

ARTICLES

RESTORING THE CONGRESSIONAL DUTY TO
DECLARE WAR*Alfred W. Blumrosen & Steven M. Blumrosen**

[The President's authority] would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies; all which, by the constitution . . .

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This Article is dedicated to the memory of Ruth Gerber Blumrosen, B.A., J.D., University of Michigan (1927-2004), who began discussing the issues addressed in this Article with the Authors in 2002 when the invasion of Iraq loomed. *See* Alfred W. Blumrosen, *A Memorial for Ruth Gerber Blumrosen*, 30 WOMEN'S RIGHTS L. REP. 620 (2009); Steven Blumrosen, *Postscript to a Memorial for Ruth Gerber Blumrosen*, 30 WOMEN'S RIGHTS L. REP. 626 (2009); Annamay T. Sheppard, *Memorial: Ruth Gerber Blumrosen (1927-2004)*, 25 WOMEN'S RIGHTS L. REP. 55 (2004); Eleanor Holmes Norton, *Memorial: Remembering Ruth Gerber Blumrosen*, 25 WOMEN'S RIGHTS L. REP. 57 (2004); Evan H. Caminker, *A Tribute to Ruth G. Blumrosen*, 37 U. MICH. J. L. REFORM 679 (2004).

would appertain to the legislature.

— Alexander Hamilton, 1788¹

The President is authorized to use the Armed Forces of the United States *as he determines* to be necessary and appropriate in order to . . . defend the . . . United States against the continuing threat posed by Iraq

— Congress and the President, 2002²

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1. THE FEDERALIST No. 69, at 369 (Alexander Hamilton) (J.R. Pole ed., 2005). (emphasis added).

2. Authorization for Use of Military Force Against Iraq, H.R.J. Res. 114, 107th Cong. § 3(a) (2002) (enacted) (emphasis added) (adopted by Congress on October 11, 2002, and signed by the President on October 16, 2002). The preamble includes, "Whereas the President has authority under the Constitution to take action in order to deter and prevent acts of international terrorism against the United States, as Congress recognized in the joint resolution on Authorization for Use of Military Force (Public Law 107-40)" *Id.* at preamble.

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INTRODUCTION

From the frozen hills of Korea and the steaming jungles of Vietnam, to the grimy back streets of Baghdad and the rugged mountains of Afghanistan, thousands of Americans have been killed or wounded and billions of dollars spent on wars since 1950. The decisions to conduct each of these wars were made by Presidents, in the face of the explicit language and history assigning that power to

Congress in the Constitution of 1787.³ When our newly independent nation struggled to form a more perfect union, Americans remembered their recent hatred of the British King and, at the Convention of 1787, worked to avoid creating a ruler with similar autocratic powers.⁴ The delegates thought they had done so starting on June 1 and continuing with thoughtful deliberation and recorded votes throughout the convention.⁵ But since 1950, the United States has been ordered into hostilities by the President, without war first being declared by Congress. This transfer of power was perpetuated by the silent abdication of the federal judiciary supposed to protect the balance of powers.⁶ This silence of the federal courts is equivalent to Edgar Allen Poe's *The Purloined Letter*⁷ and Arthur Conan Doyle's *Silver Blaze*.⁸ Like *The Purloined Letter*, evidence of the Framers' resolve to prevent the President from deciding to take the nation to war has been in plain public view for 100 years, since Max Farrand published his *Records of the Federal Convention of 1787*. Neither the Supreme Court nor the Circuit Courts of Appeal have ever recognized its significance during those 100 years, as if it was the dog that did not bark in *Silver Blaze*.⁹

Congress has formally declared war in five situations, ending with World War II in 1941.¹⁰ In 1950, the period of congressional

3. "The Congress shall have Power to . . . declare War" U.S. CONST. art. I, § 8, cl. 11; THE CONSTITUTION PROJECT, DECIDING TO USE FORCE ABROAD: WAR POWERS IN A SYSTEM OF CHECKS AND BALANCES (2005), <http://www.constitutionproject.org/manage/file/28.pdf>.

4. MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 162 (1913) [hereinafter FARRAND, FRAMING] (explaining the worry at the convention over the office of the President: "It was a new officer whom they were creating, and . . . from the very limitations of their experience they were compelled to think of him in terms of monarchy, the only form of national executive power they knew.").

5. See generally THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand, ed. 1911) [hereinafter FARRAND, RECORDS].

6. See CONSTITUTION PROJECT, *supra* note 3; see also *Marbury v. Madison*, 5 US 137, 176-78 (1803).

7. EDGAR ALLEN POE, *The Purloined Letter*, in EDGAR ALLEN POE READER 250 (Ashley Stoudt ed. 1993).

8. SIR ARTHUR CONAN DOYLE, *SILVER BLAZE: THE MEMOIRS OF SHERLOCK HOLMES*, in THE COMPLETE SHERLOCK HOLMES VOL. 1 399 (2004).

9. *Id.*

10. Wars formally declared by Congress include: the War of 1812, the Mexican War of 1846, the Spanish American War of 1898, World War I declared in 1917, and World War II declared in 1941. War was declared twice in World War I (Germany and Austria-Hungary) and six times during WWII (Japan, Germany, Italy, Bulgaria, Hungary, and Rumania). See JENNIFER K. ELSEA & RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RL 31133, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS 4-5 (2007). This report provides much useful information, though it categorizes early cases like *Bas v. Tingy*, 4 U.S. 37 (1800), as Authorizations for the Use of Military Force

decisions to take the nation to war ended. The era of presidential wars began. President Truman took the United States into the Korean War from 1950 through 1953 without asking Congress.¹¹ He considered response to the invasion of South Korea by North Korea a continuation of the Cold War policy of containment in Europe.¹² Congress did not contest this exercise of presidential power.¹³

In 1955, President Eisenhower asked Congress to give him discretion to interpose an American fleet to protect Formosa, now Taiwan (R.O.C), from the mainland People's Republic of China (PRC).¹⁴ Congress complied. This action succeeded without military engagement and was not challenged in the courts. This was the first modern authorization for the use of military force ("AUMF").¹⁵

Congress provided Eisenhower another authorization in 1957, empowering him to undertake military assistance programs to nations in the Middle East and providing that "*if the President determines the necessity thereof, the United States is prepared to use armed forces to assist any such nations . . . requesting assistance against armed aggression from any country controlled by international communism.*"¹⁶ In 1964, Congress adopted similar language allowing President Johnson to decide whether to use military force in Southeast Asia (Vietnam).¹⁷ This has been repeated in four more situations, including Lebanon (1983), Iraq-Kuwait (1991), the response to the September 11 attacks (2001), and the Second Iraq War (2002).¹⁸

By adopting an AUMF, legislators no longer vote on the decision for war as required by the Constitution. Instead, legislators vote to let the President make the decision for war. Once the President makes the decision, Congress invariably supports and finances troops

("AUMF") while we treat the congressional actions as declarations of limited war for the reasons specified in this article. *See id.* at 28-29.

11. GEOFFREY PERRET, COMMANDER IN CHIEF: HOW TRUMAN, JOHNSON, AND BUSH TURNED A PRESIDENTIAL POWER INTO A THREAT TO AMERICA'S FUTURE 7-48 (2007).

12. *See id.* at 134-75.

13. *See id.* at 146.

14. *Id.* at 181.

15. Congress authorized the President to employ the Armed Forces of the United States *as he deems necessary* for the specific purpose of securing and protecting Formosa and the Pescadores against armed attack, this authority to include the securing and protection of such related positions and territories of that area now in friendly hands and the taking of such other measures *as he judges to be required or appropriate* in assuring the defense of Formosa and the Pescadores.

Pub. L. No. 4, 69 Stat. 7 (1955) (emphasis added).

16. ELSEA & GRIMMETT, *supra* note 10, at 97 (emphasis added).

17. *Id.* at 98-99.

18. *Id.* at 99-109.

in combat. The AUMF shields legislators from personal responsibility for the decision to go to war, and gives Presidents a free hand to choose war. Since legislators no longer vote on war, they are freer to follow their party's position rather than consider the interest of their constituents and the nation. Since party positions have tended to become more rigid in recent years, the influence of the President as party leader has become more dominant. Enhancing the position of the President's party has become an important factor in congressional decisions about war. The public's ability to influence their representatives has become a mirage, and the congressional debates on the issue of war have become a farce rather than an opportunity for serious deliberation.¹⁹

The declarations of war in the first half of the twentieth century made clear that Congress was taking full responsibility for its decision.²⁰ Each member was recorded as voting for or against the war and could be judged by their constituents for that act.²¹ In contrast, the AUMF authorizes the President to make the decision and, thus, absolves Congress of that responsibility and relieves its members of accountability. For more than half a century, Congress has allowed the President to do the work of taking the nation to war, "as he determines to be necessary and appropriate," instead of following the Constitution.²²

19. See *infra* text accompanying notes 326-29 concerning the AUMF authorizing the Second Iraq War and the similar discussion in the Senate Foreign Relations Committee in 1968 concerning the Vietnam War, *infra* note 285. See also ANDREW J. BACEVICH, *WASHINGTON RULES: AMERICA'S PATH TO PERMANENT WAR* (2010) (illustrating how the political party process precludes serious public debate); *THE PERMANENT CAMPAIGN AND ITS FUTURE* (Norman J. Ornstein & Thomas E. Mann eds., 2000).

20. See ELSEA & GRIMMETT, *supra* note 10, at 3-4 (noting that each declaration of war in the twentieth century contained this identical language: "[T]he President is authorized *and directed* to employ the entire naval and military forces of the United States, and the resources of the Government to carry on war against [the Government of the particular nation]; and to bring the conflict to a successful termination all of the resources of the country are hereby pledged by *the Congress* of the United States." (emphasis added)).

21. The Declaration of War against Spain in 1898 was the only declaration by voice vote. See DAVID M. ACKERMAN & RICHARD F. GRIMMETT, *CONG. RESEARCH. SERV., RL 31133, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS 2* (2003).

22. See generally GARRY WILLS, *BOMB POWER: THE MODERN PRESIDENCY AND THE NATIONAL SECURITY STATE* (2010), which suggests that the hesitancy of the judiciary to enforce the constitutional duty of Congress to declare war is related to the extraordinary risks arising from the existence and possible use of nuclear weapons. Yet these same risks suggest the importance of the great caution imposed by a requirement that Congress—not the President—make such decisions. The failures of U.S. Presidents in the Vietnam War of 1965-1973 and in the Iraq War of 2003-2011 do not suggest that wisdom lies with one person rather than with the Congress.

In the public outcry against the Vietnam War in the 1960s and 1970s, the AUMF was challenged in the lower federal courts as unconstitutional for want of a congressional declaration of war. Those courts upheld the AUMF without attention to the debates and decisions of the Constitutional Convention which took place on and after June 1, 1787.²³ These decisions were followed without serious examination by lower federal courts when confronted with challenges to the AUMF in response to the attack by Al Qaeda of September 11, 2001 and the AUMF concerning Iraq of October 2002. The Supreme Court has never written an opinion on this issue in the modern era.²⁴

At least two lengthy wars—Vietnam (1964 - 1973) and the Second Iraq War (2003-2010)—have been based on weak or non-existent evidence provided to Congress by the President as he asked for an AUMF.²⁵ The expense in blood and treasure might have been limited or avoided if legislators had felt they might be put under pressure from their constituents to carefully evaluate the necessity for war.

Since both Congress and Presidents have supported the use of the AUMF, only the judiciary has the potential to protect our most pressing interests in “Life, Liberty and the pursuit of Happiness.”²⁶ Relevant human conditions have not significantly changed since 1787. The terrors of the present are matched by the terrors of the constitutional era. The ambitions of a President—enhanced as the head of a victorious political party—have not ceased; they may have expanded. This Article will demonstrate that errors in interpretation of history and laws should invalidate the lower federal court decisions of the 1960s and 1970s, leaving today’s courts free to honor the still-relevant view of the Framers that, in a republic, no one person may decide to take the nation to war.²⁷

23. See *infra* Part IX.

24. *Atlee v. Laird*, 347 F. Supp. 689 (E.D. Pa. 1972), *aff’d*, 411 U.S. 911 (1973) (affirming without opinion, the Supreme Court held that the “declare war issue” was a “political question” beyond judicial supervision); see also *Massachusetts v. Laird*, 400 U.S. 886 (1970) (raising the same question, the Court refused to consider a suit brought directly by a state). In both cases, there were three justices who would have taken the case. The Supreme Court has specifically avoided expressing an opinion on the constitutionality of the war while deciding post-9/11 cases concerning alleged terrorists.

25. Louis Fisher, *When Wars Begin: Misleading Statements by Presidents*, 40 PRESIDENTIAL STUD. Q. 171, 172 (2010).

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

27. Opinions vary about the importance of the passage of time and change of fundamental societal values and analyses of economic processes in interpreting the Constitution. Supreme Court Justice Antonin Scalia takes the position that if the language of the Constitution is clear as to original intent, that is sufficient. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37-41 (1997). Justice Stephen Breyer seeks to interpret the Constitution to further its underlying

This Article has four main sections: Parts I through VI will examine the discussions at the Constitutional Convention, which began on June 1, 1787, and led to the conclusion that only Congress should have the power to “declare war.” Parts VII and VIII provide an overview of how the United States interpreted the Constitution and declared its wars during the first 155 years of its history, further exposing the paradigm shift that occurred following the Second World War. Parts IX and X address the erroneous decisions of the Vietnam era that permitted Congress to delegate its power to the President, and more recent Supreme Court decisions whose logic gives hope that the federal courts may correct these errors.²⁸ Part XI reinforces the argument that Congress should awaken to its duty to declare war, by reference to the Fifth Amendment’s Due Process Clause.

I. AMERICANS’ FEAR OF A POWERFUL EXECUTIVE WAS FIRMLY ESTABLISHED BY THE EVENTS LEADING UP TO THE CONSTITUTIONAL CONVENTION

At the successful conclusion of the French and Indian War in 1763, American colonists were solid supporters of Great Britain. Massachusetts Governor Thomas Pownall noted with pride that “nothing can eradicate from the [English] colonists’ hearts their natural, almost mechanical affection to Great Britain.”²⁹ But in that same year, the British government prohibited colonial expansion beyond the Appalachian Mountains, frustrating colonial

objectives in the present social and economic environment. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005). In making these choices and in emphasizing values differently, these justices make “political” judgments, using the term “political” in the positive sense of “the art and science of government.” Viewed this way, all justices are “activist,” in that they face choices not compelled by precedent. When they bring the totality of their experiences and approaches to bear on issues they must decide, they may differ. We believe either perspective will yield the same outcome concerning the “war powers” issue. The Constitutional history—once acknowledged—is clear. Contemporary conditions are well served by the decisions of 1787.

28. In 1983, the Court held that Congress and the President could not short circuit constitutional procedures by allowing a one house veto. *INS v. Chadha*, 462 U.S. 919, 957 (1983). In 1998, Justice Kennedy explained that the same constitutional procedures precluded Congress and the President from adopting a line item Presidential veto. *Clinton v. New York*, 524 U.S. 417, 447 (1998). In 2004 and 2006, the Supreme Court carefully refrained from reviewing the constitutionality of the 2002 AUMF against Iraq. *Hamdi v. Rumsfeld*, 542 U.S. 507, 517 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557, 559 (2006). In 2008, Supreme Court Justice Scalia applied a high standard for evaluating constitutional provisions designed to protect the citizenry against risks of Presidential tyranny. *District of Columbia v. Heller*, 554 U.S. 570, 628-29 (2008).

