenada intervention suggests that concern for the safety of Americans on the island largely explains congressional acquiescence after an initial protest of the deployment. See *supra* note 187. Unlike Grenada, Panama was invaded while Congress was in recess. Although the President’s claim that Americans were in imminent danger was far weaker in Panama and the broader objectives of deposing and arresting General Manuel Noriega were clear, the operation was virtually complete when Congress resumed and few members were interested at that point in challenging a politically

was even arguable in Haiti. The cases of military action by invitation cited by the Justice Department all involved action at the behest of the government actually in power, in contrast to Haiti, where the intervention was designed to depose the *de facto* regime. While the consent of President Aristide strengthened the international legitimacy of the planned intervention, forcibly removing a sitting government is a quite different situation than coming to the aid of one actually in power. Even the Justice Department acknowledged, moreover, that deploying forces at the invitation of a country's legitimate government might require congressional authorization in some cases, depending on the circumstances.<sup>298</sup> In the "little war" cases of the early twentieth century, presidents argued that they were not going to war but rather were promoting "order"—in the nature of "police action." Yet those interventions, which in some cases involved toppling governments, did constitute acts of war under international law, even if the magnitude of the hostilities was limited by the disparity of power between the countries involved; they are best understood as constituting "war" for constitutional purposes as well.<sup>299</sup> In the end, no unproblematic, longstanding, and systematic practice clearly analogous to the Haiti situation can be confidently invoked.<sup>300</sup>

### 3. *Bosnia: Implementing and Enforcing a Peace Agreement*

A final case I would like to examine is the commitment of American forces to Bosnia to help implement the Dayton Peace Agreement, concluded

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popular *fait accompli*. Even before the intervention, moreover, a number of members of Congress had expressed support for military action to remove Noriega from power. See Sofaer, *supra* note 69, at 54.

298. See OLC Haiti Opinion, *supra* note 142, at 126 ("We are not suggesting, however, that the United States cannot be said to engage in 'war' whenever it deploys troops into a country at the invitation of that country's legitimate government."); see also Letter from Professors to Dellinger, *supra* note 289, at 129–30 ("Presumably, at the outset of World War II, General deGaulle could not have nullified the Constitution's requirement of congressional approval by 'inviting' the United States to invade occupied France.").

299. See *supra* note 203 and accompanying text.

300. Nor do I ultimately find persuasive the Justice Department's claim that the President's decision to deploy U.S. forces to Haiti to depose the Cedras regime accorded with the "sense of Congress" expressed in section 8147 of the 1994 Department of Defense Appropriations Act. See OLC Haiti Opinion, *supra* note 142, at 122–23. Certainly, under the provisions of the War Powers Resolution, that "sense of Congress" resolution did not *authorize* the subsequent deployment. Moreover, the legislation invoked by the Justice Department was adopted by Congress almost a year before the actual intervention, at a time when the only military action authorized by the United Nations was a limited peacekeeping operation. See Stromseth, *supra* note 139, at 173. Congress, especially the Senate, admittedly did send some mixed signals in the months and weeks leading up to the U.S. intervention, see *id.* at 173–76, but Congress's repeated refusal to cut off funds prospectively for military action in Haiti said more about its sensible reluctance to limit the President's ability to negotiate effectively with General Cedras and convince him to leave voluntarily than it said about congressional approval of possible military action. The debates in Congress and the various resolutions passed immediately before the President's deployment conveyed opposition more than support for unilateral executive action. In fairness, however, Congress seemed to want it every way: neither to authorize expressly, nor to prohibit, nor to speak unambiguously regarding a possible U.S. military intervention in Haiti. Cf. ELY, *supra* note 6, at 47–48 (arguing same point about Vietnam War).

in November 1995.<sup>301</sup> Approximately eighteen thousand American troops were deployed in Bosnia by early 1996 as part of NATO's Implementation Force (IFOR). They were deployed primarily for the purposes of monitoring a ceasefire and separating the previously warring factions as part of a negotiated peace settlement accepted by all the parties to the conflict.<sup>302</sup> The Clinton Administration argued, persuasively in my view, that American involvement was critical to the success of the peace plan, and that the Dayton Agreement was Bosnia's best hope for the future after an especially bitter and brutal war. Before deploying American forces, moreover, President Clinton said he would "welcome a Congressional expression of support for U.S. participation" in IFOR.<sup>303</sup> The President, however, neither sought nor acknowledged the need for congressional authorization.

Congress, in the months leading up to the Dayton Agreement, passed a number of resolutions on the question of sending American troops to Bosnia.<sup>304</sup> In mid-December of 1995, after the President announced his decision to commit U.S. forces to IFOR, opponents of the deployment in Congress even sought to block the use of funds for this purpose. Both the House and the Senate rejected these measures.<sup>305</sup> Instead, after heated debate,

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301. Fisher's discussion of Bosnia in his book predates the Dayton Peace Agreement. However, his discussion of American participation in UN peacekeeping operations suggests that he would view congressional authorization as required for a troop deployment such as that in Bosnia—a position that he confirmed in a subsequent article. See *supra* note 218.

302. See General Framework Agreement for Peace in Bosnia and Herzegovina and Annexes I–11, reprinted in 2 INT'L PEACEKEEPING 140–46, 155–67 (1995).

