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The Continuation of Politics by Other Means: The Original Understanding of War Powers

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an independent, unitary governor wedded to the traditional Anglo-American system of war powers. They also had before them the alternative paths, such as requiring legislative approval of military action or consultation with a council before engaging in war. Now that we comprehend what the Framers inherited from their English and colonial experiences, and imagine what they could have done differently, we can begin to understand what they eventually established in the new Constitution.

IV
THE NEW CONSTITUTION

Meeting in Philadelphia in the summer of 1787, the delegates to the Constitutional Convention devoted more of their energies toward creating a strong national government than toward detailing its precise internal organization. Beyond establishing the existence and general functions of the three branches, the Framers did not set down in writing the exact allocation of authority between the executive, legislative, and judicial branches. This silence might indicate that the Framers intended to leave to future Presidents, Congressmen, and Justices the freedom to work out the separation of powers for themselves. Alternatively, silence might indicate an intent to continue practices and relationships between the branches that were so widely understood as to need no specific description. This Section will show that both interpretations partially explain the Framers' approach. In establishing war powers, the Framers intended to adopt the traditional system they knew—executive initiative in war combined with a legislative role via the spending power. Yet, this very arrangement left the precise boundaries of war powers unfixed and subject, in each case, to the exercise of each branch's constitutional powers. In effect, the Framers demarcated a gray area in which the President and Congress could either cooperate in war or engage in an inter-branch brawl to achieve their desired goals.

In reinterpreting the Constitution's meaning, this Section examines several overlooked debates and reveals a more subtle approach to the separation of powers issues than has been put forth before by contemporary war powers scholarship. This Section also analyzes the arguments—both in the state conventions and in the press—that took place during the Constitution's ratification. We examine the Antifederalist-Federalist debates on the Constitution in a dynamic fashion to provide a clearer model of war powers.

This Section demonstrates a framework different from the straw man of unchecked executive discretion. Under the Framers' ideal, war would begin by the joint decision of President and Congress, each complementing the other branch's powers to ensure the efficient decision

on, and conduct of, war. However, the Framers realized that war could spring forth by accident or emergency, or in the midst of dissension among the branches. Because they did not intend the Constitution to be a suicide pact, the Framers permitted the executive to undertake the initiative in war, subject to legislative review during the appropriations process.

A. The Constitutional Text in Context

Our analysis begins with the constitutional text. In order to understand what the Constitution requires, we must place its text in the legal context of its day. Those who ratified the Constitution would not have understood its provisions in a vacuum, but instead would have compared and contrasted the document with both their legal understanding of the words and their understanding of how these provisions operated in the world of the eighteenth century. This Section concludes that the war powers provisions of the Constitution are best understood as an adoption, rather than a rejection, of the traditional British approach to war powers.

1. The Declare War Clause

The Framers included the declaration of war in the Constitution as a device to facilitate the federal government's representation of the nation in international affairs, and to make clear that the declaration of war was a power of the national government, not the state governments. As we have seen, a declaration of war performed a primarily juridical function under eighteenth-century international law, and it was this understanding that the Framers drew upon in giving Congress the authority to declare war. Critics, however, have misinterpreted it as primarily a separation of powers vehicle.

As we have seen, in the eighteenth-century mind, a *declaration* of war was not the same thing as a domestic *authorization* of war. In fact, a declaration of war was understood as what its name suggests: a declaration. Like a declaratory judgment, a declaration of war represented the judgment of Congress, acting in a judicial capacity (as it does in impeachments), that a state of war existed between the United States and another nation. Such a declaration could take place either before or after hostilities had commenced. While the power to "declare" war adds to Congress' store of powers, it does little to alter the relative domestic authorities of the executive and legislative branches. Its primary function was to trigger the international laws of war, which would clothe in legitimacy certain actions taken against one's own and enemy citizens.

This was the meaning attributed to a declaration of war by seventeenth and eighteenth-century scholars on the laws of nations. The works of Hugo Grotius,[364] Emmerich de Vattel,[365] Jean Jacques Burlamaqui,[366] and Samuel Pufendorf[367] exerted a greater influence on the minds of the Framers than the articles of today's "publicists" do on today's lawyers. In part, the revolutionary generation relied on English and continental legal authorities due to the disorganized nature of the colonial and early American legal systems.[368]

We can also understand the appeal of international law to Americans then—perhaps in contrast to today—when we consider America's place in the world of 1787. As *The Federalist* shows, the Framers remained ever-conscious of their nation's relative youth and vulnerability on the world stage. John Jay, the most prominent and respected of the Publius triumvirate, devoted his inaugural installments of *The Federalist* to the possibility that the European powers would divide and conquer the new nation, or frustrate its attempts to grow in territory and commerce.[369] As the impressment controversy with Great Britain later would reveal, the new American nation often had to turn to international law, rather than military strength, to support its national interests.[370] Two hundred years ago, Americans were the Melians more often than the Athenians.[371]

In this context, it is not surprising that Madison, in *The Federalist No. 41,* made no mention of separation of powers concerns when discussing the Declare War Clause. Rather, the Clause was designed to allow the national government to provide "[s]ecurity against foreign danger," "one of the primitive objects of civil society."[372] Because protection against foreign danger "is an avowed and essential object of the American Union," Madison continued in *No. 41,* "[t]he powers requisite for attaining it, must be effectually confided to the federal

364. *See* GROTIUS, *supra* note 208.

365. *See* 2 VATTEL, *supra* note 207.

366. *See* J.J. BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW (trans. 1817).

367. *See* SAMUEL PUFENDORF, OF THE LAW OF NATURE AND NATIONS (1688).

368. *See* Yoo, *supra* note 160, at 1610-11; *see also* WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830 (1975); WOOD, *supra* note 175, at 298-302. In reading the ratification debates, one cannot help but be impressed by the Framers' intimate knowledge of the classical authors such as Tacitus, Livy, Cicero, and Sallust as well as more recent writers such as Blackstone, Locke, and Montesquieu.

369. *See* THE FEDERALIST NOS. 2-5, *supra* note 304, at 8-27 (John Jay). On the Framers' national security concerns and the passage of the Constitution, see MARKS, *supra* note 347, at 3-51.

370. For a wonderful and rich account of the American problems with impressment and international law, see generally Ruth Wedgewood, *The Revolutionary Martyrdom of Jonathan Robbins,* 100 YALE L.J. 229 (1990).

371. *See* 5 THUCYDIDES, THE PELOPONNESIAN WAR ch. 7 (trans. 1951).

372. THE FEDERALIST No. 41, *supra* note 304, at 269 (James Madison).

councils."[373] Declaring war under international law was one vital national security power that any truly national government had to possess.

There is ample evidence that European theories of international law made their way into American thought and practice. As mentioned earlier, Blackstone, the colonists' foremost legal authority, often directly borrowed from the likes of Grotius and Vattel. Federalists and Antifederalists alike repeatedly referred to and discussed international law theories and concepts. The revolutionary state constitutions and the Articles of Confederation referred specifically to the declaration of war.[374]

The Framers turned to international law to define phrases such as to "declare war" because it was international law (and international politics) which gave these powers meaning. Consistent with Chief Justice John Marshall's holding in *The Schooner Charming Betsy*[375] that international law serves as a canon for statutory construction, it is appropriate to use international law as a canon of construction in the constitutional context. For example, in explaining the piracy clause to the Virginia ratifying convention in 1788, James Madison described that the clause incorporated international law understandings.[376]

American jurists in the decades following the ratification of the Constitution continued to interpret the declaration as a notification mechanism that defined the wartime rights of citizens and neutrals. Writing after 1789, Chancellor Kent described the declaration of war thus:

> [S]ome formal public act, proceeding directly from the competent source, should announce to the people at home, their new relations and duties growing out of a state of war, and which should equally apprize neutral nations of the fact, to enable them to conform their conduct to the rights belonging to the new state of things. . . . Such an official act operates from its date to le-

373. *Id.* Scholars of war powers often neglect the surrounding context of *The Federalist No. 41*, and are instead transfixed by the language stating the necessity of the Declare War Clause. Unfortunately, this practice of selective quotation makes the Clause appear to be a separation of powers provision, when its context clearly shows it to be a federalism provision.