29. WALTER R. BORNEMAN, *THE FRENCH AND INDIAN WAR: DECIDING THE FATE OF NORTH AMERICA* 279 (2006).

expectations. Two years later, Britain imposed the infamous stamp taxes, only to withdraw them after a colonial boycott.³⁰ Tensions went from bad to worse as more colonists became angered with British denials of their rights as Englishmen. Disenchantment with Parliament's actions led the first Continental Congress in 1774 to declare independence from Parliament.³¹

The next year, after fighting had begun in Massachusetts, Parliament passed the "intolerable acts" extending the colony of Quebec to the lands north of the Ohio River, further destroying colonial land expectations, and demonstrating that colonial "rights" as Englishmen could be abrogated.³² These heavy-handed actions lost the colonists' confidence in Parliament, and finally, in the King.³³ The ensuing separation became inevitable after King George made his speech to the House of Lords on October 26, 1775, in which he announced that "[t]he rebellious war . . . is manifestly carried on for the purpose of establishing an independent empire."³⁴

Some colonists found it difficult to shake off years of loyalty to Britain. The uncertainties of life without a King and Parliament were disquieting for them, so they hesitated to support the move toward independence. Many found courage in a forty-six-page pamphlet by a relative newcomer to America, Thomas Paine.³⁵ His *Common Sense*, published in January 1776, attacked both the concept of hereditary monarchy and King George III. This pamphlet crystallized almost overnight the movement toward independence.³⁶

30. JOHN FERLING, A LEAP IN THE DARK: THE STRUGGLE TO CREATE THE AMERICAN REPUBLIC 51-52 (2003).

31. ALFRED W. BLUMROSEN & RUTH G. BLUMROSEN, SLAVE NATION: HOW SLAVERY UNITED THE COLONIES AND SPARKED THE AMERICAN REVOLUTION 99-119 [hereinafter SLAVE NATION] (2005).

32. BORNEMAN, *supra* note 29, at 300-02.

33. John Adams wrote to Thomas Jefferson on August 24, 1815 that "[t]he Revolution was in the Minds of the People, and this was effected from 1760 to 1775, in the course of fifteen Years before a drop of blood was drawn at Lexington." JOHN ADAMS, THE ADAMS-JEFFERSON LETTERS: THE COMPLETE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND ABIGAIL AND JOHN ADAMS 455 (Lester J. Cappon ed., 1987). The events that gave rise to a desire for independence over the fifteen years are described in JOHN FERLING, ALMOST A MIRACLE: THE AMERICAN VICTORY IN THE WAR OF INDEPENDENCE 16-119 (2007) and JOSEPH J. ELLIS, AMERICAN CREATION: TRIUMPHS AND TRAGEDIES AT THE FOUNDING OF THE REPUBLIC 20-58 (2007).

34. DAVID MCCULLOUGH, 1776, 10-12 (2005).

35. Paine's acceptance in Philadelphia was facilitated by a recommendation from Benjamin Franklin shortly after Franklin had been humiliated in public by the British Government and discharged as deputy postmaster for America. WALTER ISAACSON, BENJAMIN FRANKLIN: AN AMERICAN LIFE 275-80, 307-09 (2003).

36. See SCOTT LIELL, 46 PAGES: THOMAS PAINE, COMMON SENSE, AND THE TURNING POINT TO INDEPENDENCE (2003) (detailing the colonial reaction to *Common Sense*); ERIC FONER, TOM PAINE AND REVOLUTIONARY AMERICA 86-87 (2005) (quoting George

Paine's message was blunt and clear: "In England a king hath little more to do than to make war and give away places; which, in plain terms, is to impoverish the nation . . ."³⁷

Common Sense persuaded many colonists that they could live without a king's reign. Historian Joseph Ellis describes their sentiments:

At the very core of the revolutionary legacy . . . was a virulent hatred of monarchy and an inveterate suspicion of any consolidated version of political authority. A major tenet of the American Revolution—Jefferson had given it lyrical expression in the Declaration of Independence—was that all kings, and not just George III, were inherently evil. The very notion of a republican king was a repudiation of the spirit of '76 and a contradiction in terms.³⁸

Washington as supporting the "sound doctrine and unanswerable reasoning" of *Common Sense*). Phillip Foner called it "the perfect conjunction of a man and his time, a writer and his audience, and it announced the emergence of Paine as the outstanding political pamphleteer of the Age of Revolution." PHILLIP S. FONER, *THE COMPLETE WRITINGS OF THOMAS PAINE* xiv (Philip S. Foner ed., 1969). Foner describes the reaction to *Common Sense*, stating that "written in simple, plain, and direct language easily read and understood by all, *Common Sense* became overnight a best seller; shortly after its publication almost a half million copies were sold . . ." *Id.* Shortly after reading the booklet many upper class Americans who had hesitated to support independence for fear of meeting the power of the British singlehandedly and who did not yet clearly see the advantages of separation, declared with Washington that they were ready "to shake off all connections with a state so unjust and unnatural." *Id.*

37. THOMAS PAINE, *COMMON SENSE* 19 (Belknap Press 2010). Paine drew on the biblical story of how the Jews, despite warnings from God, insisted on having a king, and were punished for it. *See id.* at 12. Paine's retelling of 1 *Samuel* 8 interlined his own notes in clear type, with the Bible in italics, to demonstrate that the biblical story applied to the colonies. An angry God directed Samuel to:

show [the Jews] the manner of the [K]ing that shall reign over them, i.e. not of any particular King, but the general manner of the Kings of the earth whom Israel was so eagerly copying after . . . And Samuel . . . said, 'This shall be the manner of the king that shall reign over you. He will take your sons and appoint them for himself . . . (this description agrees with the present mode of impressing men) . . . and ye shall be his servants, and ye shall cry out in that day because of your king which ye shall have chosen, AND THE LORD WILL NOT HEAR YOU IN THAT DAY . . . These portions of scripture are direct and positive. . . . That the Almighty hath here entered his protest against monarchical government is true, or the scripture is false.

Id. at 13-14.

38. JOSEPH J. ELLIS, *FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION* 127-28 (2000). *Common Sense* generated and reflected a wave of support for independence. Within five months of its publication, the Second Continental Congress declared independence from King and Parliament. Jefferson's pithy language in the Declaration of Independence focused on the actions of King George.

He has abdicated government here, by declaring us out of his Protection and Waging war against us. He has plundered our seas, ravaged our coasts,

These sentiments helped carry the colonies through years of war while Washington begged for troops and financial aid. The Articles of Confederation, initially drafted to establish a strong federal government, was drastically revised in 1777 to create a weak government with no taxing powers that required the votes of nine of the thirteen states to act on important matters, including “peace and war.”³⁹ Congress was essentially a committee of states that met the first Monday in November, each year. Each state could send two to seven delegates, but each state had only one vote.⁴⁰ There was no “President of the United States,” only a revolving “President” who presided over the Congress, with no separate or additional authority. The Articles became effective in 1781, after the states with western land claims surrendered their claims to the federal government.⁴¹

The states remained powerful, did not pay their contributions to the federal government, instituted inconsistent economic policies, taxed each others’ trade, issued unsecured currency, and were unable to maintain order against angry war veterans threatened with debtors’ prison. Shay’s Rebellion in 1786 exemplified how easily commerce could be disrupted and further cast doubt on the capacity of the confederation of states to provide stability and stave off mob rule.⁴²

Virginia, which had led the movement toward independence in 1773, also led the movement for a Constitutional Convention in Philadelphia in 1787.⁴³ During the two weeks before the Convention met, the Virginians crafted a fifteen-point outline for a stronger federal government. This document, known as the Virginia Plan, became the agenda for the first weeks of the Convention. James Madison is credited not only with his major role in developing the Virginia Plan, but also for acting as a floor leader in carrying the

burnt our towns, and destroyed the lives of our people. He is at this time transporting large armies of foreign mercenaries to compleat the works of death, desolation and tyranny, already begun He has excited domestic insurrections amongst us, and has endeavored to bring on the inhabitants of our frontiers, the merciless Indian savages

THE DECLARATION OF INDEPENDENCE para. 25-29 (U.S. 1776).

39. See *SLAVE NATION*, *supra* note 31, at 145-55.

40. ARTICLES OF CONFEDERATION OF 1781, art. V, para. 2, 4. Further, a committee of one member per state remained when the Congress was in recess, to provide some continuity. *Id.* art. IX, para. 5.

41. MERRILL JENSEN, *THE ARTICLES OF CONFEDERATION* 225-238 (1959).

42. LANCE BANNING, *THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC* 121-25 (1995); FARRAND, *FRAMING*, *supra* note 4, at 49-50; see generally DAVID P. STATUARY, *SHAY’S REBELLION: THE MAKING OF AN AGRARIAN INSURRECTION* (1980).

43. *SLAVE NATION*, *supra* note 31, at 57-58; GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC* 5-32 (2009).

plan forward and, simultaneously, reporting the deliberations of the Convention.⁴⁴

The delegates began their substantive work on May 29, 1787. On May 30, they adopted elements of the first six points in the Virginia Plan, establishing a new government with a bi-cameral legislature, a judiciary and an executive.⁴⁵ On May 31 they agreed that the first branch of the legislature should be elected by the people.⁴⁶ On Friday, June 1, they addressed the authority of the newly created executive branch in the seventh item in the Virginia Plan: “Resolved that a national executive be instituted; . . . that besides a general authority to execute the national laws, it ought to enjoy *the ‘executive rights vested in Congress by the confederation.’*”⁴⁷

This phrase was immediately challenged by one of the youngest delegates, Charles Pinckney from South Carolina.⁴⁸ “Pinckney

44. FARRAND, FRAMING, *supra* note 4, at 59-60; BANNING, *supra* note 42, at 111-57.

45. 1 FARRAND, RECORDS, *supra* note 5, at 30-31 (Journal, May 30), 35 (Madison’s notes, same date). Discussions at the Convention were usually conducted in a Committee of the Whole House, rather than before the Convention itself. The delegates adopted this procedure during the first weeks of the Constitutional Convention to permit free discussion. When matters were settled, they were reported to the Convention. Later, delegates would rely on more specific committees to make recommendations to the Convention. See FARRAND, FRAMING, *supra* note 4, at 263; CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787 40-41 (1966).

46. 1 FARRAND, RECORDS, *supra* note 5, at 46 (Journal), 48 (Madison’s notes). The rest of the convention was concerned with fleshing out the details of these fundamental propositions, and resolving three crises: (1) the relations between the large and small states in the legislature (the solution included equal representation of the states in the Senate and representation of the voters in the House of Representatives, with districts based on population with each slave counting as three-fifths of a person, known as the Connecticut Compromise), (2) whether slavery would continue without restriction throughout the country which was settled by establishing the then-largest slave-free area in the world, in the Northwest Territory, see SLAVE NATION, *supra* note 31, at 171-244, and (3) how the President should be elected, which was settled by inventing a complex electoral college. CAROL BERKIN, A BRILLIANT SOLUTION: INVENTING THE AMERICAN CONSTITUTION 117-68 (2002); DAVID O. STEWART, THE SUMMER OF 1787: THE MEN WHO INVENTED THE CONSTITUTION 207-16 (2007).

47. 1 FARRAND, RECORDS, *supra* note 5, at 63 (emphasis added). The Virginia Plan did not anticipate that legislative powers would be specified; rather it was expected that they might be as vague as was the British Parliament’s authority. Only after the compromise that provided equal votes for the states in the Senate and proportionate voting by population in the House, did the Convention decide to identify the powers of Congress. See SLAVE NATION, *supra* note 31, at 225-30.

48. 1 FARRAND, RECORDS, *supra* note 5, at 63; FARRAND, FRAMING, *supra* note 4, at 30 (“Pinckney, at twenty-nine, was the youngest member of the delegation and . . . [r]ather superficial but brilliant, with a high opinion of his own ability and with extraordinary conversational powers, it is little wonder that he pushed himself forward.”).

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was . . . afraid the Executive powers of (the existing) Congress might extend to peace & war which would render the Executive a Monarchy, of the worst kind, to wit an elective one.”⁴⁹

Under the Articles of Confederation, there was no separation between governmental powers. The Congress had the “sole and exclusive right and power of determining on peace and war.”⁵⁰ If this authority constituted “executive rights” then the Virginia Plan would give control over “peace and war” to the President.⁵¹ The leading authorities of the time agreed that the power of “peace and war” was a prerogative of the executive. This was the view of French philosopher Montesquieu,⁵² British philosopher John Locke,⁵³ and

49. 1 FARRAND, RECORDS, *supra* note 5, at 64-65 (his question raised concerns expressed in Tom Paine’s *Common Sense*, still vivid in the minds of citizens who would decide whether to ratify the Constitution).

50. ARTICLES OF CONFEDERATION of 1777, art. IX, para. 1. To exercise this power, or to appoint a “commander in chief of the army or navy,” the votes of nine states were required. *Id.* para. 6.

51. The Committee of Detail proposed the term “President” on August 6, 1787. 2 FARRAND, RECORDS, *supra* note 5, at 185. For simplicity, we have used the word “President” to include discussions of the “executive” before the title was adopted. Because the Articles of Confederation had no executive and no separation of powers, powers were vested in Congress. There had been no reason to consider whether the power of “peace and war” was to be classified as “executive” or “legislative.”

52. Charles de Secondat, Baron de Montesquieu was a seventeenth-century historian-philosopher whose *Spirit of the Laws* (1750) was well known to colonial lawyers for its analysis that identified legislative, executive and judicial functions of government.

By virtue of the first [legislative power], the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted. By the second [executive power], he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third [judicial power], he punishes criminals, or determines the disputes that arise between individuals.

1 CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 173-74 (Thomas Nugent trans., 1873); see also Matthew P. Bergman, *Montesquieu’s Theory of Government and the Framing of the American Constitution*, 18 PEPP. L. REV. 1 (1990); Kathryn L. Einspanier, *Burlamaqui, the Constitution, and the Imperfect War on Terror*, 96 GEO. L.J. 985 (2008).

53. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT §§ 144-48 (1690).

[B]ecause the Laws, that are at once, and in a short time made, have a constant and lasting force, and need a *perpetual* Execution, or an attendance thereunto: Therefore ‘tis necessary there should be a *Power always in being*, which should see to the *Execution* of the Laws that are made, and remain in force. And thus the *Legislative* and *Executive Power* come often to be separated.

Id. § 144.

There is another *Power* in every Commonwealth, which one may call *natural*, because it is that which answers to the Power every Man naturally had before he entered into society. For though in a commonwealth the Members of it are distinct Persons . . . yet in reference to the rest of Mankind, they

English Judge William Blackstone.⁵⁴ The works of all three were well known by delegates who were familiar with the political theories of the time.⁵⁵

While Madison agreed that “certain powers were in their nature Executive, and must be given to that department,”⁵⁶ he insisted to the Convention that the term “executive” did not “ex vi termini” (by definition) include the power to take the nation to war, regardless of the views of Montesquieu, Locke, and Blackstone.⁵⁷ Madison’s actions reflected his willingness to oppose their theories if they did not “fit” his perception of the American situation. In *Federalist No. 14*, he rejected Montesquieu’s view that a republic could only operate in small intimate states:

[W]hy is the experiment of an extended republic to be rejected

make one Body, which is . . . still in the State of Nature with the rest of Mankind. Hence it is, that the Controversies that happen between any Man of the Society with those that are out of it, are managed by the publick; and an injury done to a Member of their Body, engages the whole in the reparation of it. So that . . . the whole Community is one Body in the State of Nature, in respect of all other States or Persons out of its Community.