303. President's Letter to Senate Democratic Leader Thomas Daschle on Implementation of the Balkan Peace Process, 31 WEEKLY COMP. PRES. DOC. 2177, 2177 (Dec. 11, 1995). The Administration had indicated for over a year that President Clinton would not send U.S. forces to Bosnia to implement a peace agreement without giving Congress an opportunity to speak to the issue. For example, on October 5, 1993, Assistant Secretary of State Stephen Oxman said that the Clinton Administration would consult with Congress and not commit American troops to a peacekeeping operation in Bosnia without congressional support. See RICHARD F. GRIMMETT, THE WAR POWERS RESOLUTION: TWENTY-TWO YEARS OF EXPERIENCE 35–36 (Congressional Research Serv. No. 96-476 F, May 24, 1996).

304. On September 29, 1995, the Senate passed an amendment to the State, Commerce, and Justice Appropriations Bill for Fiscal Year 1996, which expressed the sense of the Senate that funds provided by the bill should not be used to deploy U.S. combat troops to Bosnia unless Congress first approved the deployment in advance or to evacuate endangered UN peace keepers. See GRIMMETT, *supra* note 303, at 37. On October 30, the day before the Dayton peace talks began, the House passed a resolution objecting to the presumption that U.S. troops would automatically be involved in implementing a peace accord in Bosnia, and stating that "no United States Armed forces should be deployed on the ground in the territory of the Republic of Bosnia and Herzegovina to enforce a peace agreement until Congress has approved such a deployment." H.R. Res. 247, 104th Cong. (1995). On November 17, the House passed another resolution, probably in response to signs that a peace agreement at Dayton was about to be reached, to prohibit the use of "funds appropriated or otherwise available" to the Department of Defense for the deployment of ground troops to Bosnia "as part of any peacekeeping operation or as part of any implementation force," unless such funds were specifically appropriated by Congress. See H.R. 2606, 104th Cong. § 1 (1995). In fact, even as early as mid-1993, Congress had enacted legislation addressing the issue of funding for Bosnia. Section 8146 of the Department of Defense Appropriations Act of 1994 stated the sense of Congress that none of the funds appropriated by the Act should be used to deploy troops for a new peacekeeping mission to Bosnia, unless previously authorized by Congress. See Pub. L. No. 103-139, § 8146, 107 Stat. 1418, 1474 (1993).

305. On December 13, both Houses considered and defeated legislation that would have blocked the use of funds for the deployment of troops to Bosnia. This simultaneous legislative activity was probably

the House adopted a resolution expressing "serious concerns and opposition to the President's policy" of deploying American ground forces to Bosnia, while declaring its "pride and admiration" for the Americans serving there.<sup>306</sup> The Senate was more affirmative: It expressed "unequivocal[] support[]" for the U.S. armed forces in Bosnia, while noting "reservations" about the President's decision to deploy them.<sup>307</sup> Given that the President already had made a commitment to send troops, the Senate "recogniz[ed] that . . . preserving United States credibility is a strategic interest" but indicated that U.S. forces should stay only for "approximately one year." The Senate also called for detailed reports, every sixty days, on the status of both the military and civilian aspects of implementing the Dayton Peace Agreement.<sup>308</sup> The disparate House and Senate resolutions were never reconciled, however. Later, in a deal with the congressional leadership, the President obtained a tacit agreement that funds from Department of Defense authorizations for fiscal year 1996 could be used for Bosnia.<sup>309</sup> In the end, Congress as a body opted neither to block the deployment of American combat forces to Bosnia nor to authorize it.

Whether congressional authorization was required under the Constitution is a complex question, but, in my view, the better answer is no. While a direct vote in Congress to authorize American participation in IFOR would have been preferable, as a matter of policy and accountability, to Congress's more ambiguous stance, the commitment of American troops to help implement the Dayton Peace Agreement did not entail commencing "war" or reprisals against another state. Although the deployment, given the bitter history of the Bosnia conflict, was and is hardly without risks, each of the parties to the conflict agreed to abide by the terms of the peace accord. They also agreed to IFOR's well-defined role in implementing it. American forces thus arrived not to impose peace, but rather to monitor a negotiated settlement accepted by the parties on the ground.

The Bosnia mission, admittedly, is not a traditional UN peacekeeping operation, authorized under Chapter VI of the UN Charter, in which force is authorized only in self-defense and then only as a last resort. While Congress

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induced by the fact that the President would attend the final signing of the Dayton Peace Agreement in Paris the next day and by a letter from the President to Congress asking for a vote of support. See President's Letter to Senate Democratic Leader Thomas Daschle on Implementation of the Balkan Peace Process, *supra* note 303. First, the Senate considered and overwhelmingly rejected H.R. 2606, 104th Cong. (1995), a measure passed by the House several weeks earlier to prohibit Department of Defense funds from being used to deploy troops to Bosnia. See 141 CONG. REC. S18,470 (daily ed. Dec. 12, 1995) (rejecting H.R. 2606 by vote of 77 to 22). Likewise, the House defeated H.R. 2770, 104th Cong. (1995), a bill to prohibit federal funds from being used for the deployment of troops to Bosnia "as part of any peacekeeping operation, or as part of any implementation force." In contrast to the Senate, the House bill was defeated by a narrow margin of 218 nays to 210 yeas. See 141 CONG. REC. H14,848 (daily ed. Dec. 13, 1995).