374. *See supra* text accompanying notes 283-363.

375. 6 U.S. (2 Cranch) 64, 118 (1804); *see* Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1135-79 (1990).

376. 3 ELLIOT, *supra* note 119, at 531.

> In compositions of this kind, it is difficult to avoid technical terms . . . . I will illustrate this by one thing in the Constitution. There is a general power to provide courts to try felonies and piracies committed on the high seas. *Piracy* is a word which may be considered as a term of the law of nations. *Felony* is a word unknown to the law of nations, and is to be found in the British laws, and from thence adopted in the laws of these states. It was thought dishonorable to have recourse to that standard. A technical term of the law of nations is therefore used, that we should find ourselves authorized to introduce it into the laws of the United States.

Id.

> galize all hostile acts, in like manner as a treaty of peace operates from its date to annul them.[377]

In his *Commentaries on the Constitution,* Justice Story similarly discussed the declaration of war for its impact on *domestic* legal relationships.[378]

Thus, Americans of the eighteenth century would have understood that the power to declare war dealt with setting the formal, legal relationship between two nations, and not with authorizing real hostilities. Once war was declared, a citizen of the United States could seize a ship flying French colors regardless of the state of relations between the two nations. However, if Congress has not declared a state of hostilities, the citizen must return the ship and pay damages; if a declaration has issued, he may sell the ship as a prize.[379] But in neither case is a declaration of war necessary to "authorize," ex ante, the seizure of the ship.

Of course, in legitimating hostilities, this core function of a declaration of war could be thought to "authorize" war by justifying federal wartime policies. Because the declaration of war has a primary domestic effect of notifying the citizens of their new rights and obligations, it grants the government a different standard of conduct in relation to those rights and duties. Thus, a declaration of war would permit the government to treat its citizens in a way that restricted peacetime liberties in favor of a more effective war effort. The Fifth Amendment, for example, generally guarantees the right to an indictment or presentment by grand jury for capital crimes, "except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or

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377. 1 KENT, *supra* note 250, at 54. Kent notes that during the French-Indian War of 1756, "vigorous hostilities had been carried on between England and France for a year preceding" any declaration of war. 1 *id.* at 53-54. Kent used the example to point out that going to war and a declaration of war are two different things.

378. According to Story:

> [I]n the exercise of such a prerogative as declaring war, despatch, secrecy, and vigor are often indispensable, and always useful towards success. On the other hand, it may be urged in reply, that the power of declaring war is not only the highest sovereign prerogative, but that it is, in its own nature and effects, so critical and calamitous, that it requires the utmost deliberation, and the successive review of all the councils of the nation. War, in its best estate, never fails to impose upon the people the most burdensome taxes, and personal sufferings. It is always injurious, and sometimes subversive of the great commercial, manufacturing, and agricultural interests. Nay, it always involves the prosperity, and not unfrequently the existence, of a nation.

2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1171 (1873). Justice Story went on to describe the power to declare war as a legislative power, because "[t]he representatives of the people are to lay the taxes to support a war, and therefore have a right to be consulted as to its propriety and necessity." 2 *id.* He also believed that "[t]he executive is to carry it on, and therefore should be consulted as to its time, and the ways and means of making it effective." 2 *id.* I think that Story here is again referring to legislative control over the domestic effects of war, rather than to warmaking. In discussing the reason for giving the legislature the power to declare war, Story refers only to a domestic function: raising taxes.

379. *See* Little v. Barreme, 6 U.S. (2 Cranch) 170, 178-79 (1804).

public danger."[380] In time of war, Congress may authorize seizure of property belonging to foreigners without the need for compensations as required by the Takings Clause.[381] During the Quasi-War, Federalists clamored for a declaration of war against France, because it would allow the passage *at home* of broad sedition laws, higher taxes, an expanded peacetime army, and other war measures.[382] Thus, a declaration of war had a domestic function, which permitted new government actions in light of the changed legal status of its citizens.[383] A declaration of war did not grant permission for executive action abroad, as we would expect of an "authorization" of war, but only set the stage for the exercise of domestic wartime powers, primarily by Congress.

This interpretation of "declare" war is also compatible with the Framers' understanding of the power to declare as applied in other contexts.[384] A declaration did not create or authorize; it recognized. Most Americans in 1787 would have been familiar with the declarations of rights that prefaced their state constitutions. These declarations did not create or authorize rights by positive enactment. Instead, they declared what rights existed and were inherent in the People, such as the right to alter and reform government. Similarly, a declaration of war announced Congress' judgment that a *legal* state of war exists between the United States and another country. The declaration gave legitimacy to hostile acts which would be illegal in a time of peace.

The Framers were also familiar with the declaratory nature of the Declaration of Independence. When the Continental Congress convened in Philadelphia in the summer of 1776, the delegates were not meeting to authorize military action; the machinery of war had already started running.[385] Instead, the delegates sought to decide what legal significance they were to give to the break with England. While containing a catalogue of individual rights and of new sovereign powers, the work of the Continental Congress resembles the traditional British declaration of war more than a declaration of rights. Much like a complaint in a civil lawsuit, the Declaration of Independence revisits the

380. U.S. CONST. amend V; *cf.* Reid v. Covert, 354 U.S. 1, 22 (1957) (holding that civilian dependents who accompany military personnnel to foreign countries are entitled to a jury trial for capital crimes).

381. *See* Brown v. United States, 12 U.S. (8 Cranch) 110, 127-29 (1814).

382. *See* RICHARD H. KOHN, EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783-1802, at 227-29 (1975).

383. *See generally* J. Gregory Sidak, *War, Liberty, and Enemy Aliens*, 67 N.Y.U. L. REV. 1402 (1992).

384. *See, e.g.*, John C. Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967, 970-99 (1993).

385. Representatives of the colonies had first met in 1774 to adopt a non-importation policy on British goods. After various colonies called out their militias, hostilities broke out on April 19, 1775, first at Lexington and Concord and later at Bunker Hill. *See generally* BERNARD BAILYN ET AL., THE GREAT REPUBLIC (1977).

"history of repeated injuries and usurpations"[386] suffered at the hands of the Crown—the suspension of the laws, the use of bench trials, the taxation without representation—and the failed efforts at reconciliation.[387] It lists the remedy sought (independence), the law upon which relief is sought ("the Laws of Nature and of Nature's God"), and the forum (before the "Supreme Judge of the world").[388] The Declaration of Independence did not simply mirror British declarations of war, which usually included a detailed list of grievances, what relief was sought, and a description of the hostilities.[389] It was also consistent with the contemporary understanding of the nature of war, described by Grotius and other international scholars as a system of interstate dispute resolution,[390] in which the declaration served the function of a complaint. War was as much a legal status as an act, with the declaration's primary purpose to define the change in legal relationships between states.

The Framers' belief that a declaration of war was unnecessary when a nation was under attack provides further evidence that declarations of war were legally formal, or even ceremonial, in purpose. Consistent with the theory of international law that a declaration of war was unnecessary for a nation under attack,[391] future Supreme Court Justice James Iredell, under the pseudonym "Marcus," argued, "What sort of a government must that be, which, upon the most certain intelligence that hostilities were meditated against it, could take no method for its defence, till after a formal declaration, of war, or the enemy's standard was actually fixed upon the shore."[392]

Iredell and other Federalists, such as Alexander Hamilton, who made the same argument in *The Federalist No. 25*,[393] saw that an inva-

386. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

387. *Id.* paras. 3-4, 19-20, 30-31.

388. *Id.* paras. 1, 32.

389. *See, e.g.*, 11 COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND 1-3 (1812) (declaration of war against Spain on November 15, 1739).

390. *See* Benedict Kingsbury & Adam Roberts, *Introduction* to HUGO GROTIUS AND INTERNATIONAL RELATIONS 16 (Hedley Bull et al. eds., 1990).