Id. § 145. “This therefore contains the Power of War and Peace, Leagues and Alliances, and all the Transactions, with all Persons and Communities without the Commonwealth, and may be called *Federative*, if any one pleases.” *Id.* § 146.

These two Powers, *Executive* and *Federative*, though they be really distinct in themselves, yet one comprehending the *Execution* of the Municipal laws of the Society *within* its self, upon all that are parts of it; the other the management of the *security and interest of the publick without*, with all those that it may receive benefit or damage from, yet they are always almost united. And though this *Federative Power* in the well or ill management of it be of great moment to the commonwealth, yet it is much less capable to be directed by antecedent, standing, positive Laws, than the *Executive*; and so must necessarily be left to the Prudence and Wisdom of those, whose hands it is in, to be managed for the publick good.

Id. § 147.

54. 1 WILLIAM BLACKSTONE, COMMENTARIES *249 (“The king has also the sole prerogative of making war and peace. For it is held by all the writers on the law of nature and nations, that the right of making war, which by nature subsisted in every individual, is given up by all private persons that enter into society, and is vested in the sovereign power: and this right is given up not only by individuals, but even by the entire body of people, that are under the dominion of a sovereign.”).

55. More than half the delegates were lawyers, and several others, including George Mason, Washington’s friend and advisor, were well versed in the policy and practices of government.

56. 1 FARRAND, RECORDS, *supra* note 5, at 67.

57. *Id.* at 70. Rufus King’s notes for June 1 read: “[Madison] agrees wth. Wilson in his definition of executive powers – executive powers ex vi termini, do not include the Rights of war & peace &c. but the powers shd. be confined and defined – if large we shall have the Evils of elective Monarchies – probably the best plan will be a single Executive of long duration wth. a Council, with liberty to depart from their Opinion at his peril.” *Id.*

merely because it may comprise what is new? Is it not the glory of the people of America, that whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience?⁵⁸

In light of these authorities, Pinckney's fears were well founded. The Virginia Plan could appear to give the power of "peace and war" to the President. This appearance would feed fears that were sure to be raised by opponents of a stronger Constitution.⁵⁹

Historian Bernard Bailyn emphasized that this fear of centralized power continued through the early years of independence and permeated the ratification process of the Constitution, writing that:

The initial publication of the Constitution on September 19, 1787, and Congress's call for the states to vote on ratification touched off one of the most extensive public debates on constitutionalism and on political principles ever recorded. . . . There were some fifteen hundred official delegates to the twelve state ratifying conventions, where every section, every clause and every phrase of the Constitution was raked over.

. . . [M]ost of the writings and speeches in this great debate. . . were sensible, and through them all there was one dominant theme: *fear*.

. . . The American Revolution in its essence had been a struggle against unconstrained centralized power

. . . [T]he Revolutionaries, after destroying the British power system, had put their faith in the smaller, weaker, local governments of the states, linked together into a loose national confederation But with the proposed Constitution, in 1787, the movement of the Revolution seemed to have been reversed. The

58. THE FEDERALIST NO. 14, at 141-47 (James Madison) (J.R. Pole ed., 2005).

59. The final point in the Virginia Plan proposed a method of ratifying the Constitution that would be consistent with the Declaration of Independence "[t]hat . . . Governments are instituted among Men, deriving their just powers from the consent of the governed." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). The Virginia Plan recommended that the outcome of the Convention be reported to the Congress of the Confederacy, and by them "submitted to an assembly or assemblies of Representatives, recommended by the several Legislatures to be expressly chosen by the people, to consider & decide thereon." 1 FARRAND, RECORDS, *supra* note 5, at 22. For a careful examination of the ratification process, see JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 94-160 (1996). Historian Gordon Wood describes this proposal as a vivid example of "The American Science of Politics." GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 593 (W.W. Norton & Co., 2d ed. 1972), "In America, a constitution had become . . . a charter of power granted by liberty rather than, as in Europe, a charter of liberty granted by power." *Id.* at 601; *see also* BANNING, *supra* note 42, at 111-32.

proposal before the ratifying conventions was not the dissolution of power but the opposite: the rebuilding of a potentially powerful central government that would have armed force . . . and that had the potential to sweep through the states and dominate the daily lives of the American people.

So fear and the responses to fear dominated the debate on ratification-fear of recreating a dangerous central power system, similar, it seemed, to what they had only recently escaped from.⁶⁰

These fears were embodied in Pinckney's question to the Convention on June 1, which precipitated the Convention's deliberation and decision about restraining the war powers of the executive.

II. JUNE 1, 1787: THE CONSTITUTIONAL CONVENTION GIVES ONLY CONGRESS THE POWER TO TAKE THE NATION TO WAR

After Pinckney stated his concern that the Constitution might create "a Monarchy, of the worst kind, to wit an elective one,"⁶¹ a response came swiftly and unanimously from everyone who spoke to the issue, delegates representing the northern, central and southern colonies.⁶² The discussion proceeded as follows, with the views of Pinckney's concern italicized.

[Mr. Rutledge of South Carolina] said he was for vesting the Executive power in a single person, *tho' he was not for giving him the power of war and peace . . .*.⁶³

Mr. Sherman [Connecticut] "considered the Executive magistracy as nothing more than an institution for carrying the will of the Legislature into effect . . . which was the depositary of the supreme will of the Society. . . ."⁶⁴

Mr. Wilson [Pennsylvania] . . . did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature.

60. BERNARD BAILYN, *TO BEGIN THE WORLD ANEW: THE GENIUS AND AMBIGUITIES OF THE AMERICAN FOUNDERS* 107-09 (2003).

61. 1 FARRAND, *RECORDS*, *supra* note 5, at 65.

62. *Id.* at 64-66.

63. *Id.* at 65 (emphasis added); FARRAND, *FRAMING*, *supra* note 4, at 30 ("At the head of the [South Carolina] delegation was the Irish-American, John Rutledge, who was regarded as the great orator of his day, and as 'one of the claims to fame of South Carolina.' He . . . had been a member of congress, governor of his state, and chancellor also. A man of unquestioned ability, noted for his quick wit and for his boldness and decision . . . he was distinctly a person to be reckoned with.").

64. 1 FARRAND, *RECORDS*, *supra* note 5, at 65 (emphasis added). Sherman had been a signer of the Declaration of Independence and the Articles of Confederation, a member of Congress, and was Mayor of New Haven, Connecticut. FARRAND, *FRAMING*, *supra* note 4, at 34. He was among the delegates who "were fearful of establishing a too strongly centralized government." *Id.* at 200.

Among others that of war & peace The only powers he conceived strictly Executive were those of executing the laws, and appointing officers⁶⁵

Mr. Randolph [Virginia] strenuously opposed a unity in the Executive magistracy. He regarded it as the foetus of monarchy. . . . the first genius of the people of America required a different form of Government. . . . The Executive ought to be independent. It ought therefore . . . to consist of more than one.⁶⁶

Mr. Wilson said that Unity in the Executive . . . would be the best safeguard against tyranny. He repeated that he was not governed by the British Model which was inapplicable to the situation of this Country; the extent of which was so great, and the manners so republican, that nothing but a great confederated Republic would do for it.⁶⁷

The absence of controversy over Pinckney's question about of whether the President would become an elected monarch did not mean it was unimportant; quite the opposite, it meant that the delegates who spoke were unified in their answer. Madison realized that a proposal to give the President the power to take the nation to war was not acceptable to the Convention. Thoughtful delegates from all three regions opposed the idea. No delegate supported it. All who spoke were firmly against giving the President any power over the decision for war.

Madison quickly moved to strike the language that Pinckney found objectionable in an effort to move the Convention on to different issues for discussion. However, he simultaneously moved to substitute alternative language that could have allowed Congress to accomplish the same result that concerned Pinckney. Madison thought that

it would be proper, before a choice sh[ould] be made between a unity and a plurality in the Executive, to fix the extent of the Executive authority; that as certain powers were in their nature Executive, and must be given to that depart[ment] whether

65. 1 FARRAND, RECORDS, *supra* note 5, at 65-66 (emphasis added). Wilson was "the strongest member of [the Pennsylvania] delegation and Washington considered him to be one of the strongest men in the convention." FARRAND, FRAMING, *supra* note 4, at 21. Madison and Wilson agreed that, "executive powers [by their terms] do not include the Rights of War & peace[, etc] but [its] powers [should] be confined and defined—if large we shall have the Evils of elected Monarchies" 1 FARRAND, RECORDS, *supra* note 5, at 70 (Rufus King's notes).

66. 1 FARRAND, RECORDS, *supra* note 5, at 66 (emphasis added) (He proposed a three person executive, which was rejected.); FARRAND, FRAMING, *supra* note 4, at 16 (describing Edmund Randolph, Virginia's Governor, "his manners were dignified and polished. He usually showed an excellent command of language and appeared well in debate. As a leader he was wanting in decision, as a figurehead he was splendid.").

67. 1 FARRAND, RECORDS, *supra* note 5, at 66 (emphasis added).

administered by one or more persons, a definition of their extent would assist the judgment in determining how far they might be safely entrusted to a single officer. He accordingly moved that so much of the clause before the Committee as related to the powers of the Executive sh[ould] be struck out & that (after the words) 'that a national Executive ought to be instituted' (there be inserted the words following) viz, "with power to carry into effect. the national laws. to appoint to offices in cases not otherwise provided for, *and to execute such other powers (not Legislative nor Judiciary in their nature)* as may from time to time be delegated by the national Legislature."⁶⁸

Pinckney quickly saw that Madison was trying to permit the Congress to allow the Executive to declare war by asserting that declaring war is neither legislative nor judicial. He

moved to amend the amendment by striking out the last member of it; viz. "and to execute such other powers not Legislative nor Judiciary in their nature as may from time to time be delegated." He said they were unnecessary, the object of them being included in the "power to carry into effect the national laws."⁶⁹

There was division on Madison's motion but ultimately "the words objected to by Mr. Pinkney [were] struck out."⁷⁰

This exchange was the defining moment that foreclosed the possibility that the President would be given the power to take the nation to war. Madison withdrew the original Virginia Plan language suggesting that the Constitution give the executive the power over peace and war, and Pinckney successfully defeated, by a seven to three vote, Madison's substitute motion which would have permitted Congress to give the power of peace and war to the President.⁷¹ Members of the Convention thus concluded that neither the Constitution nor Congress could allow the executive to hold the power to decide on "peace and war." The Convention retained only that part of the resolution giving the executive "power to carry into effect the national laws."⁷² Only one of the fifty-five delegates ever expressed a contrary desire during the Convention.⁷³

The astounding aspect of this moment is not that it occurred, for

68. *Id.* at 66-67 (emphasis added).

69. *Id.* at 67 (emphasis added).

70. *Id.* at 67 (as recorded by Madison).

71. *Id.* at 63-64 (Journal reports that on June 1 Madison's motion to insert the words "'and to execute such powers, not legislative or judiciary in their nature, as may from time to time be delegated by the national legislature' . . . passed in the negative." Madison recorded the vote. *Id.* at 67). The vote was Yeas: Massachusetts, Virginia, South Carolina; Nays: Connecticut, New York, New Jersey, Pennsylvania, Delaware, North Carolina, and Georgia. 1 FARRAND, RECORDS, *supra* note 5, at 67.

72. 1 FARRAND, RECORDS, *supra* note 5, at 67.

73. Pierce Butler on August 17. *See* 2 FARRAND, RECORDS, *supra* note 5, at 318.

it faithfully represented public attitudes concerning presidential power over war, nor that it went unquestioned for 168 years during which Congress alone declared wars. It is that for the last sixty-five years Congress has utilized the AUMF instead of declaring war and the lower federal courts have upheld the AUMF, relying on a number of arguments, including that the President and Congress “shared” war powers or that the issue involved a “political question.”

The judiciary has ignored the discussion of June 1. On the federal bench, only District Judges Sirica⁷⁴ and Dooling⁷⁵ have considered it. The silence of the federal courts, especially after the academic community had “found” the information beginning in 1986 is inexplicable. Some academics also continued to ignore the decisions of June 1.⁷⁶

As recently as 2008, a comprehensive two-part study of war powers of the President, published in the *Harvard Law Review*, misunderstood the meaning of June 1. The authors wrote that:

The Virginia Plan did not expressly discuss the military or war powers at all, although the delegates mentioned such matters in

74. See *infra* note 352.

75. See *infra* note 354 and accompanying text.

76. See FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW 17-31 (2d ed. 1989); LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMER'S CONSTITUTION 30-53 (Ivan R. Dee ed., 1988); JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 3-11 (1993); LOUIS FISHER, PRESIDENTIAL WAR POWERS 4-5 (2d ed., rev. 2004); PETER IRONS, WAR POWERS: HOW THE IMPERIAL PRESIDENCY HIJACKED THE CONSTITUTION 11-27 (2005); David Gray Adler, *The Constitution and Presidential Warmaking*, in THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 183-226 (David Gray Adler & Larry N. George eds., 1996).

Major authors who supported the War Powers Resolution of 1973 and did not mention June 1 include ARTHUR W. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 1-12 (1973); JACOB JAVITS, WITH DON KELLERMAN, WHO MAKES WAR: THE PRESIDENT V. CONGRESS 1-15 (1973) (Senator Javits was a major sponsor of the War Powers Resolution).

Other important authors who did not mention June 1 include BOWEN, *supra* note 45, at 54-68 (citing 1 FARRAND, RECORDS, *supra* note 5, at 64-69); CHRISTOPHER COLLIER & JAMES LINCOLN COLLIER, DECISION IN PHILADELPHIA: THE CONSTITUTIONAL CONVENTION OF 1787, 247 (1986) (“The Virginia Plan said nothing whatever about who could declare war The debate on war-making power began on August 17”); STEWART, *supra* note 46; RAKOVE, *supra* note 59, at 257 (noting that the Virginia Plan provided the President with “executive rights” of the Articles, but concludes that “whether those ‘executive rights’ included matters of war and diplomacy was left unresolved.”). As we have seen, the war issue was not left unresolved; it was defeated by a vote of 7-3. EDWARD KEYNES, UNDECLARED WAR: TWILIGHT ZONE OF CONSTITUTIONAL POWER 34 (1982); Robert Gray Blacknell, *Real Facts, “Magic Language,” The Gulf Of Tonkin Resolution, and Constitutional Authority to Commit Forces to War*, 13 NEW ENG. J. INT’L & COMP. L. 167 (2007); BERKIN, *supra* note 46, at 77-89 (discussing June 1, but without focusing on the war powers issue).

their early June debates about what was implicit in the broad generalities of the Virginia Plan and whether the executive power should be wielded by one person or by a group of three.⁷⁷

This comment minimizes the significance of the history and language of the exchanges at the Convention on June 1. As we have seen, the delegates discussed the issue and took votes to reach their resolution.⁷⁸ When the fears of a kingly presidency, and the views of Montesquieu, Locke and Blackstone are understood as they were in 1787, the significance of Part 7 of the Virginia plan is as vivid to us as it was to Charles Pinckney. He understood that the Virginia plan left open the possibility that the war powers of the Confederation could be assumed by the newly proposed presidency. That is the reason he opposed it and the Convention rejected it.