306. See H.R. Res. 302, 104th Cong. § 2 (1995).

307. See S.J. Res. 44, 104th Cong. (1995).

308. See *id.*

309. See Donna Cassata, *Clinton Accepts Defense Bill in Bid for Bosnia Funds*, 53 CONG. Q. 3672, 3672 (1995); Louis Fisher, *The Bosnia Commitment*, LEGAL TIMES, Mar. 11, 1996, at 22, 23.

can limit American participation in such peacekeeping operations, the troops involved are unlikely, in most cases, to become embroiled in hostilities, and the President thus would not require congressional authorization under the Constitution or the War Powers Resolution.<sup>310</sup> The role of IFOR in implementing the Dayton Agreement goes beyond traditional peacekeeping, however, and includes authority, under Chapter VII of the UN Charter, to use force to compel compliance with the Agreement. But each of the parties to the conflict has itself consented to giving IFOR this power, distinguishing this operation from other recent nonconsensual “peace enforcement” operations under Chapter VII, including those in Bosnia and Somalia.<sup>311</sup>

Other factors, to be sure, argued in favor of congressional authorization. These included the fragility of the peace agreement and the risk of relapse into hostilities, and the substantial commitment of American combat-ready forces for a lengthy period of time to an unsettled region. Prudentially, a vote of authorization by Congress clearly would have been desirable as a statement of American commitment and resolve, and as an indication to the U.S. forces in Bosnia that the country supported their mission. Given the consensual nature of the deployment and the limited objectives of IFOR’s mission, however, it did not involve commencing war or reprisals with all the risks and sacrifices they entail, and Congress’s authorization thus was not constitutionally required. Instead, the commitment of American forces to Bosnia is best viewed as part of the longstanding historical practice of peacetime troop deployments for foreign policy purposes. Such deployments fall within the zone of concurrent authority where the President can act in the absence of legislation to the contrary.<sup>312</sup>

How to understand the Constitution’s allocation of war powers today—in light of the challenges of translating original purposes into the UN context, and in light of subsequent historical practice—is a difficult question over which thoughtful scholars inevitably will continue to disagree. In evaluating the respective war powers of Congress and the President in three recent cases—the Persian Gulf, Haiti, and Bosnia—I have tried to grapple with the hard issues raised. In so doing, I have sought to emphasize the value of a more candid, nuanced conversation about the Founders’ animating purposes and about their applicability today. Fisher commendably begins this effort in his book, but his failure fully to engage those on the other side or to probe the complexities of recent small-scale deployments renders his effort incomplete.

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310. See Stromseth, *supra* note 139, at 161–62.

311. See *id.* at 146–47, 162–63. The Clinton Administration indicated, moreover, that while force will be used, if necessary, to compel rogue elements to comply with the agreement, the United States does not intend to become embroiled in a war if the peace accord collapses and the parties resume their fighting. See, e.g., *The News Hour with Jim Lehrer* (PBS television broadcast, Dec. 4, 1995), available in LEXIS, News Library, Macleh File (interview with William Perry, Secretary of Defense).

312. See *supra* text accompanying note 191.

## IV. WHAT ABOUT REFORM? RESTORING CHECKS AND BALANCES

Fisher's overriding goal in *Presidential War Power* is to reverse the tension that has developed during this century between the Founders' understanding of congressional responsibility for the commencement of war and the practice of unilateral presidential action with only token consultation with Congress.<sup>313</sup> Understanding the causes of this tension is essential to evaluating Fisher's reform proposals.<sup>314</sup> In this Part, I examine the major factors he identifies as contributing to Congress's reduced war powers role in recent years, as well as the reforms he advocates to rectify the situation. I then explain why several additional, deep-seated factors must be taken into account in assessing the prospects for reform. Next, I examine whether, and to what extent, the international and domestic changes resulting from the Cold War's demise are likely to lead to a more substantial war powers role for Congress in the future.

Fisher identifies two main factors that have contributed to unilateral presidential action and a diminished role for Congress in decisions to commit U.S. forces into hostilities. First, the pressures and leadership responsibilities accompanying America's growing world role during the twentieth century led to expanded presidential claims of power, particularly in the years following World War II.<sup>315</sup> As the Cold War commenced and the United States signed on to numerous collective security treaties, presidents claimed a corresponding authority to commit American forces abroad in response to threats to U.S. security interests around the world. The pressures and recurring crises accompanying America's expanding global role, moreover, often led Congress to acquiesce in, or at least fail to challenge, executive actions impinging on its constitutional war powers, especially during the height of the Cold War.<sup>316</sup> The decline in Congress's war powers role was reinforced by the "real or contrived urgency" accompanying "many of the great policy decisions of the postwar era"; congressional belief in "the cult of executive expertise" in matters of foreign policy; and a sense of "penance" for Congress's "prewar isolationism."<sup>317</sup> Some of these factors no longer apply to the same degree.