391. *See, e.g.*, BURLAMAQUI, *supra* note 366, pt. IV, ch. IV, para. XVII, at 361-64.

392. James Iredell ("Marcus"), *A System of Government Which I Am Convinced Can Stand the Nicest Examination: Answers to Mason's "Objections,"* NORFOLK & PORTSMOUTH J., Mar. 12, 1788, *reprinted in* 1 DEBATE ON THE CONSTITUTION, *supra* note 16, at 384, 392-93.

393. THE FEDERALIST NO. 25, *supra* note 304, at 161 (Alexander Hamilton) ("As the ceremony of a formal denunciation of war has of late fallen into disuse, the presence of an enemy within our territories must be waited for as the legal warrant to the government to begin its levies of men for the protection of the State."). Hamilton's views on the war powers changed before and after the adoption of the Constitution. *Compare* 1 FARRAND, *supra* note 357, at 292 (Hamilton's proposed frame of government in the Constitution Convention) *with* Alexander Hamilton, *Pacificus No. I*, *reprinted in* 15 PAPERS OF ALEXANDER HAMILTON, *supra* note 123, at 33. However, his view that defensive wars required no declaration of war remained consistent. *See* Alexander Hamilton, *The Examination No. I*, *reprinted in* 25 *id.* at 444, 453-57.

sion, or even the threat of attack, converted peacetime into wartime just as easily as a declaration of war. Under international law, by its act of invasion, the offensive nation effectively transformed the legal relationship between the two nations into one of war, rendering a declaration of war by the defending nation superfluous. A declaration of war only recognized the existing state of war, and was unnecessary for the commencement of hostilities by the invaded nation. In defending the federal government's power to counter hostilities by others without a declaration of war or actual attack, the Framers' thoughts reflected the teachings of the international law of the time.

A declared "war" bore a specific meaning which we today would associate with total war. Burlamaqui called such wars "perfect". wars because they "entirely interrupt the tranquility of the state, and lay[] a foundation for all possible acts of hostility."[394] "Imperfect" wars were less than total wars,[395] like the covert or limited wars, such as the Vietnam and Korean conflicts.

The Framers' understanding that declarations of war were not required to authorize combat was expressed during the ratification period. For example, Alexander Hamilton noted in *The Federalist,* "The ceremony of a formal denunciation of war has of late fallen into disuse . . . ."[396] Other Framers, both Federalist and Antifederalist, echoed Hamilton's judgment that declarations of war had become obsolete in an era of great power conflict.[397] This understanding endured beyond the framing of the Constitution. In 1833, Joseph Story wrote that "formal declarations of war are in modern times often neglected, and are never necessary."[398] To read the Declare War Clause as requiring Congress to issue an outmoded declaration of war before the nation could commence hostilities would have seemed foolhardy, if not misguided, to an American of the eighteenth century.

Interpreting "declaration" to mean a judgment of a current status of relations, not an authorization of war, provides a new understanding of Congress' role in war, one which is not purely legislative. We should conceptualize the war clause as vesting the legislature with a *judicial* function, which involves a capacity for judgment in the manner of a

394. BURLAMAQUI, *supra* note 366, pt. IV, ch. III, para. XXX, at 333. In the early case of *Bas v. Tingy,* the Supreme Court held that such limited wars did not require a declaration of war by Congress. 4 U.S. (4 Dall.) 37, 39-40 (1800). According to the Court, Congress could decide to wage such wars if it chose to without a declaration, although none of the Justices examined whether the President could do so as well. 2 *id.* At the very least, this evidence of the original understanding suggests that the declaration of war clause did not operate in less than "total" war situations.

395. BURLAMAQUI, *supra* note 366, pt. IV, ch. III, para. XXX, at 333.

396. THE FEDERALIST No. 25, *supra* note 304, at 161 (Alexander Hamilton).

397. *See, e.g.,* Brutus, *Essay X,* N.Y. J., Jan. 24, 1788, *reprinted in* 2 STORING, *supra* note 114, at 413, 415; Iredell, *supra* note 392, at 393.

398. 2 STORY, *supra* note 378, at § 1185.

court, rather than the enactment of positive law in the style of a legislature. Formally vesting one branch of government with powers that another branch inherently ought to exercise did not trouble the Framers. They gave the President the right to veto legislation, which they thought of as a legislative power; they gave the President and the Senate the power to enter into treaties, which they also believed to be a legislative function.[399] Thus, in discussing the treaty power, Publius argued that "whatever name be given to the power of making treaties . . . certain it is that the people may with much propriety commit the power to a distinct body from the legislature, the executive or judicial."[400] It is this formal mixing of powers that underlies Madison's famous argument in *The Federalist No. 47* that the departments of government might have a "partial agency in, or . . . controul over the acts of each other."[401]

Thinking of Congress as exercising judicial functions comes more easily when we consider that Article I already vests the legislature with the power of impeachment. Impeachment requires the Senate to act as nothing less than a court of first and last resort.[402] As the Supreme Court implicitly recognized in *Nixon v. United States,*[403] the Constitution vests Congress with a judicial function in impeachment, thereby precluding the federal courts from subsequent review. Although the Court in *Nixon* did not make the connection suggested here, and instead relied upon the political question doctrine, it reached the correct result because the Constitution already vests *all* judicial power over impeachments to Congress. In other words, the Court could not permit itself to review impeachment proceedings because to do so would vest Article III courts with appellate jurisdiction in derogation of the Senate's own judicial powers.

Analogizing to impeachment supports the legitimacy of the Article III courts' refusal to review war powers cases. Because the Constitution has vested Congress with the entire judicial power to decide whether the United States is in a state of war, no role for the courts is warranted. To be sure, the courts may still adjudicate cases that involve the ramifications of the nation's wartime or peacetime status, such as insurance cases that have wartime clauses.[404] But the Constitution's allocation of the power "to declare war" in Congress divests the courts of any judicial

399. *See* THE FEDERALIST No. 73, *supra* note 304, at 494-99 (Alexander Hamilton) (executive may exercise legislative veto power); No. 64, at 432-38 (John Jay) (executive and Senate may exercise legislative treaty power).

400. THE FEDERALIST No. 64, *supra* note 304, at 436 (John Jay).

401. THE FEDERALIST No. 47, *supra* note 304, at 325 (James Madison) (emphasis omitted).

402. *See* CHARLES L. BLACK, JR., IMPEACHMENT: A HANDBOOK, 9-14 (1974).

403. 113 S. Ct. 732, 735-39 (1993).

404. For example, American courts have decided insurance cases which demand the interpretation of war-risk clauses. *See* John H. Ely, *Suppose Congress Wanted a War Powers Act That Worked,* 88 COLUM. L. REV. 1379, 1409 & n.88 (1988).

power in war, just as the impeachment clause deprives the courts of any involvement in impeachments. The courts simply must accept the actions of the political branches in war matters as valid indications of whether a state of war exists.[405]

2. Other Constitutional War Powers Provisions

If we read the text of the Declare War Clause in this way, then other provisions in the Constitution gain in significance for discerning the structure of war powers. The war clauses' juridical function becomes even clearer when we examine the clauses' textual companions in the Constitution.

a. Other Formal Congressional Powers

Article I, Section 8, Clause 11 not only gives Congress the power to declare war but also the authority to "grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." These powers are similar to that of declaring war in that defining "rules of Capture" is a declaratory function, rather than an authorizing one. Letters of marque and reprisal also played a formal legal role in both the English and international law of the time. A government could issue such letters only to private citizens who held a claim against another state and could not obtain compensation. The letters gave legal sanction to attempts at redress by seizing the property of the other nation, and saved capturers from being considered pirates under international law. As Blackstone explained, "letters of marque and reprisal (words in themselves synon[y]mous and signifying a taking in return) may be obtained, in order to seise the bodies or goods of the subjects of the offending state, until satisfaction be made . . . ."[406]

Although letters of marque and reprisal first appeared in this form in the Middle Ages, by the late eighteenth century their use appears to have grown to encompass low-level conflicts between nations. The English King could issue general, as well as limited, letters of marque, which were given to armed trading ships and privateers to attack foreign ships. Letters of reprisal referred generally to the use of force as retaliation for an injury caused by a foreign nation.[407] Letters of marque and reprisal thus came to refer to a mechanism of sovereign consent to

405. For a more detailed discussion, see *infra* text accompanying notes 548-558.

406. 1 BLACKSTONE, *supra* note 184, at *250-51; *see* 2 STORY, *supra* note 378, §§ 1175-76 (describing letters of marque and reprisal).

407. Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035, 1042-44 (1986); *see* 1 MATTHEW HALE, HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN 162 (1736).

the use of private force against another nation, but it does not appear that the phrase referred to all forms of imperfect war.[408]

Some scholars, however, have interpreted the war clause to give Congress control over all forms of war, whether they be total and declared, or limited and undeclared.[409] They read the marque and reprisal provision, even though it refers specifically only to marque and reprisal letters, as giving Congress control over all forms of hostilities short of a declared war. Surely this goes too far, although it is quite true that Blackstone and the international law scholars viewed such letters as a species of undeclared war.[410] Perhaps the better view is that the Framers intended the Clause to give Congress control over these uses of private force to conduct hostilities, because these situations would produce difficulties under domestic and international law. But reading the Clause more broadly stretches the text too far. Letters of marque and reprisal do not clearly refer to the use of the state's own military against another state. If the Framers had intended to place strict regulations on the public use of force in undeclared war situations, we can reasonably have expected them to use more direct, relevant language to express their meaning.

Regardless of the extent of hostilities referred to, the important point remains that letters of marque and reprisal conveyed a certain meaning at international law. Holders of letters of marque or reprisal had a right, under international law, to attack or seize the person or property of another nation, in order to recover a debt or satisfy an injury.[411] Because international law prohibited hostilities waged by private persons, states normally could treat such persons as pirates under international law or as robbers and murderers under municipal law. But if the attacker possessed a letter of marque or reprisal, his actions received the protections granted by international law to combatants. According to Blackstone, who sometimes lifted passages on international law verbatim from Grotius, "if any subjects of the realm are oppressed in time of truce by any foreigners, the king will grant marque in due form, to all that feel themselves grieved."[412] If the foreigner did not "make due satisfaction or restitution," then "by virtue of these [letters,] [the subject] may attack and seise the property of the aggressor nation, without hazard of being condemned as a robber or pirate."[413] Thus, the letter

408. *See* Lobel, *supra* note 407, at 1044-47.

409. LOFGREN, *supra* note 114, at 35-36; REVELEY, *supra* note 2, at 65.

410. *See* 1 BLACKSTONE, *supra* note 184, at *250 (letters evidenced "only an incomplete state of hostilities, and generally ending in a formal denunciation of war").

411. *See* 3 GROTIUS, *supra* note 208, at ch. 2, pts. 4-5.

412. 1 BLACKSTONE, *supra* note 184, at *251.

413. 1 *id.*

did not authorize the efforts to recover satisfaction so much as it immunized offensive conduct a letter-holder undertook.[414]

b. The President's Powers

The signal innovation of the new frame of government, the presidency, would have caught the eye of any eighteenth-century reader. Many Americans in a society still infused by hierarchical patterns of social, political, and economic relations[415] would have viewed the President as, if not a King, at least a paternal figure vested with the duty of protecting his fellow citizens.

This paternal vision of the President was consistent with the Framers' knowledge that the office would be held first by George Washington, the victorious Commander-in-Chief of the Continental Army, the modern-day Cincinnatus who had laid down his arms after the war and returned to life as a farmer. As Pierce Butler, a delegate to the Philadelphia Convention, wrote afterwards, the powers of the President were

> greater than I was disposed to make them. Nor . . . do I believe they would have been so great had not many of the members cast their eyes towards General Washington as President; and shaped their Ideas of the Powers to be given to a President, by their opinions of his Virtue.[416]

In discussing this phenomenon, Clinton Rossiter describes Washington's record as pointing "toward unity, strength, and independence in the executive."[417] "We cannot measure even crudely the influence of the commanding presence of the most famous and trusted of Americans,"[418] Rossiter concludes.

The Framers established the President's leadership role in war by vesting the office with the commander-in-chief power. Americans of the Framers' generation would have widely understood the commander-in-chief power as a continuation of the English and colonial tradition in war powers. The state constitutions both expressed this understanding and provided the relevant legal context for interpreting the new federal Constitution. Dissatisfied with the Continental Congress, leading revolutionaries greatly admired the constitutions of New York, Massachusetts, and New Hampshire, which as we have seen, vested the

414. As the Marshall Court found in its international law cases, the nature of the letter produced a significant impact on the rights and liabilities of the parties to numerous maritime disputes. *See* G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835, at 884-926 (1988).

415. *See* GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 43-56 (1991).

416. Letter from Pierce Butler to Weedon Butler (May 5, 1788), *in* 3 FARRAND, *supra* note 357, at 301-02.

417. ROSSITER, *supra* note 318, at 222.

418. *Id.*

governor with expansive powers.[419] In *The Federalist,* Alexander Hamilton noted that the new Constitution owed a large debt to the Massachusetts Constitution of 1780.[420] He and his colleagues also expressed high regard for the strong executive leadership exercised by Governor Clinton under the New York Constitution of 1777, which was the model for the Massachusetts Constitution's executive powers.[421] Massachusetts and New Hampshire's Constitutions, which embraced the concept of a vigorous, independent executive in both war and peace, informed the meaning of the federal Constitution's clauses on executive power for Americans of the eighteenth century.

Thus, the meaning of the "Commander in Chief" language of Article II can be fleshed out by Massachusetts and New Hampshire's description of the Commander in Chief powers of their governors. Both of these state constitutions granted to the Commander in Chief the authority to fully control the military, and to use it to "kill, slay, and destroy" by any appropriate means anyone who attempted or planned to attack or even "annoy[]" the state.[422] Alexander Hamilton, in *The Federalist No. 69,* explicitly compared the governors' commander-in-chief powers in those two states with that of the President's. Although Hamilton suggested the possibility that the governors may have had more power than the President because they were commanders in chief of the navy as well as the army, he clearly indicated that the President's command over the army was equal to that of the governors.[423] Reading the proposed Constitution in the context of the state constitutions would have come naturally to an eighteenth-century American, because, at the time, the state texts constituted the only other documents that bore a similar level of legal significance to the Constitution.[424]

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419. *See supra* text accompanying notes 311-340.

420. *See* THE FEDERALIST No. 69, *supra* note 304, at 464 (Alexander Hamilton).

421. *See* THACH, *supra* note 294, at 37-40.

422. MASS. CONST. art. VII (1780), *reprinted in* 3 THORPE, *supra* note 271, at 1901; N.H. CONST. (1784), *reprinted in* 4 *id.* at 2463-64. *See supra* text accompanying notes 321-323.

423. After cataloguing the powers of the President versus that of the King, Hamilton wrote:

> [T]he Constitutions of several of the States, expressly declare their Governors to be the Commanders in Chief as well of the army as navy; and it may well be a question whether those of New-Hampshire and Massachusetts, in particular, do not in this instance confer larger powers upon their respective Governors, than could be claimed by a President of the United States.

THE FEDERALIST No. 69, *supra* note 304, at 465-66 (Alexander Hamilton).

Although it appears otherwise, Hamilton's statement may not actually reveal a belief that the President's power ranks below that of the two governors. As we will see *infra* text accompanying notes 521-523, Hamilton purposely, and I think misleadingly, disparaged the President's powers in an attempt to deflect strong Antifederalist criticism. Furthermore, Hamilton only goes so far as to state that the comparison is an open "question," which, at the very least, indicates that others probably were making the association as well.

424. For examples of such overt comparisions, see, e.g., THE FEDERALISTS No. 69, *supra* note 304, at 464 (Alexander Hamilton); No. 81, at 544-45 (same); No. 83, at 565-66 (same).