Members of the Convention concluded that neither the Constitution nor any future Congress could allow the executive to hold the power to decide on “peace and war.”⁷⁹ The Convention retained only that part of the resolution giving the executive “power to carry into execution the national laws.”⁸⁰

Madison’s decision to withdraw the phrase that might have placed the commencement of war in the hands of the executive meant that the power would fall within the authority of the legislature.⁸¹ Delegates John Dickinson, Ben Franklin, Edmund Randolph and George Mason provided further rationale for this decision in their discussions in the days that followed.

On June 2, 1787, the day after the convention denied the executive the power to declare war, delegate John Dickinson (Delaware) expressed his preference:

A limited Monarchy he considered as one of the best Governments in the world It was certain that equal blessings had never yet been derived from any of the republican form. *A limited monarchy however was out of the question. The spirit of the times—the state of*

77. David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARVARD L. REV. 689, 787 n.316 (2008) (citing 1 FARRAND, RECORDS, *supra* note 5, at 64-66, 70, 88-89, 97).

78. See *supra* notes 62-69 and accompanying text.

79. 1 FARRAND, RECORDS, *supra* note 5, at 67; 1 JONATHAN ELLIOT, THE JOURNAL OF THE FEDERAL CONVENTION, in THE DEBATES IN THE SEVERAL STATE CONVENTIONS 155.

80. Later in the Convention, Madison’s concept that the Constitution could permit Congress to authorize the President to take actions to defend the nation from invasions, insurrections, violence, and failure to enforce federal law was adopted following the recognition raised by the same Charles Pinckney that Congress would be rarely in session. See *infra* Part IV.

81. FARRAND, FRAMING, *supra* note 4, at 67.

*our affairs, forbade the experiment, if it were desireable.*⁸²

On the same day, Benjamin Franklin observed:

It will be said, that we don't propose to establish Kings. I know it. But there is a natural inclination in mankind to Kingly Government *I am apprehensive therefore, perhaps too apprehensive, that the Government of these States, may in future times, end in a Monarchy.*⁸³

Edmund Randolph of Virginia, opposed a single person as the executive,

declaring that he should not do justice to the Country which sent him if he were silently to suffer the establishment of a Unity in the Executive department. He felt an opposition to it which he believed he should continue to feel as long as he lived. He urged . . . *that the permanent temper of the people was adverse to the very semblance of Monarchy.*⁸⁴

Two days later, George Mason of Virginia, Washington's neighbor echoed Franklin's concern:

We are not indeed constituting a British Government, but a more dangerous monarchy, an elective one. We are introducing a new principle into our system Do gentlemen mean to pave the way to hereditary Monarchy? . . . *Notwithstanding the oppressions & injustice experienced among us from democracy; the genius of the people is in favor of it, and the genius of the people must be consulted.*⁸⁵

The delegates were political realists as well as inventors. They understood that if the people perceived that "a limited monarchy" was being considered, the Constitution would not be adopted by the ratifying conventions and the infirmities of the Articles of Confederation would doom the union.⁸⁶ The Framers went to great

82. 1 FARRAND, RECORDS, *supra* note 5, at 86-87 (emphasis added).

83. *Id.* at 83 (emphasis added).

84. *Id.* at 88 (emphasis added).

85. *Id.* at 101 (emphasis added); see WOOD, *supra* note 43, at 16-19; JOSEPH J. ELLIS, HIS EXCELLENCY GEORGE WASHINGTON 63 (2004) (describing how Mason advised Washington in the early 1770's); FARRAND, FRAMING, *supra* note 4, at 17 (describing Mason as "the author of the Virginia Bill of Rights and at sixty two the rival of Patrick Henry in popular estimation as the champion of the rights of the people and of the states."). "According to Madison, he possessed 'the greatest talents for debate of any man he had ever seen or heard speak.' He was a gentleman of the old school, courtly but self-willed." FARRAND, FRAMING, *supra* note 4, at 17-18.

86. One example of the uncertainty that the delegates lived with occurred when the Convention faced a deadlock over slavery, from late June to July 13, that almost dissolved the nation. The Convention was saved when the Continental Congress sitting in New York created the then-largest slave free area of the world by adopting the Northwest Ordinance of 1787 with the votes of eight states, four from the north and four from the South. See SLAVE NATION, *supra* note 31, at 171-202 ("Deadlock

lengths on June 1 to assure that the newly minted executive would not have the indicia of kingship. While they worked assiduously and successfully to keep their deliberations secret, they were aware from the last clause in the Virginia Plan that they would likely recommend the Constitution be adopted by a process that now would be called “transparent.”⁸⁷

On June 13, the Convention sitting as a Committee of the Whole House, reported its recommendations concerning the Virginia resolutions.⁸⁸ These recommendations provided that “a national Executive be instituted to consist of a single person with power to carry into execution the national laws.”⁸⁹ Again, there is no reference to the President having the executive powers of the Congress under the Articles of Confederation, or of Madison’s alternative proposal allowing Congress the power to delegate “executive power” concerning decisions on war to a President. Thus the Convention again made clear that the power of war was exclusively “legislative.”

Later in July, the Convention created a Committee of Detail, to bring together the decisions made since the beginning of the Convention.⁹⁰ Its report, on August 6, became the framework for much of the rest of the Convention. The report followed exactly the conclusion of June 1 that the Congress—not the President—should have the power to “make war.”⁹¹

That same report provided that “[t]he Executive Power of the United States shall be vested in a single person. His stile shall be ‘The President of the United States of America’ . . . He shall be commander in chief of the Army and Navy of the United States, and of the Militia of the Several States.”⁹²

The decision that the power to “make war” belonged to Congress was agreed to on June 1, 1787, confirmed by the Committee on Detail on August 6, recommended by the Committee of the Whole House on June 13, and reaffirmed with one modification by the Convention on August 17.⁹³

Over Slavery at the Constitutional Convention”).

87. See *supra* note 59.

88. See *supra* note 45.

89. 1 DEP’T OF STATE, DOCUMENTARY HISTORY OF THE CONST. OF THE U.S. OF AM. 263 (1894).

90. 1 FARRAND, RECORDS, *supra* note 5, at 116-17.

91. *Id.* at 182.

92. *Id.* at 185.

93. 1 FARRAND, RECORDS, *supra* note 5, at 66-67, 229; 2 FARRAND, RECORDS, *supra* note 5, at 185, 318-19. The one modification is analyzed in Part III.

III. AUGUST 17, 1787: THE CONVENTION CONFIRMED CONGRESS' SOLE
POWER TO DECIDE ON WAR AND STARTED TO CONSIDER
PRESIDENTIAL ACTION FOR EMERGENCIES

Friday, August 17, 1787, was a cool sixty-three degrees, with some rain.⁹⁴ During that cloudy afternoon, the Convention had been working through the report of the Committee on Detail, and reached its recommendation that Congress was to have the power to “make war.”

Charles Pinckney was troubled. On June 1, he had objected to giving that power to the President. Now he objected to giving that power to Congress as a whole because: “Its proceedings were too slow. It would meet but once a year. The House of Representatives would be too numerous for such deliberations. The Senate would be the best depository, being more acquainted with foreign affairs, and most capable of proper resolutions.”⁹⁵

Pierce Butler of South Carolina thought that Pinckney's point about the House not being in session applied equally to the Senate. He proposed vesting the power to “make war” in the President, “*who will have all the requisite qualities, and will not make war but when the Nation will support it.*”⁹⁶ Butler was the only delegate at the Convention to propose that Presidents be given the power to make war.⁹⁷

Mr. Madison and Mr. Gerry moved to insert “declare,” striking out “make” war; leaving to the Executive the power to repel sudden attacks.⁹⁸

94. SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 334 (James H. Hutson ed. 1987).

95. 2 FARRAND, RECORDS, *supra* note 5, at 318. The quoted text includes spelling clarifications.

96. *Id.* at 318 (emphasis added); *see also* JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11, at 100 (2005) (asserting that Butler represented “another group” in proposing to give the President the power to “make war”). Professor Yoo exaggerated: Butler represented only himself. He had no supporters. WORMUTH & FIRMAGE, *supra* note 76, at 18; ELY, *supra* note 76, at 3; FISHER, *supra* note 76, at 9.

97. 2 FARRAND, RECORDS, *supra* note 5, at 312-20.

98. *Id.* at 318. Madison and Gerry saw that Pinckney, once again, had obliquely identified two serious problems, as he had on June 1. First, Congress would rarely be in session, and the President had no authority to enter hostilities if the country was attacked. There was nothing similar to Articles IX and X of the Articles of Confederation, which had authorized a committee of the states to act in the absence of Congress, if representatives of nine states were present. Second, Congressional power to “make” war might overlap with the President's authority as Commander in Chief. It had become necessary to break apart the components of “make war,” which among the European monarchies had included both the declaration of war and its conduct. *See supra* notes 52-54 and accompanying text.

Mr. Sh[er]man thought it stood very well. The Executive should be able to repel and not to commence war. "Make" better than "declare" the latter narrowing the power too much.⁹⁹

Mr. Gerry never expected to hear in a republic a motion to empower the Executive alone to declare war.¹⁰⁰

Mr. Elsworth. There is a material difference between the cases of making *war*, and making *peace*. It should be more easy to get out of war, than into it. War also is a simple and overt declaration. [P]eace attended with intricate & secret negotiations."¹⁰¹

Mr. Mason was against giving the power of war to the Executive, because not (safely) to be trusted with it; or to the Senate, because not so constructed as to be entitled to it. He was for clogging rather than facilitating war; but for facilitating peace. He preferred "declare" to "make."¹⁰²

On the Motion to insert declare-in place of Make, (it was agreed to).¹⁰³

The delegates, satisfied with the outcome, did not wish further discussion of which body would determine on war.¹⁰⁴

The right of the President to defend against "sudden attacks" was not only consistent with colonial practice and common sense, but a necessity in an era of slow communications. Thus Article I, Section

99. 2 FARRAND, RECORDS, *supra* note 5, at 318. The first sentence's reference to "it" refers to the Madison/Gerry proposal. The second sentence clarifies both the first and third sentences. Sherman supported the Madison/Gerry proposal in accord with his clearly stated position on June 1. *See supra* note 64 and accompanying text.

100. 2 FARRAND, RECORDS, *supra* note 5, at 318.

101. *Id.* at 319.

102. *Id.* Mason's distrust of presidential ambition may have led him to oppose adoption of the Constitution at the Virginia Convention. Since the "Connecticut Compromise" of July 16, the states were to be represented equally in the Senate. The Virginians had been opposed to equal representation of states from the beginning of the Convention, fearing domination or obstructionism by the smaller states as had been demonstrated under the "failed" Articles of Confederation. Mason may have been referring to this situation in saying the Senate "is not so constructed as to be entitled to it." *Id.*

103. *Id.* ("N. H. no. Mas. abst. Cont. no. Pa ay. Del. ay. Md. ay. Va. ay. N. C. ay. S. C. ay. Geo. ay. [Ayes-7; noes-2; absent - 1] On the remark by Mr. King that 'make' war might be understood to 'conduct' it which was an Executive function, Mr. Elsworth gave up his objection (and the vote of Cont was changed to-ay.")). Thus, the final tally was Ayes 8, Noes 1, Absent 1.).

104. *Id.* Pinckney, who had started that day's discussion by proposing that the Senate alone "make war," was dissatisfied with the conclusion that Congress be authorized to "declare war" so he moved to strike out the entire clause. *Id.* at 318-19. His motion was rejected "without call of states." But Pierce Butler was not finished. He had seen his proposal that the President be empowered to declare war rejected by all the delegates who spoke. He moved to "give the Legislature the power of peace, as they were to have that of war." But the Convention was finished with the question. All states present voted no to Butler's last proposal by a vote of ten to zero. *Id.* at 319.

8, Clause 11 of the Constitution was written to read, “Congress shall have Power . . . To declare War.”¹⁰⁵ Congress included the House of Representatives, the only body elected directly by the people in the original Constitution.¹⁰⁶ After the unanimous understanding on June 1 that the decision for war was “legislative” rather than “executive,”¹⁰⁷ the discussion on August 17 created an exception to permit the President to respond to “sudden attacks.”¹⁰⁸ But it did not reduce the legislative authority of Congress to decide if the United States would be pulled into any war – total or limited – by the “sudden attack.” In fact, the concept agreed to on June 1, that the executive power did not include “war and peace,” was reinforced on August 17 by the statements quoted above from Gerry, Sherman, Ellsworth and Mason.¹⁰⁹

When Madison and Gerry proposed to change ‘make’ to ‘declare,’ they invoked not only centuries of the laws of nations, but the specific meaning that the term “declaration” had in revolutionary times.

As historian Pauline Maier explains: “a declaration was a particularly emphatic pronouncement or proclamation that was often explanatory: from the fourteenth century ‘declaration’ implied ‘making clear’ or ‘telling’ . . . *but the word ‘declaration’ also referred to a legal instrument, a written statement of claims served on the defendant at the commencement of a civil action.*”¹¹⁰

The colonists adopted the term “declaration” at the first Continental Congress in 1774. It was a “Declaration of Rights and Grievances” that asserted independence from Parliament.¹¹¹ In 1775, Congress responded to the fighting at Lexington and Concord with a “Declaration on the causes and necessity of taking up arms,” authorizing military action against the British.¹¹² In 1776, the

105. U.S. CONST. art. I, § 8, cl. 11.

106. The Senators were selected by state legislatures, the President by the Electoral College. Direct election of Senators was first mandated in the Seventeenth Amendment. U.S. CONST. amend. XVII.

107. *See supra* Part II.

108. 2 FARRAND, RECORDS, *supra* note 5, at 318.

109. *Id.* at 318-19.

110. PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 50-51 (1997) (emphasis added); *see* BLACK’S LAW DICTIONARY 437 (8th ed. 2004) (“Declaration 7. Common-law pleading. The plaintiff’s first pleading in a civil action. It is an amplification of the original writ on which the action is founded, with the additional circumstances of the time and place of injury.”) (citing BENJAMIN J. SHIPMAN, HANDBOOK OF COMMON-LAW PLEADING § 76, at 192 (Henry Winthrop Ballantine ed., 3d ed. 1923)).

111. SLAVE NATION, *supra* note 31, at 103-09.

112. A DECLARATION BY THE REPRESENTATIVES OF THE UNITED COLONIES OF NORTH-AMERICA, NOW MET IN CONGRESS AT PHILADELPHIA, SETTING FORTH THE CAUSES AND NECESSITY OF THEIR TAKING UP ARMS, *reprinted in* DOCUMENTS

Declaration of Independence validated a war already in progress and declared independence from the king and did “declare . . . that, as free and independent states, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do.”¹¹³

These declarations by the Continental Congress have three common characteristics: All were thoughtful statements speaking for the nation in crisis. All demanded a new political or legal order: Parliament was to be bargained with, not obeyed; the Crown was to be fought until it withdrew its troops. All looked to future transformations. They not only altered existing arrangements between Britain and the colonies, but also commenced military actions to achieve the objectives they described. Garry Wills sees the term “declaration” in two different lights. “Declaration sometimes meant just the explanation of an act. But at other times, declaring was the act itself—e.g., when a sovereign declares war Declaring independence, like declaring war, is an act of state.”¹¹⁴

“Declare war” as an “act of state” was a potent political reality, rather than a trivial formality.¹¹⁵ While the Framers might have used other words in giving Congress the power to declare war, there is no evidence that they intended Congress to play the role of a herald announcing that a war existed that had been commenced by a President.¹¹⁶ It is misleading to insist that the power of Congress to

ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, H.R. Doc. No. 69-398, at 10-15 (1927).