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313. Of course, presidential conduct even in the post-World War II period is not completely uniform. Some modern presidents, such as President Eisenhower, sought congressional authorization for military deployments. In numerous other instances, however, presidents have notified and "consulted" Congress only on the eve of military intervention.

314. Those who view original intent somewhat differently than Fisher does may dispute the nature and magnitude of the tension, although they may in any event still lament the decline of congressional responsibility. See, e.g., Sofaer, *supra* note 69, at 54 ("It would be preferable, legally and politically, for Congress to participate more often in decisions concerning force.").

315. See FISHER, *supra* note 4, at 45, 185-88.

316. See *id.* at 121-22 (citing NATIONAL COMMITMENTS REPORT, *supra* note 9, at 8). As the Senate Foreign Relations Committee wrote in 1969, the experience of "world involvement and recurrent crisis" since 1940 was new to the United States and gave rise "to a tendency toward anxious expediency in our response to it." NATIONAL COMMITMENTS REPORT, *supra* note 9, at 8.

317. NATIONAL COMMITMENTS REPORT, *supra* note 9, at 16.

The Vietnam experience led Congress to reassert itself and to view executive claims of expertise more skeptically, for instance, and the ongoing sense of crisis and emergency that marked the Cold War years has dissipated.<sup>318</sup> Yet the United States remains the only global superpower today, and pressures for it to play a leading role across a spectrum of conflicts remain strong.

Second, Fisher highlights certain institutional factors that have contributed to executive assertions of power at the expense of Congress. Among the most important, he argues, is the growing role of short-term political appointees in the executive branch who often "advocate heavy reliance on executive powers and inherent authority, thus eliminating the need to build congressional support" even though this often proves harmful to the political system as a whole.<sup>319</sup> In addition, "the disparate defense measures available to the President and to Congress" contribute to the imbalance between them.<sup>320</sup> Congress is not as centralized or unified in defending its constitutional prerogatives. On the contrary, congressional leaders "are often at cross-purposes: partly inclined to protect their institution, but just as disposed to defend the President's powers and interests," especially when the President is of their own party.<sup>321</sup> Institutionally, in short, the executive branch is more likely to take the initiative and claim authority in military matters, whereas Congress is more likely to be divided in response.

In light of the factors he identifies, Fisher offers proposals to help restore checks and balances and assure greater legislative control over the commitment of U.S. forces into hostilities. For one, Fisher urges the President and his advisors to study and learn from history, which he believes shows that unilateral presidential assertions of military power, without the support and cooperation of Congress, generally have had unfortunate consequences for the President and for the country over time.<sup>322</sup> Presidential aides, he argues, should reflect on the larger interests of the country and the enduring importance of the system of checks and balances. There is real wisdom in Fisher's emphasis on the importance of learning from history, and not simply deploying it as precedent to validate unilateral executive uses of force. Yet history's lessons are more complex. Among other things, the history of American foreign relations surely also shows the critical importance of presidential leadership in difficult times, as well as the value of executive-legislative cooperation. In addition, it shows that Congress has, on occasion,

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318. I will analyze the effects of the end of the Cold War more fully below. See *infra* text accompanying notes 340–41.

319. FISHER, *supra* note 4, at 202; see *id.* at 203.

320. *Id.* at 204.

321. *Id.* The willingness of the Democratic Party leadership to delay a vote on President Clinton's decision to send U.S. troops to Haiti is one recent example. See Stromseth, *supra* note 139, at 176, 178–79.

322. See FISHER, *supra* note 4, at 203.



been more bent on war than the President<sup>323</sup> and less subtle in its response to complex crises; and that an isolationist and overreaching Congress can create real risks both to American security and to effective U.S. engagement in world affairs. Indeed, many members of the current Congress could benefit from reading some history as well. Those periods in history in which both Congress and the President worked together constructively (such as the early years of the Republic and the Eisenhower years) would be particularly fruitful to study.<sup>324</sup> A significant feature of these periods was Congress's willingness to provide the President with flexible authorizations to use force for particular purposes. Although Fisher expresses some caution about this approach to war powers, it nevertheless deserves further examination.<sup>325</sup>

Fisher urges Congress to strengthen the War Powers Resolution in various ways,<sup>326</sup> but unlike other scholars who have made similar proposals,<sup>327</sup> he does not advocate a more active judicial role in enforcing it. This is surprising in light of Fisher's belief in the clarity of the Constitution and his focus on the prominent role of the courts in the early years of the Republic in cases bearing upon war powers; but it does reflect a realism about the reluctance of courts today to rule on the merits in war powers cases.<sup>328</sup> "Instead of relying on unpredictable court decisions," Fisher argues, "Congress must learn to invoke the powerful weapons at its command," particularly its power of the purse, to

323. One example is the case of the Spanish-American War at the turn of the century. See FISHER, *supra* note 4, at 41–43.

324. I share Peter Spiro's belief in the value of studying history, but not necessarily his view about the periods most illuminating and relevant for today. See Peter J. Spiro, *Old Wars/New Wars*, 37 WM. & MARY L. REV. 723, 744–47 (1996) (reviewing FISHER, *supra* note 4; WILLIAM C. BANKS & PETER RAVENHANSSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE (1994)) (arguing that periods of congressional dominance in foreign affairs should be primary focus of study today for their sobering lessons).