Provisions found in the state constitutions that were not included in the Constitution also demonstrate the Framers' intent to create a strong executive in the war powers arena. The Philadelphia delegates decided to sweep state restraints on the executive into the dustbin of history. The Constitution did not establish a council with joint control over the military, nor did it require the President to seek legislative permission before engaging the military. Absent was any clause, such as that adopted by South Carolina, which declared "[t]hat the governor and commander-in-chief shall have no power to commence war, or conclude peace" without legislative approval.[425] Also absent were the limitations imposed by legislative appointment of the executive, by limited opportunity for re-election, by lack of a veto power, or by multiple executive officials. Rather, the Framers of the Constitution established a presidency whose unity and energy would give the executive branch "[d]ecision, activity, secrecy, and dispatch."[426]

A comparison of the state and federal constitutions also would have suggested to an eighteenth-century American that the grants of war powers to Congress mimicked the authorities exercised by the legislatures in England, the colonies, and the states. Congress' powers to "raise and support Armies," to "provide and maintain a Navy," to "make Rules for the Government and Regulation of the land and naval Forces," to "provide for calling forth the Militia," and to "provide for organizing, arming, and disciplining, the Militia,"[427] initially would have appeared as transfers of power from the states to the federal government. Closer examination also revealed these powers as checks which prevented the President from raising and supporting his armies independently.[428] Thus, while the powers to raise and support armies and to

425. S.C. CONST. art. XXXIII (1778), *reprinted in* 6 THORPE, *supra* note 271, at 3255.

426. THE FEDERALIST No. 70, *supra* note 304, at 472 (Alexander Hamilton). As Rossiter has described it, the Constitution created

> a President [who] had a source of election legally separated if not totally divorced from the legislature, a fixed term and untrammeled reeligibility, a fixed compensation (which could be "neither increased nor diminished" while he was in office), immunity from collective advice he had not sought (whether tendered by the Court, the heads of executive departments, or a council of revision), and broad constitutional powers of his own. It would be his first task to run the new government: to be its administrative chief, to appoint and supervise the heads of departments and their principal aides, and to "take care" that the laws were "faithfully executed." He was to lead the government in its foreign relations, peaceful and hostile, and he was, it would appear, to be a ceremonial head of state, a "republican monarch" with the prerogative of mercy.

ROSSITER, *supra* note 318, at 221.

427. U.S. CONST. art. I, § 8, cls. 12-16.

428. *See* 1 WILLIAM W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 423-25 (1953). Crosskey, however, goes too far in arguing that these provisions served *only* a separation of powers role. Clearly, they have both federalism and separation of power purposes. It might be tempting, and even more convincing, to argue that the military powers mentioned in Article I, Section 8 might have been intended to serve only a federalism role, but that too would be taking the argument too far.

regulate the military possessed a federalism purpose, they had a separation of powers function as well.

One final aspect of the Constitution's text is relevant for our inquiry. Not only did the Constitution allocate war-making authorities between the branches of the federal government, it also imposed specific prohibitions on the independence of the states in foreign relations. The last paragraph of Article I, Section 10 states: "No State shall, without the Consent of Congress . . . keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with . . . a foreign Power, *or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.*"[429] Given the purpose of a national government, the Constitution logically prevents the states from maintaining a standing military, from entering into international agreements, and from waging war. Some have interpreted Section 10 as implicitly recognizing that the President could wage war unilaterally in the same emergency situations—invasion or imminent danger—that the states could.[430]

This reading misses the Clause's greater significance for interpreting federal war powers. Section 10 demonstrates that when the Framers wanted to prohibit the initiation of hostilities, they knew how to be quite clear—thus the phrase "No state shall . . . *engage* in war."[431] If the Framers intended to require congressional consent before war, they again were perfectly capable of making their wishes known, as evidenced by the second and third paragraphs of Section 10, which begin, "No state shall, without the Consent of Congress."[432] Had the Framers intended to prohibit the President from initiating wars, or to require him to receive congressional approval beforehand, they easily could have incorporated a Section 10 analogue into Article II. ("The President shall not, without the Consent of Congress . . . .") But the Framers chose not to, and instead left the allocation of war powers intact.

We should resist the temptation to see innovation and novelty in every constitutional clause. Of course, the Framers intended to alter certain aspects of traditional Anglo-American forms of government. But transferring the power to declare war from the executive to the legislature does not necessarily reflect a general desire to reallocate all of the war powers. Instead, we should construe the Constitution's spare language concerning war powers within the context of eighteenth-century British, colonial, and state governments, which had employed a system of executive initiative balanced by legislative appropriation. Ex-

429. U.S. CONST. art. I, § 10 (emphasis added).
430. *See, e.g.*, ELY, *supra* note 1, at 7.
431. U.S. CONST. art. I, § 10 (emphasis added).
432. *Id.*

amined in this light, the Constitution enacts a system that provides for agreement between the branches, but allows for discord as well.

B. The Constitutional Convention and the Allocation of War Powers

Although the intent of those who drafted the Constitution may not be conclusive, especially if that intent is not apparent from the text or was not made known during ratification, such evidence can be relevant in establishing the contemporary understandings of war powers. Statements and arguments made during the drafting of the Constitution support what is evident from the Constitution's text: the war clauses establish a flexible system of war powers that does not give the legislature the predominant role suggested by today's scholars.[433]

Delegates came to Philadelphia to repair the defects of the Articles of Confederation, including what they saw as an inability to provide a sufficient defense against invasion.[434] This weakness arose not because the Congress was unable to initiate war, but because it had to rely on the good faith of the states to raise and supply the military. The Framers quickly corrected this problem by expanding federal powers in foreign affairs at the expense of the states. The Constitution not only vested the federal government with the power to raise, supply, and lead the national military, but it also divested the states of the ability to maintain peacetime armies and to wage war.

While the Framers made clear that the national government, not the states, should exclusively govern the nation's foreign affairs, when it came to the allocation between the President and Congress, the Framers did not seek to place complete power in one branch. Some Framers initially hoped to place Congress at the forefront in decisions on war, but this approach did not prevail. Rather, the provisions that they adopted contemplated overlapping competencies and powers held by equal, although structurally different, branches.

When the battle over the Constitution shifted from Philadelphia to the states, intelligent and forceful critiques forced the Federalists to express their vision of war in more concrete terms. The Federalist re-

433. This analysis is limited by the reliability of the documentary records we have on the Constitutional Convention. James Madison's notes provide the most complete and objective record of the Convention. Unfortunately, it is likely that Madison was able to record, at best, only ten percent of the speeches made at the Convention, and that his notes also contain expanded versions of ideas that he put forth only in embryonic form during the summer of 1787. James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 34-35 (1986); Richard B. Bernstein, Review Essay, *Charting the Bicentennial*, 87 COLUM. L. REV. 1565, 1604-06 (1987). Aside from ninety percent of the convention speeches, we also have no record of the informal discussions between delegates. The limited nature of the documentary evidence, however, persuades all the more for reliance upon the institutional and political history presented in this Article.

434. *See, e.g.*, 1 FARRAND, *supra* note 357, at 18-19 (speech of Edmund Randolph (May 29, 1787)).

CONCLUSIONS

This study has shown that the Framers intended Congress to participate in war-making by controlling appropriations. Although the Constitution gives the President the initiative in war by virtue of his powers over foreign relations and the military, it also forces the President to seek money and support from Congress at every turn. In making decisions whether to raise and support the requested forces, Congress can judge the benefits of a particular war as well as influence its means and ends. Such was the practice under the British Constitution and under the early American governments, elements of which provided models for the drafters of the new federal Constitution. Such was the explanation given by the supporters of the Constitution to its opponents.

Contrary to the arguments by today's scholars, the Declare War Clause does not add to Congress' store of war powers at the expense of the President. Rather, the Clause gives Congress a judicial role in declaring that a state of war exists between the United States and another nation, which bears significant legal ramifications concerning the rights and duties of American citizens. Congress' power to declare war also has the additional effect of ousting the courts from war powers disputes, because it deprives the courts of the ability to second-guess Congress' determination of whether a formal state of war exists.