113. THE DECLARATION OF INDEPENDENCE, para. 33 (U.S. 1776).

114. GARRY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE 336 (1978) Wills made a distinction between the declaration (document) of July 2 and the declaration (communication of the document) of July 4 that seems overdrawn when considered in light of the slow communications in 1776. *Id.* at 337.

115. WORMUTH & FIRMAGE, *supra* note 76, at 17-20.

116. YOO, *supra* note 96, at 146, relies heavily on the language in Article I, Section 10 Clause 3 of the Constitution: “No state shall, without the consent of Congress . . . engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.” Yoo claims that this provision deals with the “exact war powers process between Congress and the states that scholars critical of the presidency want to create between Congress and the President.” *Id.* The framers did not use the language of Article 1, Section 10 in Article I, Section 8; therefore, according to some scholars, they did not intend to get the same result as in Article 1, Section 10. This leads Professor Yoo to the view that Congress is merely a reporter of the fact that war exists. *Id.* at 147. He claims the provisions of Article I, Section 8, Clause 11 “involve the power of Congress to recognize or declare the legal status and consequences of certain wartime actions, and not the power to authorize those actions.” *Id.* at 147.

Professor Yoo ignores the history of June 1 and subsequent events, which demonstrates that the framers were virtually united in concluding that the President should not be able to take the nation to war. *See supra* Part II. They expressed that idea in the August 6 Committee of Detail printed working copy by giving the power to

declare war was so anemic. Its power was placed in the Constitution alongside powers to regulate captures on land and water, raise and support armies, provide and maintain a navy, regulate state militias, make rules for the land and naval forces, and make “all Laws which shall be necessary and proper for carrying into execution *the foregoing powers and all other powers vested by the Constitution in the Government of the United States or in any Department or Officer thereof.*”¹¹⁷ This text makes plain that Congress may direct the President who is, of course, an “officer of the United States.”

“Make war” to the Congress and not the President and later changed it to “declare” only when Pinckney pointed out that this left the nation unprotected during the expected long congressional recesses. *See First Printed Draft of the Constitution, August 6, 1787, selected pages*, NATIONAL ARCHIVES, http://www.archives.gov/exhibits/charters/charters_of_freedom_zoom_pages/charters_of_freedom_zoom_6.1.3.html. They also provided for the federal legislature

To call forth the aid of the militia, in order to execute the laws of the Union, enforce treaties, suppress insurrections, and repel invasions And to make all laws that shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested, by this Constitution, in the government of the United States, or in any department or officer thereof,

thereby establishing that the President’s power was to be kept under Congressional control. *Id.* This development of the structure of Federal government obviated any necessity for using the language of Article I, Section 10.

Article I, Section 10 was a near copy of Article IX of the Articles of Confederation. The framers wanted to continue the pre-existing relationship with the states, so they used language that was similar to that already in use. The creation and empowering of a President was a far more complex matter. Differences in wording between Section 10 and Section 8 of Article I means that the delegates were thinking about different things.

All that Yoo’s analysis about the failure to use the same wording as Article I, Section 10 proves is that the Convention had developed the President’s relation to Congress without any need of copying Article I, Section 10. The relationship between Congress and the President is vastly different than the relationship between the Congress and the States. The way the Convention developed these ideas was also different. Yet, Yoo assumed they’re the same. YOO, *supra* note 96, at 146-47.

Beyond that, there is a timing problem in Prof. Yoo’s view. While the language of Article I, Section 10, Clause 3 that Yoo says the framers could have used for Article I, Section 8, Clause 11 was similar to the language in the Articles of Confederation, the specific wording of Article I, Section 10, Clause 3 for the new Constitution was not finalized until the last days of the Convention. *See* UNIVERSITY OF VIRGINIA, THE PAPERS OF GEORGE WASHINGTON, WASHINGTON’S HANDWRITTEN ANNOTATIONS TO THE CONSTITUTION, AS DICTATED BY THE COMMITTEES, <http://gwpapers.virginia.edu/documents/constitution/draft/> [hereinafter PAPERS OF GEORGE WASHINGTON]. While the delegates could have spent more time working on the style of the document, they did not. They left different wording to express their interest in continuing to avoid having a State use its militia against another country and bringing the United States into a war without the prior consent of the Congress, and to prevent a President from using the military against another country and causing the same result.

117. U.S. CONST. Art. I, §8, cl. 11-16, 18 (emphasis added); *see also* WILLS, *supra* note 22, at 189-90.

The word “declare” does not stand alone; it is coupled with the word “war.” These words together had been used extensively.¹¹⁸ Emmerich de Vattel’s work, *The Law of Nations*, was published in 1758.¹¹⁹ It defines “declaration of war” as follows:

§51. *Declaration of war.* T[he] right of making war belongs to nations only as a remedy against injustice, it arises from an unhappy necessity. This remedy is so dreadful in its effects . . . that unquestionably the law of nature allows of it only at the utmost extremity We owe this . . . to declare to this unjust nation, or its chief, that we at length are going to have recourse to the last remedy, and make use of open force, [for the purpose of] bringing him to reason. This is called *declaring war*. . . . War is that state in which a nation prosecutes its right by force.¹²⁰

Vattel’s approach is reflected directly in the Supreme Court’s 1800 opinion in *Bas v Tingy*.¹²¹

The Framers knew personal ambition animated people to become political figures and to expand the power of their positions, particularly in war time. Fear that presidential ambition would shape national policy toward war permeated the Convention. Hamilton was especially concerned. An intensely ambitious man himself, he understood how ambitious leaders could create wars.

118. Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by “Declare War,”* 93 CORNELL L. REV. 45, 67-80 (2007). For a detailed discussion of the American understanding of declaring war in the Revolutionary era, see *id.* at 77-94.

119. 3 EMMERICH DE VATTEL, *THE LAW OF NATIONS OR THE PRINCIPALS OF NATURAL LAW* (P.H. Nicklin & T. Johnson 1758).

120. *Id.* ch. IV, § 51 (“Of the Declaration of War, and of war in form”). Vattel further explained:

§52. *What it is to contain.* A declaration of war being necessary, as a further effort to terminate the difference without the effusion of blood, by making use of the principle of fear. . . . §53. *It is single or conditional.* After a fruitless application for justice, a nation may proceed to a declaration of war, which is then *pure and simple*. But, . . . the demand of justice . . . may, if we think proper, be accompanied by a conditional declaration of war, notifying that we will commence hostilities unless we obtain immediate satisfaction. This is all which the natural law of nations requires. . . . §55 *Formalities of a declaration of war.* It is necessary that the declaration of war be known to the state against whom it is made. §56. *Other reasons for the necessity of its publication.* . . . It is necessary for a nation to publish the declaration of war for the instruction and direction of her own subjects. . . . §60. *Time of the declaration.* The law of nations does not impose the obligation of declaring war, with a view to give the enemy time to prepare for an unjust defense.

121. “[E]very contention by force between two nations, in external matters, under the authority of their respective governments, is not only war, but public war.” *Bas v. Tingy*, 4 U.S. 37, 40 (1800) (Washington, J.). This case is discussed in full *infra*, Part VI.

Some causes of wars among nations, he wrote in *Federalist No. 6*, “take their origin entirely in private passions; in the attachments, enmities, interests, hopes and fears of leading individuals. . . . Men of this class . . . assuming the pretext of some public motive, have not scrupled to sacrifice the national tranquility to personal advantage, or personal gratification.”¹²²

Hamilton believed in a strong executive, but he, like virtually all the delegates, did not trust future Presidents with power to take the nation to war. In his June 18 speech to the Constitutional Convention, Hamilton proposed that the Senate, not the President, have the “sole power” to declare war, and that the President was to direct it when “authorized or begun.”¹²³

The Framers knew opponents of serious changes in the Articles of Confederation would pounce on any argument that the executive would become an elected despotic monarch, who would in short order make his reign hereditary.¹²⁴ Anti-Federalists worried that Presidents might create and use a standing army for their own purposes, and worried about the provision allowing appropriations for the army for two years instead of one. Hamilton, in *Federalist No. 26* responded that the Congress would check any abuse every two years. He wrote that “The legislature . . . will be *obliged* . . . to deliberate upon the propriety of keeping a military force on foot; to come to a new resolution on the point; and to declare their sense of the matter, *by a formal vote in the face of their constituents*.”¹²⁵

This emphasis on the “formal vote in the face of their constituents” was an assurance that “the people” would be heard in the House of Representatives, the only body elected directly by the voters. Then, as now, the public understood the hazards of undertaking a war. By the time of the Convention, the nation had been engaged in war for seventeen of the previous thirty-one years.¹²⁶ A declaration of war by each legislator in a “formal vote in the face of

122. THE FEDERALIST NO. 6, at 21-22 (Alexander Hamilton) (J.R. Pole ed., 2005).

123. “The authorities & functions of the Executive to be as follows: . . . to have the direction of war when authorized or begun The Senate to have the sole power of declaring war, the power of advising and approving all Treaties” 1 FARRAND, RECORDS, *supra* note 5, at 292.

124. BANNING, *supra* note 42, at 121-27; *see infra* note 133 (discussing the views of the Anti-Federalists). “The founders of our republics . . . seem never for a moment to have turned their eyes from the danger to liberty from the overgrown and all-grasping prerogative of an hereditary magistrate, supported and fortified by an hereditary branch of the legislative authority.” THE FEDERALIST NO. 48, at 268 (James Madison) (J.R. Pole ed., Hackett Publ’g Co., 2005).

125. THE FEDERALIST NO. 26 at 141 (Alexander Hamilton) (J.R. Pole ed., 2005) (emphasis added).

126. The French and Indian War from 1754-1763 and the Revolution, from 1775 to 1783. DAVID SAVILLE MUZZEY, AN AMERICAN HISTORY 96-107, 128, 351 (1911).

their constituents” placed each House member’s political future at risk.¹²⁷ This personal responsibility would make legislators cautious in deciding to go to war. Voters would consider war’s impact on their lives, fortunes, futures, and on the nation.¹²⁸ They could seek to influence their representatives’ votes, and perhaps unseat them at the next election.¹²⁹ For Hamilton this was a crucial element of the “checks and balances” among constituents and their representatives. The right of the people to vote their representatives out of office was the ultimate check on the powers of Congress.¹³⁰ While his statement was made in the context of arguments over a standing army, that issue was connected by the Anti-Federalists with the power of the President to control the military and thus the country.

James Wilson of Pennsylvania, speaking on December 11, 1787, to his state’s ratifying convention, emphasized the significance of Congress declaring war:

This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large: this declaration must be made with the concurrence of the House of Representatives: from this circumstance we may draw a certain

127. THE FEDERALIST NO. 26, at 141 (Alexander Hamilton) (J.R. Pole ed., 2005).

128. U.S. CONST. art. I, §5, cl. 3, requires a roll call vote whenever one fifth of the members present request it.

129. See generally THE FEDERALIST NO. 26, at 141 (Alexander Hamilton) (J.R. Pole ed., 2005) (“The provision for the support of a military force will always be a favourable topic for declamation. As often as the question comes forward, the public attention will be roused and attracted to the subject, by the party in opposition; and if the majority should be really disposed to exceed the proper limits, the community will be warned of the danger and will have an opportunity of taking measures to guard against it. Independent of parties in the national legislature itself, as often as the period of discussion arrived, the state legislatures, who will always be not only vigilant but suspicious and jealous guardians of the rights of the citizens, against encroachments from the federal government . . .”).

130. See 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES WITH NOTES OF REFERENCES (1803), Appendix, Note D, Of the Constitution of the United States, Part 5—Powers of Congress (cont) Paragraph 11, <http://www.lonang.com/exlibris/tucker/tuck-1d5.htm>.

One of the most salutary provisions of the constitution . . . appears to be that no appropriation of money to use for an army shall be for a longer term than two years . . . [I]nasmuch as no appropriation can be made for a longer time than the period affixed for the duration of congress, it will be in the power of the people, should the reasons of such an appropriation be disapproved by them to remove their representatives, on a new election, from a trust which they may appear willing to betray. It is, therefore, to be hoped, that such a consideration will afford a sufficient check to the proceedings of congress, in regard to the raising and supporting armies.

Id.

conclusion that nothing but our national interest can draw us into a war.¹³¹

The statements made in the *Federalist Papers*, private statements, and comments at ratifying conventions gave the Anti-Federalists no reason to claim that the President had been given the authority to take the nation to war.¹³² They cursed future Presidents who they saw seeking a monarchy by using the military, but never claimed either that under the Constitution the President could take the nation to war or that he should not defend the nation if attacked.¹³³ The Anti-Federalists' silence on an issue that would have

131. THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (Jonathan Elliot, 2d rev. ed.) ("The Debates In The Convention Of The State Of Pennsylvania"), available at [http://lcweb2.loc.gov/cgi-bin/query/r?ammem/hlaw:@field\(DOCID+@lit\(ed0028\)\)](http://lcweb2.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(ed0028))).

132. The depths of the Framers' concern that the public would be fearful of creating a powerful President was exemplified by Abraham Baldwin, a Connecticut Yankee who had moved to Georgia after the revolution and became a delegate to the Convention. When he was worried that the New England States might not ratify the Constitution, he prepared a statement explaining the Executive branch to Yale President Ezra Stiles, who was revered as "the most learned man in New England." Richard Kohn, *The Constitution and National Security*, in AMERICAN DEFENSE POLICY, 103 n.62 (Paul J. Bolt et al. eds., 2005).

The Opin. of Convention, [was] that [the President] should be a Character respectable by the Nations as well as by the Federal Empire. To this End that as much Power should be given him as could be consistently with guarding against all possibility of his ascending in a Tract of years or Ages to Despotism and absolute Monarchy: – of which all were cautious. Nor did it appear that any Members in Convention had the least Idea of insidiously laying the Foundation of a future Monarchy.... But were unanimously guarded and firm against every Thing of this ultimate Tendency. Accordingly they meant to give considerable Weight as Supreme Executive, but fixd him dependent on the States at large, and at all times impeachable.

3 FARRAND, RECORDS, *supra* note 5, at 169 (Ezra Stiles Diary).

133. See HERBERT J. STORING WITH MURRAY DRY, THE COMPLETE ANTI-FEDERALIST, IN SEVEN VOLUMES (1981). Volume 1 includes an essay entitled, *What the Anti-Federalists Were For*, *id.* at 3, and *The Constitution of the United States, Keyed to the Principal Anti-Federalist Discussions*. *id.* at 110. The citations to this work that follow will include Storing's key system, which includes volume, number of the entry and paragraph, in a parenthetical following the citation:

[G]reat power in the hands of a magistrate, and that power connected, with a considerable duration, may be dangerous to liberties of a republic the deposit of vast trust in the hands of a single magistrate, enables him in their exercise, to create a numerous train of dependants this tempts his ambition . . . and gives him the means and time to perfect and execute his designs.

2 STORING, *supra*, at 114 (CATO, 2.6.25).

When an army shall once be raised for a number of years, it is not probable that it will find much difficulty in getting congress to pass laws for applying monies to its support. I see so many men in America fond of a standing army, and especially among those who probably will have a large share in administering the federal system.

strengthened opposition to the Constitution is telling evidence that they had no reason to believe that the President would have “joint powers of war with the Congress.”¹³⁴ But that is exactly what the federal courts decided in the late 1960s and early 1970s in upholding the Vietnam AUMF.¹³⁵

IV. THE TERM “DECLARE WAR” WAS UNDERSTOOD TO INCLUDE COMMENCEMENT OF “ANY CONTENTION BY FORCE” AGAINST ANOTHER NATION

The Committee of Detail had devised the words “make war” on August 6. The shift to “declare war” on August 17 had been a quick response to Pinckney’s concern.¹³⁶ Madison certainly knew that the

Id. at 241 (FEDERAL FARMER 2.8.39).