325. See FISHER, *supra* note 4, at 187–89. To be sure, if congressional authorizations are too broad and are not supplemented with ongoing consultations, they run the risk of serving as a blunt "blank check" that diminishes Congress's real participation in critical decisions, as Congress found after adopting the Tonkin Gulf Resolution. That Resolution, like those adopted during the Eisenhower years, was broader than it needed to be. In the early years of the Republic, Congress seemed to strike a better balance by giving the President authorizations to use force for clearly specified purposes (e.g., to protect the frontiers, to pursue pirates), see, e.g., Sofaer, *supra* note 69, at 41, 48–49, and the circumstances of the time imposed additional practical restraints. For a discussion of the Eisenhower years, see FISHER, *supra* note 4, at 103–11, SCHLESINGER, *supra* note 4, at 159–63, and SUNDQUIST, *supra* note 132, at 113–16. Today, partly in response to its own behavior in adopting the Tonkin Gulf Resolution, Congress is properly reluctant to provide open-ended authorizations in the face of complex and rapidly evolving conflicts. While that caution is well founded, Congress and the President can craft authorizations that meet the concerns of both branches if they are determined to do so, as they did prior to the Persian Gulf War and (after the fact) for the first phase of the Somalia operation. (The second phase of that operation is a different story.) For an argument in favor of Congress authorizing the President to use force, short of war, in a number of circumstances, see Louis Henkin, *War Powers "Short of War"*, 50 U. MIAMI L. REV. 201, 206 (1995).

326. See FISHER, *supra* note 4, at 191–94. Among other things, Fisher recommends that the Resolution's 60-day period be shortened or even eliminated, that funding restrictions be included, and that the consultation requirements be strengthened.

327. See, e.g., ELY, *supra* note 6, at 63–67, 115–38 (advocating strengthened War Powers Resolution); *id.* at 54–60 (arguing that judges should police "malfunctions in [the] process" by "remanding" cases to Congress to fulfill its constitutionally mandated role).

328. For an argument against this reluctance, see *id.* at 54–60.

“define and limit presidential power.”<sup>329</sup> Congress, in short, has ample tools at its disposal to ensure a vigorous system of checks and balances. Yet given the pattern of recent history that Fisher presents, particularly the trend towards last-minute notice and consultation with Congress prior to presidential commitments of force abroad, he fails to explain why we should have much confidence that either Congress or the President is likely to change their recent behavior or why his suggested amendments to the War Powers Resolution have much chance of being enacted or followed.

What if the causes of the tension go even deeper? What if Congress’s reduced role in decisions to commit U.S. forces to hostilities today is rooted in factors beyond those that Fisher describes? Three such factors come to mind. First, and perhaps most fundamentally, is the recurrent reluctance of Congress itself, as a political body very responsive to constituent moods, to make a commitment and vote on whether U.S. forces should be sent into hostilities (at least not in advance). Sometimes, to be sure, the President has confronted Congress with what amounts to a military *fait accompli* because it allows little or no practical opportunity for deliberation. However, members of Congress have themselves often avoided tough decisions over whether to commit U.S. forces abroad and have, in the words of one, “preferred the right of retrospective criticism to the right of anticipatory, participatory judgment.”<sup>330</sup> In short, as John Ely cogently argues, a “tacit deal” has existed between the President and Congress for much of the Cold War era, under which the President “take[s] the responsibility” for sending U.S. troops into hostilities “as long as he can make the decisions, and Congress . . . live[s] with a lack of power as long as its members don’t have to be held accountable.”<sup>331</sup> Congress instead reserves the right to “scold” the President after the fact if things go wrong.<sup>332</sup>

A second factor that has existed since the beginning of the Republic is at work as well. The President’s preeminent role in diplomacy—and the practical continuities between diplomacy, threats of force, and possible uses of force in the conduct of foreign policy<sup>333</sup>—gives the President a substantial ability to influence the prospects of war or peace by creating what Alexander Hamilton called “an antecedent state of things.”<sup>334</sup> Historian Arthur Schlesinger explained it well: “If the President were to claim all the implications of his control of diplomacy, he could, by creating ‘an antecedent state of things,’

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329. FISHER, *supra* note 4, at 199.

330. *The War Power After 200 Years: Congress and the President at a Constitutional Impasse: Hearings Before the Special Subcomm. on War Powers of the Senate Comm. on Foreign Relations*, 100th Cong. 366 (1988) (statement of Sen. Eagleton).

331. ELY, *supra* note 6, at 87–88.

332. *See id.* at 88.

333. *See* Don Wallace, Jr., *The War-Making Powers: A Constitutional Flaw?*, 57 CORNELL L. REV. 719, 723, 733–35 (1972).

334. HAMILTON & MADISON, *supra* note 1, at 13 (Alexander Hamilton).

swallow up the congressional power to authorize hostilities.”<sup>335</sup> Ideally, the President and the Congress should work together to shape a consistent, coherent foreign policy; constitutionally, it follows that the President should not preempt Congress’s power to authorize war by presenting a *fait accompli*.