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suspected of American ownership, which had sailed from French ports. Unfortunately for Captain Little, Congress had authorized captures only of American ships sailing *to* French ports. Non-Intercourse Act, ch. 2, § 1, 3 Stat. 613 (1799). The Court, Chief Justice Marshall writing, held Little liable for damages to the ship-owners because Congress had not authorized seizures of ships sailing from French ports. *See* Little v. Barreme, 6 U.S. (2 Cranch) 170, 179 (1804). Critics of modern presidential war powers have read *Little* as standing for two propositions: (i) that courts can hear war powers cases, and (ii) that Congress can regulate the conduct of war even if Congress' regulations conflict with presidential orders. *See, e.g.*, ELY, *supra* note 1, at 55; GLENNON, *supra* note 1, at 3-8; KOH, *supra* note 1, at 81-82.

Professors Ely, Koh, and Glennon surely over-read *Little*. The Court could hear the case because it involved maritime and prize jurisdiction, which the text of the Constitution grants to the federal courts. Thus, the case did not really call upon the Court to pass judgment on the exercise of war powers, and thus did not present a political question. Congress' statute controlled because it set a "Rules concerning Captures on ... Water," again pursuant to a clear constitutional grant of power. *See* U.S. CONST. art I, sec. 8. The Court did not enjoin enforcement of the President's order, but instead merely found that Captain Little was personally liable for damages. *Little* never reached questions concerning the justiciability of inter-branch war powers disputes, or the President's inherent authority to order captures going beyond Congress' commands. In fact, Chief Justice Marshall quite carefully left the issue open:

> It is by no means clear that the [P]resident of the United States whose high duty it is to "take care that the laws be faithfully executed," and who is commander in chief of the armies and navies of the United States, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited by being engaged in this illicit commerce.

Little, 6 U.S. (2 Cranch) at 177.

The Framers also may have believed judicial participation unwarranted because of the structure established in the war powers area. The potentially conflicting powers of the President and Congress establishes a system that demanded no constitutionally correct method of waging war, but instead permits flexible decision-making based on each branch's exercise of its powers. Aside perhaps from policing against the most extreme violations of those grants by another branch—such as if Congress attempted to "fire" the President as Commander in Chief—the courts have no constitutional standards to apply to a process the Framers left intentionally undefined. Instead, the Framers understood that the legislature and the executive would use their powers to defend the prerogatives of their departments, as well as to pursue their policy preferences against a recalcitrant coordinate branch. The Framers expected the branches to cooperate to wage a successful war, but also anticipated conflict should the two disagree. They also provided the means for the government to continue to function in war, so long as the legislature acquiesced in the actions of the executive.

A. Modern War Revisited

This study suggests that our constitutional system has never needed a *Marbury* to govern war powers. Instead, the exercise of war powers has developed in the realm of politics within the broad constitutional bounds established by the Framers. In the conflicts of the last half-century, ranging from Korea to the Persian Gulf, the President has acted to protect what he believed to be American national security interests abroad. Due to the elevated levels of men and material needed, these wars invariably forced the President to go to Congress before he could take military action. In each instance, Congress' opportunity to refuse or suspend funding gave Congress a powerful weapon, which it could use to pronounce its own policies. Thus, in June 1950, Truman immediately could intervene when South Korea was invaded, but he needed further appropriations for a longer-term commitment (which he sought from Congress a month later).[585] Even though Republican leaders criticized the President's unilateral intervention, Congress readily approved the funding that Truman sought. As Dean Acheson described it later, "[a]ppropriations and powers tumbled over one another" in the haste with which Congress acted.[586] For Vietnam, Congress voted as early as May 1965 to appropriate $700 million for the war, added $1.7 billion in September, and as the war escalated, approved another $4.8 billion in March 1966.[587] During these appropriations votes, members of

585. *See* ACHESON, *supra* note 38, at 402-13, 420-22.
586. *Id.* at 421.
587. *See* ELY, *supra* note 1, at 27-28.

Congress argued about the wisdom of the war and one even attempted, without success, to prevent the use of American draftees in Southeast Asia.[588] And during the early stages of Operation Desert Shield, Congress approved $978 million to support the American troop deployment.[589] Congressional resistance to war at these points would have ended any presidential war efforts, because the President cannot veto a refusal to pass an appropriations bill. All Congress had to do was nothing.

Recent events further confirm that Congress fully understands that its appropriations power may be used to check executive military operations. Beginning in 1993, President Clinton authorized steadily increasing uses of American military force in the former Yugoslavia pursuant to United Nations Security Council resolutions. In April 1993, U.S. planes began to enforce the United Nations ban on military flights over Bosnia and Hercegovina. In June 1993, President Clinton sent 300 troops to participate in a U.N. peacekeeping force in Macedonia. In February 1994, sixty U.S. aircraft were made available to help the U.N. end the Bosnian conflict; from March through November, these planes shot down Serbian aircraft and bombed Serbian military positions. In December 1995, President Clinton ordered the deployment of 20,000 American troops to Bosnia to implement a peace agreement signed by Serbia, Bosnia, and Croatia.[590]

Like President Bush during the Persian Gulf War, President Clinton did not ask Congress for authorizing legislation or for a declaration of war. Instead, President Clinton declared that he had "directed the participation of U.S. forces in these operations pursuant to my constitutional authority to conduct the foreign relations of the United States and as Commander in Chief and Chief Executive."[591] As he put it in his message to Congress concerning his decision to send American troops to Bosnia, President Clinton requested only "an expression of support from the Congress."[592] President Clinton maintained that he had the unilateral authority to send the military to Bosnia, whether Congress gave its approval or not.

Congress fully deliberated President Clinton's decision to expand American military intervention in Bosnia. Even before he requested a

588. *Id.* at 28.

589. Tom Kenworthy, *Despite Veto Threat, House Cuts Favored Defense Programs*, WASH. POST, Sept. 20, 1990, at A6. Congress refused, however, the Bush administration's request for control over the allied contributions for the operation, stipulating that such funds cannot be spent except as authorized by Congress. *Id.*

590. William Drozdiak & John F. Harris, *Leaders Sign Pact to End Bosnia War; Clinton Urges People of Battered Country to "Seize This Chance,"* WASH. POST, Dec. 15, 1995, at A1.

591. Letter to Congressional Leaders on Bosnia, 31 WEEKLY COMP. PRES. DOC. 2144, 2145 (Dec. 6, 1995).

592. *Id.*

congressional expression of support, President Clinton already had received funding for the Bosnia operation in the 1996 Defense Department appropriations bill. During budget negotiations between the White House and congressional leaders in November 1995, President Clinton agreed to sign the $243 billion appropriations bill, in exchange for congressional agreement that $1.5 billion would be used to fund the 20,000 troops being sent to Bosnia.[593] If Congress had chosen to oppose the intervention, it easily could have refused to add the $1.5 billion, or it could have refused to fund all Pentagon operations overseas. Instead, Congress passed the funds to allow the executive to conduct its war plans.

Further debate over the wisdom of the Bosnia operation included efforts to eliminate funding for the troops. A bill to do just that passed the House of Representatives.[594] House Resolution 2606, introduced by Representative Hefley, prohibited any use of Defense Department funds for deployment of American armed forces on the ground in Bosnia as part of the NATO implementation force. After debate concerning whether to support the Bosnia intervention, the Senate rejected H.R. 2606 by a vote of 22 to 77,[595] and instead passed a resolution, by a vote of 69 to 30, supporting the mission. Disagreeing with the Senate, the House passed a resolution opposing President Clinton's policy, but supporting the troops.[596]

Thus, the appropriations power provided Congress with ample opportunity to weigh in on the decision to send troops to Bosnia. Congress had the clear opportunity to stop the mission by refusing to include funding for it in the Defense Department appropriations bill. It did not. The House then passed a funding ban, but the Senate demurred. In the course of considering the appropriations ban, Congress had the full opportunity to debate the merits of the President's military decision, and could have used its appropriations power to enforce its own judgment on the wisdom of sending the troops. By providing long-term funding for such military operations, Congress had given the executive the means to send the troops overseas. By refusing to cut those funds off, Congress chose to permit the executive to pursue war. The Senate's resolution only provided further endorsement of President Clinton's actions.