But supposing our future rulers . . . attempt to invade the rights of conscience; I may be asked how will they be able to effect so horrible a design? I will tell you my friends the unlimited power of taxation will give them the command of all the treasures of the continent; a standing army will be wholly at their devotion, and the authority which given them over the militia, by virtue of which they may, if they please, change all the officers of the militia on the continent in one day, and put in new officers whom they can better trust . . .

3 STORING, *supra*, at 36 (AN OLD WHIG, 3.3.29).

This Constitution is said to have beautiful features; but when I come to examine these features, sir, they appear to me horribly frightful. Among other deformities, it has an awful squinting; it squints towards monarchy; and does not this raise indignation in the breast of every true American? Your President may easily become king . . . If your American chief be a man of ambition and abilities, how easy is it for him to render himself absolute! The army is in his hands, and if he be a man of address, it will be attached to him, and it will be the subject of long meditation with him to seize the first auspicious moment to accomplish his design; and, sir, will the American spirit solely relieve you when this happens? I would rather infinitely you and I am sure most of this Convention are of the same opinion to have a king, lords, and commons, than a government so replete with such insupportable evils. If we make a king, we may prescribe the rules by which he shall rule his people, and interpose such checks as shall prevent him from infringing them; but the President, in the field, at the head of his army, can prescribe the terms on which he shall reign master, so far that it will puzzle any American ever to get his neck from under the galling yoke. . . . Can he not, at the head of his army, beat down every opposition? Away with your President! we shall have a king; the army will salute him monarch: your militia will leave you, and assist in making him king, and fight against you: and what have you to oppose this force? What will then become of you and your rights? Will not absolute despotism ensue?

5 STORING, *supra*, at 224-25 (PATRICK HENRY speech before Virginia Ratifying Convention, June 5, 1788); *see also id.* at 238-39.

134. 50 U.S.C. §§ 1541-48 (2006).

135. *See infra* Part IX.

136. The choice of the term “make war” may have been taken by the committee from VATTEL, *supra* note 119, Book 4, §51, where the words Declare and Make are

Convention had made clear on June 1 that it would not grant to the President the power to take the nation to war. Now the delegates were faced with the need to protect the nation without violating that promise. They built on Madison's idea that had been rejected on June 1 of permitting Congress to authorize the President to use military force, but only in certain situations. George Mason of Virginia suggested the beginning of such a plan on August 18, the day after the discussion concerning "make" and "declare." "[Mason] hoped there would be no standing army in time of peace, unless it might be for a few garrisons. The Militia ought therefore to be the more effectually prepared for the public defence. . . . He moved 'a power to regulate the militia.'"¹³⁷

Implicit in the Declare War Clause is the necessity that the "declaration" precede the application of military force; otherwise, it would be the President's decision, which could be motivated by his or her political and/or personal concerns rather than national interests.¹³⁸

These risks were well understood by James Madison. In 1793, while defending President Washington's declaration of neutrality in the war between Britain and France, Alexander Hamilton—writing as Pacificus in the exchange of pamphlets called the *Pacificus-Helvidius Debate*, with James Madison as Helvidius—asserted that the President's authority over foreign affairs extended to judgments concerning taking the nation to war. Meanwhile, at Jefferson's urging, Madison supported the exclusive power of Congress over

used interchangeably. Or it may have been informed by Hamilton's proposal of April 18 that included the idea that the President should "*have the direction of war when authorized or begun The Senate to have the sole power of declaring war.*" 1 FARRAND, RECORDS, *supra* note 5, at 292 (June 18, 1787).

137. 2 FARRAND, RECORDS, *supra* note 5, at 326.

138. In *Mitchell v. Laird*, 488 F.2d 611, 615 (D.C. Cir. 1973), Judge Wyzanski and Chief Judge Bazelon dissented from the view of the rest of the Circuit that continued funding of the Vietnam War by Congress would constitute "approval" of the war.

This court cannot be unmindful of what every schoolboy knows: that in voting to appropriate money or to draft men a Congressman is not necessarily approving of the continuation of a war no matter how specifically the appropriation or draft act refers to that war. A Congressman wholly opposed to the war's commencement and continuation might vote for the military appropriations and for the draft measures because he was unwilling to abandon without support men already fighting. An honorable, decent, compassionate act of aiding those already in peril is no proof of consent to the actions that placed and continued them in that dangerous posture. We should not construe votes cast in pity and piety as though they were votes freely given to express consent. Hence Chief Judge Bazelon and I believe that none of the legislation drawn to the court's attention may serve as a valid assent to the Vietnam War.

Id.

decisions about war. Madison's views concerning the dangers of presidential decisions to initiate war remain current:

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

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. . . . War is in fact the true nurse of executive aggrandizement. In war a physical force is to be created, and it is the executive will which is to direct it. In war the public treasures are to be unlocked, and it is the executive hand which is to dispense them. In war the honors and emoluments of office are to be multiplied; and it is the executive patronage under which they are to be enjoyed. It is in war, finally, that laurels are to be gathered, and it is the executive brow they are to encircle. The strongest passions, and most dangerous weaknesses of the human breast; ambition, avarice, vanity, the honorable or venial love of fame, are all in conspiracy against the desire and duty of peace.¹³⁹

The lower federal courts in the 1960s and 1970s ignored the necessity for the separation of powers that Madison saw in 1793. Congressional funding *after* a war was commenced by a President was said to satisfy the constitutional requirement that Congress declare war.¹⁴⁰

As Pinckney recognized on August 17, authorizing only Congress to declare war left the nation undefended while Congress was in recess, which was expected to be most of the time.¹⁴¹ The nation was at risk from many directions. Shay's rebellion had been replicated down the eastern seaboard, with revolutionary veterans joining to close courts that were throwing them into debtor's prisons.¹⁴²

139. Alexander Hamilton, *Helvidius Number IV*, in THE PACIFICUS-HELVIDIUS DEBATES OF 1793-1794: TOWARD THE COMPLETION OF THE AMERICAN FOUNDING (Morton J. Frisch ed., 2007), available at <http://oll.libertyfund.org/title/1910>.

140. Orlando v. Laird, 443 F.2d 1039, 1042 (2d Cir. 1971).

141. The Constitution requires Congress to meet at least once a year. U.S. CONST. art I, § 1. There is no provision for a committee of Congress to meet while the Congress is in recess, as there had been under the Articles. See ARTICLES OF CONFEDERATION OF 1781, art. IX.

142. SAUL CORNELL, A WELL REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA 39 (2006). The extent of Shay's rebellion is discussed in STATUARY, *supra* note 42; WOOD, *supra* note 43, at 111-16 describes the pressures from the northwest and the south; GEORGE C. HERRING, FROM COLONY TO SUPERPOWER: U.S. FOREIGN RELATIONS SINCE 1776 50-57 (2008).

Southerners worried about slave insurrections.¹⁴³ North-westerners feared attacks by Native Americans, opposing seizures of lands they considered their own.¹⁴⁴ The British continued their hold on forts in the northwest, and Spain pressed claims along the Mississippi.¹⁴⁵ The Madison-Gerry amendment was proposed expressly to allow presidential action without prior congressional approval only in case of “sudden attacks,” to accomplish the plainly evident need for defense when Congress was in recess. The Convention moved to address these other problems of defense on August 18, the day after changing “make” to “declare” war.¹⁴⁷

V. AUGUST 18, 1787: THE CONVENTION SUPPORTED RELIANCE ON
STATE MILITIA CALLED UP TO ENFORCE FEDERAL LAW, REPEL
INVASIONS, AND SUPPRESS INSURRECTIONS

In the remaining month of the Convention, the Framers added three provisions that filled the “gap” in the nation’s defenses that Pinckney had identified. These provisions (1) strengthened the state Militias under federal standards making them subject to presidential direction in specified situations, (2) assured that Congress could “support” as well as “authorize” an Army, and could fund that army for up to two years at a time, and (3) authorized Congress to issue letters of marque and reprisal.¹⁴⁶

Organizing Federal Defenses by Use of State Militias

With Anti-Federalists worried that a standing army subject to presidential control was an opening to presidential monarchy, the Convention turned to the existing state militias to provide protection when Congress was in recess. By 1787, the government had almost completely disbanded the continental army and sold off the navy.¹⁴⁷

143. SLAVE NATION, *supra* note 31, at 33-37.

144. WOOD, *supra* note 43, at 120-21.

145. See generally THE FEDERALIST NO. 24 (Alexander Hamilton) (describing the hazards facing the nation).

146. *Letters of Marque and Reprisal*, CONSTITUTION.ORG, <http://www.constitution.org/mil/lmr/lmr.htm> (last updated Apr. 15, 2009) (“Letters of marque and reprisal are commissions or warrants issued to someone to commit what would otherwise be acts of piracy. They will normally contain the following first three elements, unless they imply or refer to a declaration of war to define the enemies, and may optionally contain the remainder: 1. Names person, authorizes him to pass beyond borders with forces under his command. 2. Specifies nationality of targets for action. 3. Authorizes seizure or destruction of assets or personnel of target nationality. 4. Describes offense for which commission is issued as reprisal. 5. Restriction on time, manner, place, or amount of reprisal.”).

147. Estimates of the actual size of the military vary widely, while congressional concern about the military appears constant. The organization of the Army authorized in 1787 was 700; in 1789 it was 886; in 1790 it was 1,273; in 1819, it was 2,232. 2

In this situation, while wisdom precluded giving the President the power to declare war, the delegates authorized Congress to allow the calling forth of the state militias into federal service in any of three circumstances: insurrections, invasions, and resistance to enforcement of federal law.¹⁴⁸

Congress provided the President with authority to federalize the state militias in the Militia Act of 1792, and continued it in later acts.¹⁴⁹ Presidents under Article II, Section 2 were to exercise this authority whenever they decided that one or more of these three circumstances were taking place. In developing this approach, the Convention used Madison's idea of June 1. While it did not give Congress the power to provide the President *carte blanche* authority to take the nation to war, it did give Congress the power to pass statutes permitting the President to decide to take military action in the specific circumstances named in the Constitution without awaiting a new congressional approval. The power to summon the state Militias was the federal government's only method of obtaining a military force quickly. This arrangement conformed with Madison's

FRANCIS B. HEITMAN, HISTORICAL REGISTER AND DICTIONARY OF THE UNITED STATES ARMY, FROM ITS ORGANIZATION, SEPTEMBER 29, 1789 TO MARCH 2, 1903 at 560-61 (Gov't Printing Office, 1903). *But see* 1 AMERICAN MILITARY HISTORY Ch. 7 (Richard W. Stewart ed.), available at www.history.army.mil/books/amh-v1/ch07.htm ("As soon as President James Madison proclaimed the peace in February 1815, the Congress . . . acted promptly to create a small but efficient professional army that was thought adequate, with the addition of the militia, to guard against a repetition of the disasters of the War of 1812. Congress voted a peacetime army of 10,000 men (in addition to the Corps of Engineers), about a third of the actual wartime strength, a figure in marked contrast to the 3,220-man regular peacetime establishment under President Thomas Jefferson. . . . On March 2, 1821 Congress passed the Reduction Act that cut the enlisted strength of the Army by half (from 11,709 to 5,586) but cut the size of the officer corps by only a fifth (from 680 to 540). . . . [T]he idea of an expansible army was beginning to achieve a measure of acceptance.").

148. Article I, Section 8, Clause 15 provides that "The Congress shall have the Power . . . [t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions," and Article II, Section 2, Clause 1 provides that "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." In addition, Article IV, Section 4 provides that "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." Discussions appear in 2 FARRAND, RECORDS, *supra* note 5, at 47-49.

149. For thoughtful analysis of the constitutional provision and resulting statutes enacted by Congress, see Stephen I. Vladeck, *Emergency Powers and the Militia Acts*, 114 YALE L.J. 149 (2004), and Stephen I. Vladeck, *The Calling Forth Clause and the Domestic Commander in Chief*, 29 CARDOZO L. REV. 1091 (2008). In 1799, President John Adams called up 500 militia men to suppress the Fries Rebellion in Western Pennsylvania. WOOD, *supra* note 43, at 265, 414-15.

rationale at the convention for changing “Make” to “Declare”—to allow Presidents to “respond to sudden attack.”¹⁵⁰ All three of these conditions call for defensive actions to protect the people and the government.

George Washington’s views on the Militia and the need for a standing army were well known, and, while not expressed on the Convention floor, must have carried enormous weight with the delegates.¹⁵¹ Those views were shaped by the poor performance of the Militia in New York in 1776. He wrote to the President of the Congress on September 24, 1776:

To place any dependence upon militia is assuredly resting upon a broken staff. Men just dragged from the tender scenes of domestic life, unaccustomed to the din of arms, totally unacquainted with every kind of military skill, which (being followed by a want of confidence in themselves when opposed to troops regularly trained, disciplined, and appointed, superior in knowledge and superior in arms) makes them timid and ready to fly from their own shadows.¹⁵²

The tension between the opponents of a standing army and those who shared the Washington-Hamilton view was discussed from July 23 to July 28 at the Convention. It produced a disjointed proposal to give Congress some power over use of the states’ Militia. The Committee of Detail report on August 6 concerning the power of Congress was better organized. It identified the following as congressional powers “To subdue a rebellion in any State, on the application of its legislature; To make war; To raise armies; To build and equip fleets; To call forth the aid of the militia, in order to execute the laws of the union, enforce treaties, suppress insurrections, and repel invasions.”¹⁵³

On August 18, George Mason’s comment about federal regulation of state Militias triggered an exploratory discussion about the relation between federal authority over the state Militias that ended with a referral to a “Grand Committee.”¹⁵⁴ That Committee reported to the Convention on August 21, with the recommendation that Congress should have the power

150. *See supra* Part III.

151. Washington, while President of the Convention, rarely spoke to the Convention. On its last day, he supported a proposal to change the minimum number of residents to entitle a state to a representative to 30,000 from 40,000. It was instantly adopted. 2 FARRAND, RECORDS, *supra* note 5, at 644.

152. Letter from George Washington to the President of Congress (Sept. 24, 1776), in 1 THE AMERICAN SPIRIT: UNITED STATES HISTORY AS SEEN BY CONTEMPORARIES 97, 97 (Thomas A. Bailey & David M. Kennedy eds., 5th ed. 1984).

153. 2 FARRAND, RECORDS, *supra* note 5, at 182.

154. *See supra* note 145 and accompanying text.

[t]o make laws for organizing arming and disciplining the Militia, and for governing such part of them as may be employed in the service of the US reserving to the States respectively, the appointment of the officers, and the authority of training the Militia according to the discipline prescribed by the United States.¹⁵⁵

This language was debated on August 23. After a quiet beginning, the convention agreed on the underlined part of the proposal.¹⁵⁶

At the Virginia ratifying convention in 1788, Madison confronted a Mr. Clay, who questioned why the Congress should have the power to call out the Militia to enforce federal law.¹⁵⁷

Mr. Madison supposed the reasons of this power to be so obvious that they would occur to most gentlemen. If resistance should be made to the execution of the laws, he said, it ought to be overcome. This could be done only two ways; either by regular forces, or by the people. By one or the other it must unquestionably be done. If insurrections should arise, or invasions should take place, the people ought unquestionably to be employed to suppress and repel them, rather than a standing army. The best way to do these things, was to put the militia on a good and sure footing, and enable the government to make use of their services when necessary¹⁵⁸

The Anti-Federalists, whose major focus was on the dangers of a standing army, never challenged the Constitution on the grounds that it allowed Congress to permit the President to use military force in the three circumstances listed in Article I, Section 8, Clause 15. They must have concluded, along with Mr. Clay, that answers like those given by Madison at the Virginia ratifying convention, were convincing. If the Anti-Federalists had argued that Presidents had to ask Congress permission to repel invasions, put down insurrections, and enforce federal law, they might have been seen by the public to be out of their minds.