If the President is determined to act unilaterally, however, Congress is at a distinct institutional disadvantage in asserting its prerogatives effectively because the tools at its disposal, such as the power of the purse, are often blunter than those ideally suited to the situation. For example, although many members of Congress opposed President Clinton’s plan to send U.S. forces to Haiti to depose the Cedras regime and restore President Aristide to power, they were equally (and understandably) opposed to cutting off funds prospectively or otherwise impairing the President’s ability to engage in coercive diplomacy with General Raoul Cedras.<sup>336</sup> In other words, restricting funds in advance is often not an optimal response because it can harm the President’s ability to carry out effective diplomacy. On the other hand, cutting off funds after a deployment has just taken place can be problematic as well because it undercuts both the troops in the field and American credibility with allies. Congress, of course, can terminate funding for operations that it determines no longer serve American interests, as it did in Vietnam and, two decades later, in Somalia. Indeed, Congress’s power of the purse remains its most potent tool in restraining executive military action, and its effectiveness may be greater in the post-Cold War period when fewer military engagements stem from immediate and pressing national security crises. My point is simply that this tool can be a very blunt one, and that the President, in the fast-moving world of diplomacy, inevitably possesses an enormous practical ability to shape the “antecedent state of things.”

A third and final factor that has contributed to Congress’s reduced role in contemporary war powers decisions is linked to America’s global prominence and the dangers of the Cold War years. As a normative matter, many U.S. policymakers (including many members of Congress) have come to believe that the President *should* be free to send American forces into hostilities, without congressional authorization, to protect U.S. national interests as the President sees them, at least in cases that do not involve sustained combat with a major adversary.<sup>337</sup> Though probably not Congress’s intent in 1973,<sup>338</sup>

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335. SCHLESINGER, *supra* note 4, at 35 (quoting Hamilton). At the same time, Schlesinger continues, “[i]f Congress were to claim all the implications of its power to authorize hostilities, it could swallow up much of the presidential power to conduct diplomacy.” *Id.*

336. See Stromseth, *supra* note 139, at 173, 175–76, 178. As Senator Pell explained, if President Clinton’s efforts to persuade General Cedras to depart voluntarily were to succeed, “the possibility of the use of force to remove the junta cannot be taken off the table or called into question.” 140 CONG. REC. S10,668 (daily ed. Aug. 5, 1994) (statement of Sen. Pell).

337. See, e.g., NATIONAL COMMITMENTS REPORT, *supra* note 9, at 15–26 (discussing views of legislative and executive branch officials from late 1940s to late 1960s); Lobel, *supra* note 173, at 63–64 (discussing more recent views). Indeed, thoughtful commentators on both ends of the war powers spectrum have emphasized the connection that exists between substantive views about American foreign policy and

its behavior under the War Powers Resolution seems largely to accord with this substantive view: So long as a war is over within sixty days (and the adversary is comparatively weak), the President can expect little effective opposition from Congress in sending U.S. forces into hostilities.<sup>339</sup> If Congress's diminished role in decisions to commit U.S. forces to combat since World War II is rooted, at least in part, in the three factors I have identified—congressional reluctance to take a prospective stand for which voters might hold members accountable; diplomatic realities that make it difficult for Congress to use the tools at its disposal prospectively; and substantive views supporting broader scope for unilateral executive action—then it is hard to see how urging Congress to exercise the constitutional powers at its disposal (or to beef up the War Powers Resolution) will go very far in changing the situation.

Another recent development, however, offers promise for restoring a war powers balance between Congress and the President: the dissolution of the Soviet Union and the end of the Cold War rivalry. Just as the Cold War led to an expansion of presidential war power, its demise may lead to a more assertive congressional role and may, perhaps, moderate the force of the three factors I have mentioned. With the collapse of the Soviet Union, both the sense of crisis and emergency that pervaded the Cold War years and the overarching focus on containing communism have been replaced by a more complex, and less bipolar, foreign policy outlook. In the face of less obvious external threats and more varied U.S. security interests, members of Congress are likely to face fewer electoral risks in challenging the President's foreign policy choices, and thus may not hesitate to do so.<sup>340</sup> Congress (and the public at large) are more likely to challenge presidential military commitments in situations that do not implicate fundamental U.S. national security interests in any clear way. Whether American forces should be sent into hostilities to protect democracy, to safeguard basic human rights, or to provide urgent humanitarian assistance, for example, are issues that already have generated considerable domestic debate in individual contexts, such as Haiti, Rwanda, Somalia, and Bosnia. Just as members of Congress and the public at large may be divided on such issues, their willingness to support unilateral presidential action likely will be reduced. In short, differing substantive views about the proper U.S. role in the post-Cold War world both may modify beliefs in the need for unilateral presidential action (at least in cases that do not implicate traditional and urgent American

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attitudes about the appropriate process for committing U.S. forces abroad. *See, e.g., id.* at 62–64, Rostow, *supra* note 63, at 51.

338. *See* War Powers Resolution § 2(c), 50 U.S.C. § 1541(c) (1994).

339. In other words, Congress's actions under the War Powers Resolution have tended to reinforce a kind of de facto presidential power to engage in "short wars" and in "small-scale" hostilities.