A critic could respond to these examples in two ways. First, one could claim that Congress cannot consider war issues responsibly when

593. John F. Harris & Eric Pianin, *Clinton Accepts Hill's Defense Spending Bill*, WASH. POST, Dec. 1, 1995, at A1, A6.

594. H.R. 2606, 103d Cong., 2d Sess. (1995).

595. 141 Cong. Rec. S18470 (Dec. 13, 1995).

596. Katharine Q. Seelye, *Anguished, Senators Vote to Support Bosnia Mission; Clinton Off to Paris Signing*, N.Y. TIMES, Dec. 14, 1995, at A1, A14.

voting on appropriations, because members of Congress will not risk creating the impression that they are leaving American troops at the front defenseless.[597] Although one might feel some disappointment at Congress' failure to take advantage of its funding powers, a failure of political will should not be confused with a constitutional defect. A congressional decision not to exercise its constitutional prerogatives does not translate into an executive branch violation of the Constitution. Certainly congressional timidity cannot justify rearranging the Constitution—either to restrict the President's war-making powers, or to push the federal courts into political question cases—without a constitutional amendment.

Second, skeptics could claim that the appropriations check cannot prevent small-scale military interventions using existing funds. The original understanding cannot control because the Framers could not anticipate the existence of a large peacetime military that would allow the President to make war without immediate appropriations. Because the Framers thought that the President always had to seek congressional funding first, the argument continues, they intended to give Congress a de facto veto power over executive branch war decisions. Thus, we must require congressional approval before any hostilities to restore Congress' power to approve wars before they begin. If neither Congress nor the President will act to revive the legislature's proper role, then the courts must step in to restore the balance. As Ely puts it, we must seek "judicial 'remand' as a corrective for legislative evasion."[598]

This is a more compelling critique than the first, because it hinges on the idea that modern conditions have made the precise intent of the Constitution difficult to implement. However, we need not reach the question of whether changed conditions require today's constitutional interpreters to translate the Framers' principles into a modern context.[599] The Framers' intent on war powers, as demonstrated in this Article, quite readily takes root in modern soil—without the need for a creative transplant. Anticipating the arguments of today, the Antifederalists claimed that the President would abuse his commander-in-chief powers once in control of a standing army. As we have seen, the typical Federalist response was: "Congress, who had the power of raising armies, could certainly prevent any abuse of that authority in the President—that they alone had the means of supporting armies, and that the President was

597. Scholars, such as Ely and Koh, have sought clever ways around "congressional acquiescence" to "[i]nduc[e] Congress to [d]o [i]ts [j]ob." ELY, *supra* note 1, at 47-67; KOH, *supra* note 1, at 123-33, 185-207.

598. ELY, *supra* note 1, at 54.

599. *See* Lessig & Sunstein, *supra* note 15, at 119 (citing changed circumstances as additional support for an argument against the concept of a strong unitary executive).

impeachable if he in any manner abused his trust."[600] Such exchanges assumed that the President already possessed a standing military, and that Congress' sole remedy was a termination of funds, or impeachment if the President illegally used funds that Congress had allocated to other accounts.

The original constitutional design needs no modification to operate in the modern world. Nothing prevents Congress today from eliminating the funds for operations in Grenada, Lebanon, the Persian Gulf in 1987, or Panama. Nothing prevented Congress from prohibiting the expenditure of funds on any military operation. The Federalists realized that permitting the federal government to establish a standing army created the possibility of executive action without preceding congressional approval. Antifederalist arguments made them aware that the President could use the army not just for foreign adventures, but for domestic ones as well. But, the Framers decided that the risk brought by peacetime military forces was outweighed by the benefits of quick military action.

A final element of current war powers practice, judicial abstention, can seek hearty approval from the original understanding. An initial review of Supreme Court and lower federal court decisions demonstrated judicial reluctance to hear war powers cases.[601] During the Vietnam War, for example, the Supreme Court refused to grant certiorari in war powers cases, while the circuit courts regularly employed the much-maligned political question doctrine to abstain from war controversies. Scholars have criticized judicial reliance on the political question doctrine, but this study suggests that there is more meat to the matter. The courts cannot act in war powers cases because the Constitution allocates *all* power in the area to the political branches. The courts cannot issue a declaratory judgment concerning undeclared wars, as current scholars would have them do, because the Constitution vests this judicial-like power to declare war exclusively in Congress. There is no need for courts to police the balance of powers between President and Congress, because the Framers intended to establish a self-regulating system wherein the executive and legislative branches would monitor and control each other. Put into terms of current case law, war powers cases implicate the constitutional core of the political question doctrine, rather than its prudential emanations, because they "involve the exercise of a discretion demonstrably committed to the executive or legislature."[602] There are no "judicially discoverable and manageable stan-

600. 4 ELLIOT, *supra* note 119, at 114 (statement of Richard Spaight at North Carolina ratifying convention).

601. *See supra* text accompanying notes 70-104.

602. Baker v. Carr, 369 U.S. 186, 211 (1962).

dards"[603] for resolving these cases because the Framers quite consciously designed war powers to have no fixed rules of conduct or process. Thus, during the Persian Gulf war, it was *Dellums v. Bush*[604] which pushed judicial competence beyond its proper bounds by declaring that the President was violating the Constitution. And it was the less-touted *Ange v. Bush* which correctly concluded that the federal courts should not exercise jurisdiction in such cases because "Congress possesses ample powers under the Constitution to prevent Presidential over-reaching, should Congress choose to exercise them."[605]

But, as the refrain of some scholars goes, *Youngstown Sheet & Tube Co. v. Sawyer*[606] stands for judicial competence in war and foreign affairs. However, one can read *Youngstown* to support the vision of the Court's role as sketched by this study. As we have recognized, the Framers did not expect to exclude all cases touching on war, only those that challenged the constitutional authorities of the Congress and the President. *Youngstown* essentially called upon the Court to decide if war existed, and if that condition of war permitted the President to act domestically in a way he could not during peacetime. Quite properly, the Court concluded that a total state of war did not exist because Congress had not issued a declaration of war, much in the same way that the early Marshall Court had looked to Congress' actions to determine the legal nature of the Quasi-War. The Court in *Youngstown* recognized that Congress alone had the authority to decide if a legal state of war existed which justified the seizure of the steel mills by the federal government. And, as we have seen, such a declaration was important primarily for its domestic effects, whether it be for notifying the People of their new enemy, or the authorization for the exercise of emergency powers by the federal government. Thus, *Youngstown* correctly held that the President could not usurp Congress' domestic authority to decide whether the nation was in a legal state of war. However, to the extent that *Youngstown* might stand for the proposition that courts can

603. *Id.* at 217.

604. 752 F. Supp. 1141, 1146 (D.D.C. 1990).

605. 752 F. Supp. 509, 514 (D.D.C. 1990). As Judge Richey further noted in declining to exercise jurisdiction:

> If Congress considers the President's current deployment of forces in the Persian Gulf to violate the Constitution, or if Congress considers the country on the verge of being unconstitutionally brought to war, or if Congress concludes at any time that the President's actions in the Gulf have usurped Congress' constitutional role, Congress has many options to check the President. Congress can itself declare war, exercise its appropriations power to prevent further offensive and/or defensive military action in the Persian Gulf, or even impeach the President.

Id.

606. 343 U.S. 579 (1952).

enjoin any presidential action that conflicts with Congress, as suggested in Justice Jackson's concurrence,[607] the decision went too far.