Supporting an Army and Funding It for Two Years

On August 18, the Committee of Eleven (Brearly, Chairman) presented a series of amendments intended to form the basis of a Committee report that was presented on September 5.¹⁵⁹ One of them

155. 2 FARRAND, RECORDS, *supra* note 5, at 356.

156. *Id.* at 387-88. The disagreement was with Madison's effort to allow the Federal Government to appoint General Officers of the military. It was voted down, eight to three.

157. *See* 1 FARRAND, RECORDS, *supra* note 5, at 318-19.

158. *Id.*

159. 2 FARRAND, RECORDS, *supra* note 5, at 323-24. The proposals included:

would have allowed appropriations for the army for up to two years.¹⁶⁰ It was approved without dissent after Elbridge Gerry and Roger Sherman engaged in a gentle exchange.¹⁶¹

On September 12 the Committee on Style provided its report to the Convention, including wording for Article I, Section 8, Clause 11 that was left unchanged in the final Constitution.¹⁶²

On Friday, September 14, George Mason moved to preface the Militia clause with the words, “And that the liberties of the people may be better secured against the danger of standing armies in time of peace.” Gouverneur Morris “opposed the motion as setting a dishonorable mark of distinction on the military class of Citizens.” The motion was defeated by a vote of nine to two.¹⁶³

How did the army fit into the process erected around the “declare war” and “call forth” clauses? Could the President use the army in situations where he is allowed to “call forth” the Militia? The role of the army in enforcing federal law, suppressing insurrections and repelling invasions was not specified in the Constitution, as was the role of the Militia. However, the “guarantee clause” did imply that the federal government could use military force to protect a state

to insert the words ‘and support’ between the word ‘raise’ and the word ‘armies’ [adopted] . . . to strike out the words ‘build and equip’ and to insert the words ‘provide and maintain’ in the [navy] clause, . . . [adopted] . . . to insert ‘To make rules for the government and regulation of the land and naval forces’. . . [adopted] . . . to annex the following proviso to the last clause ‘provided that in time of peace the army shall not consist of more than --- thousand men’[rejected] . . . to insert the following as a clause in the 1 sect. of the 7 article: ‘to make laws for regulating and disciplining the militia’ of the several States, reserving to the several States the ‘appointment of their militia Officers;’ . . . to postpone the last clause in order to take up the following; ‘To establish an uniformity of exercise and arms for the ‘militia and rules for their government when called into ‘service under the authority of the United States; and to ‘establish and regulate a militia in any State where it’s legislature ‘shall neglect to do it;’ . . . to refer the last two motions to a Committee which passed in the affirmative and they were referred to the Committee of eleven. [Ayes – 8; noes – 2; divided – 1].

Id.

160. 2 FARRAND, RECORDS, *supra* note 5, at 508.

161. *Id.* at 509 (“Mr. Gerry objected that it admitted of appropriations to an army for two years instead of one, for which he could not conceive a reason—that it implied there was to be a standing army which he inveighed against as dangerous to liberty, as unnecessary even for so great an extent of Country as this . . . Mr. Sherman remarked that the appropriations were permitted only, not required to be for two years. As the Legislature is to be biennially elected, it would be inconvenient to require appropriations to be for one year, as there might be no Session within the time necessary to renew them . . . The clause was agreed to (without dissent).”).

162. 2 FARRAND, RECORDS, *supra* note 5, at 585-95; PAPERS OF GEORGE WASHINGTON, *supra* note 116.

163. 2 FARRAND, RECORDS, *supra* note 5, at 616-17

against “insurrection” and “domestic violence.”¹⁶⁴ This clause suggests the use of whatever military force may be available. In 1807, Congress passed a one-sentence amendment to the Militia Act, called the Insurrection Act of 1807, allowing the President to use the army or navy in two of the three cases where the Militia could be used: insurrections and enforcement of federal laws. Invasions were not included in this act, but they were covered under the “sudden attack” language Madison and Gerry had used to explain the shift from “make” to “declare.”¹⁶⁵

Thus the advocates of a standing army achieved their objective in twenty years, although the efforts of those who preferred to rely on the Militia succeeded in limiting the President’s unfettered use of the army to the defensive situations where the Militia could be “called forth.”¹⁶⁶

Authorizing Congress to Issue Letters of Marque and Reprisal

On August 18, the day after the Convention changed “make war” to “declare war,” Elbridge Gerry urged that “something [be] inserted concerning letters of marque.”¹⁶⁷ On September 5, the Convention voted without discussion to “add to the clause ‘To declare war,’ the words ‘and grant letters of marque and reprisal.’”¹⁶⁸ This gave Congress the power to authorize private parties to take hostile action against nations or individuals.¹⁶⁹

164. U.S. CONST. art. IV, § 4.

165. Insurrection Act of 1807, Ch. 39, 2 Stat. 443, 443.

[I]n all cases of insurrection, or obstruction to the laws, either of the United States, or of any individual state or territory, where it is lawful for the President of the United States to call forth the militia for the purpose of suppressing such insurrection, or of causing the laws to be duly executed, it shall be lawful for him to employ, for the same purposes, such part of the land or naval force of the United States, as shall be judged necessary, having first observed all the pre-requisites of the law in that respect.

Id. The Insurrection Act of 1807 was recommended by President Jefferson in the wake of rumors of efforts by Aaron Burr to “split off” Florida or Texas. *See* WOOD, *supra* note 43, at 384-85.

166. The supporters of greater executive control of a centralized military were assisted by the poor performance of the Militia fighting Native Americans in the northwest between 1790 and 1792. *Id.* at 129-130.

167. 2 FARRAND, RECORDS, *supra* note 5, at 326.

168. *Id.* at 505, 508.

169. *Id.* at 318-19. This sparse history read without considering the discussion on June 1 has generated confusion. *See* Charles A. Lofgren, *War-Making Under The Constitution: The Original Understanding*, 81 YALE L.J. 672, 699 (1972) (concluding that “[s]ince the old Congress held blanket power to ‘determine’ on war, and since undeclared war was hardly unknown in fact and theory in the late eighteenth century, it therefore seems a reasonable conclusion that the new Congress’ power ‘to declare War’ was not understood in a narrow technical sense but rather as meaning the power to commence war, whether declared or not”); SCHLESINGER, JR., *supra* note 76, 1-12. In

At the end of the long summer of 1787, the delegates had addressed both of the issues raised by Charles Pinckney. They avoided giving the President the power to declare war by insisting it was a “legislative power.” At the same time, they enabled Congress to authorize the President to call forth state Militias to enforce federal laws, suppress insurrections, and repel invasions – the major threats to the union.

Chief Justice Marshall used the canon of *expressio unius est exclusio alterius*, translatable as “the expression of one concept precludes an inconsistent alternative,” in *Marbury v. Madison*, the case establishing the Supreme Court as the final judge of the meaning of the Constitution.¹⁷⁰

Applied to the militia provision in Article I Section 8, Clause 15, this maxim would mean that while the Constitution permitted Congress to allow Presidents to make the decision to take hostile military actions in the listed circumstances, it simultaneously prohibited Congress from allowing the President to make the decision to take hostile military actions in any other circumstance.¹⁷¹

VI. FIRST IMPLEMENTERS OF THE CONSTITUTION INTERPRETED THE “DECLARE WAR” CLAUSE AS VESTING ALL POWER IN CONGRESS

The history of those who exercised power under the new Constitution is particularly important because their actions reflected the thinking among both the public and officials of the founding era concerning how the Constitution should be interpreted and applied in the absence of prior experience.¹⁷²

Bas v. Tingy, Tolbot v. Seeman, and Little v. Barreme

George Washington was inaugurated President on April 30, 1789.¹⁷³ The First Congress met on March 4, 1789.¹⁷⁴ The Second

1798, during the quasi-war with France, Congress gave the President authority to issue letters of marque and reprisal when the U.S. had no fleet of its own. *See infra* notes 179-85 and accompanying text.

170. *Marbury v. Madison*, 5 U.S. 137, 174 (1803) (“Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all.”).

171. *Marbury v. Madison* holds that because the Constitution gave the Supreme Court original jurisdiction to a named class of cases, Congress had no authority to include situations that were outside of those named classes. *See id.* at 173-77.

172. *District of Columbia v. Heller*, 128 S.Ct. 2783, 2837 (2008).

173. WASHINGTON’S INAUGURAL ADDRESS OF 1789, NATIONAL ARCHIVES AND RECORDS ADMINISTRATION (Apr. 30, 1789), *available at* http://www.archives.gov/exhibits/american_originals/inaugtxt.html.

174. ALVIN M. JOSEPHY, JR., ON THE HILL: A HISTORY OF THE AMERICAN CONGRESS 1 (1979).

Congress met on October 24, 1791.¹⁷⁵ This Congress adopted the Militia Acts on May 2, 1792.¹⁷⁶ The Militia acts authorized the President to call the state Militia into federal service under the three conditions set out in Article I, Section 8, Clause 15, and declared all able-bodied free white males between 18 and 45 to be enrolled in the Militia of his state.¹⁷⁷ President Washington called out the Militia of four states during the Whiskey Rebellion of 1794 and assembled an army of 13,000 men to suppress the violent reaction to taxation on distilled whiskey that had been imposed in 1791.¹⁷⁸

In 1798, during the presidency of John Adams, in the “quasi war” with France over the seizure of American ships and seamen, Congress enacted statutes authorizing the following specific actions to be taken at specific dates in the future: an embargo against trade with France;¹⁷⁹ authorization of U.S. merchant vessels to repel attacks by French ships, and capture such ships;¹⁸⁰ limited military action against French ships, but only within U.S. territorial jurisdiction or on the high seas, thereby precluding action against French ships or properties elsewhere;¹⁸¹ the issuance of letters of marque and reprisal by the President for the same purpose;¹⁸² a limited time (roughly one year) during which the President could exercise his authority to attack French shipping, and the requirement of further congressional action to extend his authority for any additional period;¹⁸³ a termination of the U.S. Treaty with

175. *Id.* at 78.

176. Militia Act of 1792, ch. 28, 1 Stat. 264 (1792) (amended 1975); *see also* Vladeck, *Emergency Powers and the Militia Acts*, *supra* note 149, at 152 n.9 (discussing the series of Militia Acts passed by Congress in 1792, 1795, 1807, 1861, and 1871).

177. Militia Act of 1792, ch. 28, 1 Stat. 264 (1792).

178. *See* LELAND D. BALDWIN, *WHISKEY REBELS: THE STORY OF A FRONTIER UPRISING* 185 (rev. ed. 1968); WILLIAM HOGELAND, *THE WHISKEY REBELLION: GEORGE WASHINGTON, ALEXANDER HAMILTON, AND THE FRONTIER REBELS WHO CHALLENGED AMERICA'S NEWFOUND SOVEREIGNTY* 7 (2006).

179. An Act to Suspend the Commercial Intercourse between the United States and France, and the Dependencies Thereof, 1 Stat 565 § 1 (1798).

180. An Act to Authorize the Defense of the Merchant Vessels of the United States against French Depredations, 1 Stat 572 § 1 (1798).

181. An Act Further to Protect the Commerce of the United States, 1 Stat 578 § 1 (1798).

182. 1 Stat. 572 § 2.

183. An Act to Suspend the Commercial Intercourse between the United States and France, and the Dependencies Thereof, 1 Stat 565 § 4 (“*And be it further enacted*, That this act shall continue and be in force until the end of the next session of Congress, and no longer.”) (Approved, June 13, 1798); An Act Further to Suspend the Commercial Intercourse between the United States and France, and the Dependencies Thereof, 1 Stat 613 § 8. (“*And be it further enacted*, that this act shall continue and be in force until the third day of March, in the year one thousand eight hundred.”) (Approved, February 9, 1799); An Act Further to Suspend the Commercial Intercourse

France;¹⁸⁴ and the ability of the President to relax the embargo in case France changed its policies or for other political considerations.¹⁸⁵

These statutes were reviewed by the Supreme Court in *Bas v. Tingy*.¹⁸⁶ Justice Bushrod Washington, the nephew of President Washington, wrote:

[E]very contention by force between two nations, in external matters, under the authority of their respective governments, is not only war, but public war. If it be declared in form, it is called *solemn*, and is of the perfect kind; because one whole nation is at war with another whole nation; and *all* the members of the nation declaring war, are authorised to commit hostilities against all the members of the other, in every place, and under every circumstance. . . .

But hostilities may subsist between two nations more confined in its nature and extent; being limited as to places, persons, and things; and this is more properly termed *imperfect war*; because not solemn, and because those who are authorised to commit hostilities, act under special authority, and can go no farther than to the extent of their commission. Still, however, it is *public war*, because it is an external contention by force, between some of the members of the two nations, authorised by the legitimate powers¹⁸⁷

Between the United States and France, and the Dependencies Thereof, 2 Stat. 7 § 12. (“*And be it further enacted*, that this act shall be and remain in force until the third day of March, one thousand eight hundred and one: *Provided, however*, the expiration thereof shall not prevent or defeat any seizure, or prosecution for a forfeiture incurred under this act, and during the continuance thereof.”) (Approved, February 27, 1800).

184. An Act to Declare the Treaties Heretofore Concluded with France, no Longer Obligatory on the United States, 1 Stat 578.

185. 1 Stat 565 § 5.

186. 4 U.S. 37 (1800). Bas was master of the ship *Eliza* owned by United States persons. On March 31, 1799, the *Eliza* was seized on the high seas by a French Privateer. Tingy was commander of a public armed ship, the *Ganges* that recovered control of the *Eliza* on April 21, 1799, and took it to a United States port where Tingy filed a libel seeking salvage for having recovered the *Eliza*. Two statutes were involved that addressed the amount of salvage due. The earliest was adopted on June 28, 1798, allowing a salvage of one-eighth of the value of the salvaged ship. The second was adopted on March 2, 1799, which allowed a salvage of one-half the value of the ship if it had been retaken more than ninety-six hours after being captured by an “enemy.” The ship owners claimed that the 1798 Act applied, and Tingy and the crew of the *Ganges* claimed that the 1799 law applied. The case turned on whether France was an “enemy” of the United States. The ship owners claimed that since Congress had not declared war against France, it was not an enemy of the United States and therefore 1798 law applied. The trial court found that the 1799 law applied, and both the Circuit Court of Appeals and the Supreme Court agreed, holding that it was not necessary for Congress to use the words “declare war” to engage in military hostilities against another country.

187. *Id.* at 40-41 (emphasis added). Justice Chase was of the same opinion.