340. *See* Randall B. Ripley & James M. Lindsay, *Foreign and Defense Policy in Congress: An Overview and Preview*, in CONGRESS RESURGENT: FOREIGN AND DEFENSE POLICY ON CAPITOL HILL 3, 13 (Randall B. Ripley & James M. Lindsay eds., 1993).

security interests) and will reduce the electoral risks associated with challenging the President on military decisions.

In addition, the kinds of crises so pervasive in the post-Cold War environment—violent ethnic conflicts, major humanitarian crises, and human rights violations growing out of longstanding political turmoil—cannot be resolved with quick and “immaculate” interventions. To address the causes of such conflicts in any enduring way will often require a long and costly international commitment of resources, both civilian and military. Bosnia is a good example. The very length and cost of such a commitment necessarily will enhance Congress’s influence over the U.S. role in such conflicts, through its power of the purse. Ultimately, Congress will not be able to avoid taking a stand when the issue of funding such operations is presented. While a strong case for U.S. involvement in securing the peace in cases such as Bosnia can and should be made,<sup>341</sup> Congress and the American public are likely to be cautious about expensive military commitments abroad that compete for scarce economic resources in the face of less immediate or obvious security threats to the United States.

For all these reasons, Congress is likely to play a more significant role, at least over time, when American combat forces are deployed into situations of risk and instability. But what will become of the comfortable “tacit deal” between Congress and the President highlighted by John Ely? Congress’s willingness in the years ahead to take a *prospective* stand on the deployment of U.S. forces into hostilities, and the President’s willingness to give up longstanding patterns of unilateral action (turning to Congress only for last-minute consultation and “support”) is by no means certain. Moreover, enduring diplomatic realities both give the President the power to affect a *fait accompli* and make Congress understandably reluctant to cut off options in advance. So far, the experiences in Haiti, Somalia, and Bosnia do not provide much reason for predicting a greater presidential willingness to seek (or congressional willingness to provide) prospective authorization before U.S. forces are sent into hostilities. Presidents are used to deciding first and consulting Congress afterwards; Congress is used to “auditioning” combat operations and later disavowing those that turn sour.

Yet even in cases where prior congressional authorization is not compelled by either the Constitution or the War Powers Resolution, it remains important prudentially. If U.S. forces are deployed for an extended period of time in a situation of risk and instability, ongoing congressional support will be essential to the success of the operation, even if it does not involve major combat risks or sustained hostilities. This is particularly true in cases that do not implicate

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341. See, e.g., Stanley Hoffmann, *In Defense of Mother Teresa: Morality in Foreign Policy*, FOREIGN AFF., Mar.-Apr. 1996, at 172-75 (defending broader, more humanitarian conception of U.S. national interests in post-Cold War world).

core U.S. security interests in any obvious way. Unless Congress and the American public understand the purposes, benefits, and risks of these operations in advance, and unless congressional support is sustained as a mission evolves, American policy will be vulnerable to abrupt reversal by Congress in the face of adversity, as we saw in Somalia.<sup>342</sup> Without clear congressional support, moreover, troop morale may suffer, and both our allies and our adversaries may doubt the credibility of our commitment.

Whether Congress and the President will begin to work together more constructively regarding future decisions to commit U.S. forces to hostilities in the post-Cold War world, both in the UN context and more generally, is not yet clear. Some statutory measures could be helpful in encouraging a greater prospective role for Congress, including the requirement of timely consultations and regular reports on ongoing and future UN operations in which U.S. forces might participate and for which U.S. funding is essential.<sup>343</sup> Whether the War Powers Resolution should be reformed in light of past experience and current realities, and if so, how, requires careful reexamination.<sup>344</sup> But something deeper is required: an honest and searching

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342. See Stromseth, *supra* note 139, at 170–72.

343. The Clinton Administration committed itself to regular consultations with Congress in its Policy on Reforming Multilateral Peace Operations (May 1994), reprinted in FISHER, *supra* note 4, at 224–25 app. G. The Foreign Relations Authorization Act of Fiscal Years 1994 and 1995 mandated periodic reports to Congress, and these reporting requirements remain in effect as of December 1996. See 22 U.S.C. § 287b(a) (1994). Each month the President is required to consult with Congress and to provide information to designated congressional committees on the anticipated duration, mandate, cost, and command and control arrangements of United Nations peacekeeping operations and on U.S. participation in those operations. See Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 407(a), 108 Stat. 382, 448–49 (1994), reprinted in 22 U.S.C. § 287b note at 557. The President must also notify Congress 15 days in advance of any provision of assistance by the United States to a United Nations peacekeeping mission, and the President must notify Congress five days in advance of any Security Council vote on a resolution creating a new peacekeeping operation. See *id.* A more recently enacted piece of legislation, the Omnibus Consolidated Rescissions and Appropriations Act of 1996, stipulates that none of the funds made available for “Contributions for International Peacekeeping Activities” can be spent for any new or expanded United Nations peacekeeping operation authorized by the Security Council, unless the President reports to Congress 15 days in advance on “the estimated cost and length of the mission, the vital national interest that will be served, and the planned exit strategy.” Pub. L. No. 104-134, 1996 U.S.C.C.A.N. 99 (110 Stat. 1321). Another provision within the Omnibus Act prohibits funds from being used for UN peacekeeping missions where U.S. forces are under the command or operational control of a foreign national, unless the President reports to Congress that the mission is in U.S. national security interests. See *id.* at 160.