B. War and Republicanism

Rather than setting war and foreign affairs above the Constitution, these war power principles fulfill the aims of republican government. As Gordon Wood's recent work, *The Radicalism of the American Revolution,* has shown, the Constitution represented a reaction by the young leaders of the Revolution against the rampant, unchecked democracy that had swamped the state governments and had permitted interest groups to pass legislation to further their private interests.[608] Madison's *The Federalist No. 10* "was only the most famous and frank acknowledgment of the degree to which private interests of various sorts had come to dominate American politics."[609] Still clinging to the promise of republicanism before the onset of pure democracy, the Framers designed the Constitution to check legislative excess and the instrumental use of government merely to implement private interests.[610] However, this presented the Framers with something of a paradox, because while they remained suspicious of interest group politics, they also realized that all power and legitimacy in government flowed from popular sovereignty.[611]

Perhaps more successfully than in its other areas, the Constitution's war and foreign affairs provisions struggled to solve this dilemma. The Framers attempted to recognize the ultimate authority of the People by creating checks on the powers of its agent—the federal government.[612] In a break from British political thought, the Americans posited that the government did not equal the sovereign, that the People were the only true authority, and that the government was merely the agent for exercising the power delegated by the People. Once they had broken the identity between government and sovereignty, the Framers could prevent the legislature from concentrating all powers in its hands, primarily by creating an independent executive that represented the will of the People as well as, or better than, Congress. In their competition to best effectuate the People's wishes, the branches would check each other in the hopes of winning popular acclaim and re-election. "Ambition must be made to counteract ambition," wrote Madison in *The Federalist No.*

607. *See id.* at 635-38, 654-55 (Jackson, J., concurring).

608. *See* WOOD, *supra* note 415, at 253-55.

609. *Id.* at 253.

610. *Id.* at 253-70. This historical insight has spurred the recent interest in republicanism for constitutional interpretation. *See generally* Frank Michelman, *Law's Republic,* 97 YALE L.J. 1493 (1988); Cass R. Sunstein, *Beyond the Republican Revival,* 97 YALE L.J. 1539 (1988).

611. *See generally* Akhil R. Amar, *Of Sovereignty and Federalism,* 96 YALE L.J. 1425 (1987).

612. *Id.* at 1441-44.

51.[613] In order to harness the interest of government officials for the public good, Madison concluded, each branch had to possess "the necessary constitutional means, and personal motives, to resist encroachments of the others."[614] Thus, in the war powers context, the Framers did not rest the sovereign power of making war in one department, but divided it between the executive and legislature and gave each branch the means to check the other's designs. The President could not wage war without funds; Congress could not initiate hostilities without a Commander in Chief.

Preventing the government from straying too far from the People's will, however, exacerbated the problem of interest group politics. If the leaders of the federal government strove to reflect accurately a popular will consumed with private interests, then republicanism's efforts to secure the common good surely would fail. Several of the Framers expressed fears that the federal government might engage in war or peace for sectional purposes.[615] Others believed that classical history displayed a wild tendency by pure democracies toward war.[616] It was to prevent the use of war for private interests that led the Framers to vest substantial war-making authority in an independent President. The Framers expected private interests to come forth in the legislature, against whose ambitions, Madison warned, "the people ought to indulge all their jealousy and exhaust all their precautions."[617] In response to these fears, the Framers expected the President to act as "the general Guardian of the National interests" by representing the country as a whole, rather than a particular section or interest.[618] The proper incentives would arise in part from the President's electoral base. Wrote Wilson, "Being elected by the different parts of the United States, he will consider himself as not particularly interested for any one of them, but will watch over the whole with paternal care and affection."[619] Not only would the President have the moral force of national election behind him, but the People would gain the benefit of enhanced government accountability. As Hamilton noted in *The Federalist No. 70,* concentrating such power

613. THE FEDERALIST No. 51, *supra* note 304, at 349 (James Madison).

614. *Id.*

615. Thus, Southerners might fear that a New Englander-dominated government might sacrifice navigation rights on the Mississippi for a favorable alliance with Great Britain. This fear explains some of the violent opposition to the Jay Treaty reached with Great Britain. *See* DECONDE, *supra* note 559, at 101-40. Similary, New Englanders opposed the war against the Northwest Indians because it seemed to pursue Southern hopes for westward expansion at a high price.

616. In the words of Justice Story: "Indeed, the history of republics has but too fatally proved, that they are too ambitious of military fame and conquest, and too easily devoted to the views of demagogues, who flatter their pride, and betray their interests." 2 STORY, *supra* note 378, § 1171.

617. THE FEDERALIST No. 48, *supra* note 304, at 334 (James Madison).

618. 2 FARRAND, *supra* note 357, at 540-41 (Gouverneur Morris).

619. 2 ELLIOT, *supra* note 119, at 448.

in a single man would give the People "the two greatest securities they can have for the faithful exercise of any delegated power": first, "the restraints of public opinion," and second, "the opportunity of discovering with facility and clearness the misconduct of the persons they trust."[620]

As head of the executive branch, the President's institutional superiority would allow him to act quickly in the national interest. Headed by a single official, the executive branch would have access to more information and advice, and could act swiftly and with decisiveness. As Publius told the voters of New York: "Decision, activity, secrecy, and dispatch will generally characterise the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number . . . ."[621] As a representative of the People, the President could resist interest group pressures, and as one person he could override those interests to secure the common good. If a faction-riven Congress impeded a military effort, the President could act first and then seek approval directly from the People based on his greater responsibilities and abilities.[622]

Besides the values of accountability and responsibility that adhered to a unitary executive, the President's energy and independence in war carried the additional virtue of enhancing republican decision making. As protector of the national interests, the President not only could wage war when a myopic Congress opposes it, but he also could prevent Congress from pushing the country into war too hastily. "In the legislature, promptitude of decision is oftener an evil than a benefit," wrote Hamilton.[623] By slowing down congressional action, either by not waging hostilities or by vetoing bills, the President could force greater deliberation and caution by Congress and the nation before it decided on war.[624] According to Hamilton, "[t]he differences of opinion, and the jarrings of parties in [the legislature], though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection; and serve to check excesses in the majority."[625] President Adams's conduct during the Quasi-War bears out this aspect of the presidency, for he was able to restrain his own party from plunging the nation into a full-scale war with France. Although vilified by both Federalists and Jeffersonians for his middle ground, Adams surely acted in the best

620. THE FEDERALIST No. 70, *supra* note 304, at 477-78 (Alexander Hamilton).

621. *Id.* at 472.

622. *Cf.* Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985).

623. THE FEDERALIST No. 70, *supra* note 304, at 475 (Alexander Hamilton).

624. Encouraging deliberation in all levels of government also has become one of the primary goals of modern republicanism. *See* Sunstein, *supra* note 610, at 1548-51.

625. THE FEDERALIST No. 70, *supra* note 304, at 475 (Alexander Hamilton).

interests of the nation by countering French attacks on American shipping without embroiling the nation more deeply in the European wars. Adams' tale serves as a powerful example of the duty of the President, and the political price he can pay for pursuing the national interest.

A President sometimes must chart a risky course toward war because the Constitution places him squarely at the tiller. He is not alone; the Congress is at his side, either funding his decisions or frustrating them. This cooperative, and yet competitive, relationship has produced many different wars, and many different ways of going to war, in American history. It is perhaps ironic that as the United States today turns to its military more often in international affairs, the historical roots of war powers are so little understood by academia, or so ambiguously defined by the courts. The recent examples of presidential war-making and congressional inaction do not violate the Constitution, nor should they cause the confusion they appear to. Instead, the elasticity of the war power process has resulted directly from the Framers' conscious design. They established an arena with wide markers to permit the executive and legislative branches to work in harmony, or to struggle for primacy, over issues of war.

As shown in Panama, Kuwait, Somalia, Haiti, and Bosnia, the end of the Cold War has not produced a relaxation in the need for American military force abroad. The approach of a new millennium does not seem to bring the prospects of a millennial peace any closer, either to the world or to the President and the Congress. Indeed the continuing struggle between the branches over the powers of war is only the fulfillment of the Framers' design and in the best interests of the People.