344. This is a complex and difficult question beyond the scope of this Book Review. Four major alternatives present themselves: strengthen the War Powers Resolution, repeal it in part, repeal it completely, or essentially leave it as is. Fisher, joining ranks with scholars such as John Ely and with former Secretary of State Cyrus Vance, advocates the first alternative. See FISHER, *supra* note 4, at 191–94; see also ELY, *supra* note 6, at 63–66, 115–38; John Hart Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 COLUM. L. REV. 1379 (1988); Cyrus R. Vance, *Striking the Balance: Congress and the President Under the War Powers Resolution*, 133 U. PA. L. REV. 79, 90 (1984) (“The Resolution reinforces presidential self-restraint and serves as a constant reminder that policies involving the use of force overseas must garner support beyond the short-term.”). Reforming the War Powers Resolution by strengthening its provisions, however, presupposes that Congress, to paraphrase John Ely, wants a War Powers Act that works. See Ely, *supra*. Partial repeal of the Resolution, however, is the reform most likely to succeed. Proposals to repeal the Resolution’s 60-day time clock and concurrent resolution provisions and to turn it effectively into a consultation and reporting mechanism have circulated for some time. The 1988

dialogue within and between the executive and legislative branches about the nature of American interests in the post-Cold War world and the situations that warrant placing U.S. forces in harm's way;<sup>345</sup> and a reexamination of the basic purposes reflected in the Constitution's allocation of war powers and their implications for the full range of military operations, many under UN authorization, in which the United States participates today.

## V. CONCLUSION

The end of the Cold War provides a unique opportunity to reassess war powers, including the expansion of presidential power during the Cold War years, and, perhaps, to contemplate a return to the traditions of joint executive-congressional action that marked earlier periods of our Republic. We should, in short, take seriously the fundamental message of Fisher's book, namely, that all of us (scholars, the general public, the President, Congress, other public servants) should stop at this critical juncture to reexamine the principles and values underlying the Founders' decision to allocate war powers as they did, and to evaluate our historical practice in the two centuries since the Constitution's ratification. Particularly because so few judicial decisions address war powers, the original understanding and historical practice provide the best guidance available.

Although Fisher's book paints in bold strokes and leaves out some important nuances, the clarity of his analysis serves a very useful purpose: It brings into sharp focus the central methodological and normative issues that must be addressed (but too often are submerged) as scholars, politicians, and citizens alike consider how to understand the Constitution's allocation of war

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Byrd-Nunn-Warner-Mitchell proposal aimed to improve interbranch consultation by designating a core group of congressional leaders with whom the President could easily and regularly consult. See S.J. Res. 323, 100th Cong. (1988).

More recent initiatives, by Representative Hyde in the House and former Majority Leader Dole in the Senate, made no effort to strengthen consulting arrangements. See House Amendment to H.R. 1561, 104th Cong. (1995), 141 CONG. REC. H5655 (daily ed. June 7, 1995); S. 5, 104th Cong. (1995). The Hyde amendment, rejected by the House of Representatives by a narrow margin in June 1995, would have repealed most of the War Powers Resolution and let stand only the requirement that the President "consult [Congress] in every possible instance" before introducing U.S. forces into hostilities or imminent hostilities and "report" to Congress within 48 hours after doing so. 141 CONG. REC. H5655, H5673 (daily ed. June 7, 1995). The thoughtful debate preceding the House's rejection of the Hyde amendment illuminates why the War Powers Resolution—with all its flaws—may remain on the books in its current form for some time to come. Many members of Congress are reluctant to abandon the one major congressional effort in the postwar era to restrain unilateral executive military action when it possibly has had at least some constraining effect. What is striking today, however, is that scholars on opposite sides of the constitutional debate over war powers have come to advocate the Resolution's repeal, although for different reasons. Compare, e.g., Glennon, *supra* note 289, at 17–21, 28–31 (advocating Resolution's repeal because it is unworkable in current political climate), with ROBERT TURNER, THE WAR POWERS RESOLUTION 133 (1983) (advocating Resolution's repeal because it is in tension with Constitution and practical diplomatic realities). For a defense of retaining the resolution despite its flaws, see Henkin, *supra* note 325, at 204–06.

345. This dialogue could begin, perhaps, by establishing a diverse congressional consultative group that could meet regularly with the President to discuss broad future directions for American foreign policy.

powers. Unfortunately, during the Cold War years, much of the debate over war powers had a decidedly polemical quality, rooted in part in the sense of emergency and danger of that period and also in differing reactions to the divisive Vietnam experience. We now have an opportunity to move beyond the polemics of the Cold War period.

This is not to contend that agreement will be found on the many war powers issues that have long divided thoughtful scholars and preoccupied public servants in both the legislative and executive branches. But if we were at least more honest about our areas of difference, we might begin to have a more fruitful discussion—about what the Founders' values and animating purposes were (and about gaps in what we know of their original understanding); about how their values and purposes should be understood or translated in our very different world; about what our intervening history means; and finally, about whether the Founders' values should be and still are our values today.