The conclusion that Congress was empowered under Article 1, Section 8, Clause 11 to declare both general and limited wars was the first Supreme Court interpretation of the power to declare war. Justice Chase emphasized the flexibility of choice that rested in the Congress:

The acts of congress have been analyzed to show, that a war is not openly denounced against *France*, and that *France* is no where expressly called the enemy of *America*: but this only proves the circumspection and prudence of the legislature. Considering our national prepossessions in favour of the *French* republic, congress had an arduous task to perform, even in preparing for necessary defence, and just retaliation.¹⁸⁸

Bas v. Tingy established that Article 1, Section 8, Clause 11 included all forms of armed hostilities against another nation, limited or unlimited.¹⁸⁹ It left no room for a separate category of “undeclared hostilities.” Yet, in 1971, the First Circuit Court of Appeals in *Massachusetts v. Laird* carved out such a category and denied that Congress had the broad power that *Bas v. Tingy*

There are four acts, authorised by our government, that are demonstrative of a state of war. A belligerent power has a right, by the law of nations, to search a neutral vessel; and, upon suspicion of a violation of her neutral obligations, to seize and carry her into port for further examination. But by the acts of congress, an *American* vessel is authorised: 1st. To resist the search of a *French* public vessel: 2d. To capture any vessel that should attempt, by force, to compel submission to a search: 3d. To re-capture any *American* vessel seized by a *French* vessel; and 4th. To capture any *French* armed vessel wherever found on the high seas. This suspension of the law of nations, this right of capture and re-capture, can only be authorised by an act of the government, which is, in itself, an act of hostility. But still it is a restrained, or limited, hostility. . . . The designation of ‘*enemy*’ extends to a case of perfect war; but as a general designation, it surely includes the less, as well as the greater, species of warfare.

Id. at 43-44 (emphasis added). Justice Patterson took the same position.

The *United States* and the *French* republic are in a qualified state of hostility. An imperfect war, or a war, as to certain objects, and to a certain extent, exists between the two nations; and this modified warfare is authorised by the constitutional authority of our country. . . . As far as congress tolerated and authorized the war on our part, so far may we proceed in hostile operations. It is a maritime war; a war at sea as to certain purposes. . . . It is therefore a public war between the two nations, qualified, on our part, in the manner prescribed by the constitutional organ of our country. In such a state of things, it is scarcely necessary to add, that the term ‘*enemy*,’ applies; it is the appropriate expression, to be limited in its signification, import, and use, by the qualified nature and operation of the war on our part.

Id. at 45-46 (emphasis added).

188. *Id.* at 45.

189. Kathryn L. Einspanier, *Burlamaqui, the Constitution, and the Imperfect War on Terror*, GEO. L.J. 985, 993 (2008).

explained in such detail.¹⁹⁰

The year after Justices Washington and Chase made clear that Congress had the option of declaring all-out war or a more limited form of hostilities in *Bas*, Chief Justice Marshall affirmed the distinction and underscored the responsibility of Congress in having chosen which option to pursue: “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 enquiry.”¹⁹¹

In 1804, Chief Justice John Marshall wrote the *Little v. Barreme* opinion, holding that a misinterpretation of a statute by the President as Commander in Chief did not protect a naval ship’s captain who followed instructions from the President instead of correctly reading the statute for himself.¹⁹²

In *Little*, “The Flying-Fish,” a Danish vessel suspected of being

190. *Massachusetts v. Laird*, 451 F. 2d 26, 32 (1st Cir. 1971) (“nothing was said of undeclared hostilities.”); see *infra* notes 387-392 and accompanying text.

191. *Talbot v. Seeman*, 5 U.S. 1, 28 (1801), was a claim by the commander and crew of the USS Constitution for salvage for recapturing a ship armed with cannon owned by Hamburgers carrying goods made in a British colony, and seized and staffed by French military forces in the Caribbean heading to a French possession. Captain Talbott took the ship to New York where the salvage was claimed. The ship owners who were neutrals as between France and the United States, claimed that no salvage was due because of their neutral status. Chief Justice Marshall held that the recapture by the USS Constitution was justified under statutes intended to protect American shipping from French attacks, and that the issue of salvage had been addressed by Congress amounting to from one-eighth to one-half of the value of ship and cargo depending on circumstances. He confirmed the holding in *Bas v. Tingy* in the previous year, that Congress “may authorize general hostilities . . . or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed.” *Talbott*, 5 U.S. at 19. Since French law would require that the ship be seized in St. Domingo because the cargo originated in an English colony, the USS Constitution did provide a benefit to the owners of ship and cargo, and therefore, by interpretation of the statutes, some salvage was warranted although the precise amount was not settled by statute, and it fell to the Admiralty Courts to assess the extent of salvage, which the court set at six percent of the value of ship and cargo. See also J. Gregory Sidak, *The Quasi War Cases—And Their Relevance To Whether “Letters of Marque And Reprisal” Constrain Presidential War Powers*, 28 HARV. J. L & PUB. POL’Y 465 (2005) (arguing that *Bas*, *Talbot*, and *Little v. Barreme* are not “constitutional” cases but involve private litigation rather than the allocation of power between Congress and the President). Sidak contends that *Bas* concerns a privateer, after a prize for personal profit and not under the control of Congress through appropriations. But, both pay and prize are congressional inducements to follow Congressional declarations of what is a war. The definition of “what is a war” would be the same for both military acting at the direction of the commander in chief and privateer acting pursuant to the statutory rules for attaining the prize. Thus, we disagree that the definition of “war” in *Bas v. Tingy* could have a different meaning in “public matters.” The ship “Ganges” was “a public armed ship” at the time it seized the “Eliza.” Thus the law applied in the case was a public statute that affected wartime operations at sea.

192. *Little v. Barreme*, 6 U.S. 170, 179 (1804).

controlled by United States residents, was sailing from Jeremie, a French port in Haiti, to St. Thomas, a Danish possession, when it was captured by the U.S. Frigate Boston, commanded by Captain Little. The Flying-Fish was on a voyage from, not to, a French port.¹⁹³ The “quasi-war” embargo act authorized the President to order U.S. naval ships to stop and examine any ship “owned, hired or employed” by a U.S. resident on the high seas and to seize ships bound *to* a French port. Chief Justice Marshall found that the President had improperly authorized the seizure of U.S. ships bound *from* French ports as well,¹⁹⁴ and asked:

Is the officer who obeys [the President’s order] liable for damages sustained by this misconstruction of the act, or will his orders excuse him? . . .

I confess the first bias of my mind was very strong in favor of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages. . . . But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is, that the instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass.¹⁹⁵

Thus, even though the interpretation by the President might have resulted in a reasonable military tactic, the President could not expand an authority given to him by Congress.¹⁹⁶ Equally important

193. *Id.* at 170.

194. *Id.* at 178-79.

195. *Id.* at 179.

196. See WORMUTH & FIRMAGE, *supra* note 76, at 63 (“The Supreme Court has from the beginning held that contemporaneous legislative interpretations of the Constitution are highly persuasive as to its meaning. Here we have not only legislative but also judicial judgments that Congress may initiate action short of general war, that the initiation both of general war and of action short of general war belongs to Congress, and that it is for Congress to prescribe the dimensions of the war.”); FISHER, *supra* note 76, at 25 (“Those cases do not imply that once Congress authorizes war, the President is at liberty to choose the time, location and scope of military activities. In authorizing war, Congress may place limits on what Presidents may and may not do.”).

A contrary argument has been made that the Congressional action in *Little* was taken under Congress’ power to regulate foreign commerce, and has no relation to its power to declare war. See Matthew J. Franck, *Flying Fish Indeed*, NATIONAL REVIEW ONLINE: BENCH MEMOS BLOG (January 30, 2007 8:27 a.m.), <http://www.nationalreview.com/bench-memos/51891/flying-fish-indeed/matthew-j-franck>. While ingenious, Franck’s argument ignores the holding in *Bas v. Tingy* that “There are four acts, authorised by our government, that are demonstrative of a state of war.” 4 U.S. at 43; see also *supra* note 187. The Court found that the

suspension of the law of nations, this right of capture and re-capture, can only be authorised by an act of the government, which is, itself, an act of hostility. But still it is a restrained, or limited, hostility. . . . As there may be

was that the Supreme Court would decide the meaning of the statute, and the President's role as Commander in Chief did not give him authority to make a final decision on what the statute meant.¹⁹⁷

Historian Louis Fisher demonstrated that Jefferson in his presidency, and Madison in his, both deferred to the duty of Congress to declare either unlimited war or limited war when faced with problems in the Mediterranean by the marauding Barbary Pirates and the Dey of Algiers between 1800 and 1815.¹⁹⁸

VII. CONGRESS DECLARED WARS – 1812-1945

War of 1812

America's first all-out war formally declared by Congress was the war of 1812. The causes of war included the continued impressments of American seamen, the continued British agitation among Native Americans in the northwest, west and south, and a desire among some for the occupation of Canada. Fighting on land and sea was inconclusive. The British briefly occupied Washington D.C. and burned the White House.¹⁹⁹ The war ended in 1814 with the Treaty of Ghent retaining the status quo ante.²⁰⁰

Algiers

In 1815, Congress authorized military action against Algiers, resuming the American offensive against the North African nations commenced during Jefferson's campaign against the Barbary Pirates. A substantial U.S. fleet seasoned after three years of combating the

a public general war, and a public qualified war; so there may, upon correspondent principles, be a general enemy, and a partial enemy.

Bas, 4 U.S. at 44. Once the Supreme Court decided that Congress need not make a formal "declaration of war" to invoke its war powers, but could declare war by defining the limits of military activities, Franck's argument dissolves. The Court did not treat *Bas* as a commerce clause case. A better analysis is provided by Thomas E. Woods, Jr., *Presidential War Powers*, LEWROCKWELL.COM (July 7, 2005), <http://www.lewrockwell.com/woods/woods45.html>.

197. "In 1789, Congress had directed military officers 'to observe and obey the orders of the President of the United States.' . . . Legislation in 1799 provided that any officer 'who shall disobey the orders of his superior . . . on any pretense whatsoever' shall be subject to death or other punishment." In 1800, the year that *Bas v. Tingy* was decided, Congress changed its direction so that military officers would be punished only for disobeying "the lawful orders of his superior officer." LOUIS FISHER, LAW LIBRARY OF CONGRESS, STUDIES ON PRESIDENTIAL POWER IN FOREIGN RELATIONS: THE "SOLE ORGAN" DOCTRINE, 12 n.96 (2006), available at www.fas.org/sfp/eprint/fisher.pdf.

198. FISHER, *supra* note 76, at 32-37; see also JOSEPH WHEELAN, JEFFERSON'S WAR: AMERICA'S FIRST WAR ON TERROR 1801-05 (2003).

199. HERRING, *supra* note 142, at 94-101; WOOD, *supra* note 43, 691.

200. HERRING, *supra* note 142, at 129-131; see also WALTER R. BORNEMAN, 1812: THE WAR THAT FORGED A NATION 270 (2004); WOOD, *supra* note 43, at 697.

British navy quickly subdued the Algerians, as well as Tunis and Tripoli. Treaties promptly followed.²⁰¹

Mexico

In 1846, President Polk sent United States troops into a territory disputed with Mexico, and used the resulting attack by Mexican troops as a reason to secure a declaration of war from Congress. The hostilities eventually resulted in expansion of the United States to the south and west. Then-Congressman Abraham Lincoln opposed Polk's action in 1848, challenging Polk to identify the "spot" where the Mexicans attacked, to no avail.²⁰² However, in a letter to his law partner, Lincoln did identify a serious problem with the ability of the President to "repel sudden attacks," and succinctly stated the historical basis for placing the ability to start a war in the hands of Congress and not the President.²⁰³

Civil War: Insurrection, Invasion, and Violation of Federal Law

Whatever Congressman Lincoln thought of the Militia acts in 1848, he relied heavily on them as President during the hostilities of

201. WOOD, *supra* note 43, at 695.

202. LOUIS FISHER, LAW LIBRARY OF CONGRESS, THE MEXICAN WAR AND LINCOLN'S "SPOT RESOLUTIONS," 1-5 (2009), available at http://www.loc.gov/law/help/usconlaw/pdf/Mexican_war.pdf.

203. Lincoln wrote:

Let me first state what I understand to be your position. It is, that if it shall become necessary, to repel invasion, the President may, without violation of the Constitution, cross the line and invade the territory of another country; and that whether such necessity exists in any given case, the President is to be the sole judge. . . . But . . . : Allow the President to invade a neighboring nation, whenever he shall deem it necessary to repel an invasion, and you allow him to do so, whenever he may choose to say he deems it necessary for such purpose - and allow him to make war at pleasure If, to-day, he should choose to say he thinks it necessary to invade Canada, to prevent the British from invading us, how could you stop him? You may say to him, 'I see no probability of the British invading us' but he will say to you "be silent; I see it, if you don't."

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. But your view destroys the whole matter, and places our President where kings have always stood.

ABRAHAM LINCOLN: A DOCUMENTARY PORTRAIT THROUGH HIS SPEECHES AND WRITINGS 59-60 (Don E. Farenbacher, ed., 1996); see MARIO M. CUOMO & HAROLD HOLZER, LINCOLN ON DEMOCRACY 36-37 (2004).

1861-1865.²⁰⁴ To President Lincoln, the Civil War was not a war “between two nations,” but a four year insurrection.²⁰⁵ He was motivated partly to avoid foreign recognition of the Confederacy and partly to justify, under the Militia Acts, some of his actions early in the war such as suspending the writ of Habeas Corpus,²⁰⁶ increasing the size of the regular army and navy,²⁰⁷ expending unappropriated funds for supplies,²⁰⁸ undertaking a blockade of Confederate ports and seizing ships and their cargos for its violation.²⁰⁹

Congress returned in July, three months after hostilities began when Fort Sumter was fired upon,²¹⁰ and passed following the statute:

All the acts, proclamations, and orders of the President of the United States after the 4th of March, 1861, respecting the army and navy of the United States, . . . are hereby approved, and in all respects legalized and made valid, to the same intent, and with the same effect, as if they had been issued and done under the previous express authority and direction of the Congress of the United States.²¹¹

The question of whether Congress had the authority to immunize the executive was raised but not resolved in the *Prize Cases*. The Supreme Court agreed unanimously that only Congress could declare war.²¹² The majority, through Justice Grier, not relying on the “ratification by Congress,” held that the President could have war thrust upon him by individuals and states conducting an “insurrection.”²¹³ The President’s statutory authority to respond to an insurrection, permitted him to take the actions that Congress later approved, including blockading southern ports.²¹⁴ Grier wrote:

[The President] has no power to initiate or declare a war either against a foreign nation or a domestic State. But by the Acts of Congress of February 28th, 1795, and 3d of March, 1807, he is authorized to call out the militia and use the military and naval

204. See David P. Currie, *The Civil War Congress*, 73 U. CHI. L. REV. 1131 (2006).

205. CUOMO & HOLZER, *supra* note 203, at 250.

206. Authorized under U.S. CONST. art. I, § 9, cl. 2, for cases of rebellion or invasion.

207. Authorized by Congress under U.S. CONST. art. 1, § 8, cl. 12-13.

208. Authorized by Congress under U.S. CONST. art. 1, § 8, cl. 12, § 9, cl. 7.

209. Authorized under U.S. CONST. art. I, § 8, cl. 11 (“rules concerning captures on land and water”).

210. See JAMES M. MCPHERSON, *TRIED BY WAR: ABRAHAM LINCOLN AS COMMANDER IN CHIEF* 21-22 (2008).

211. *United States v. Hosmer*, 76 U.S. 432, 434 (1869).

212. *The Brig Amy Warwick (The Prize Cases)*, 67 U.S. 635, 668 (1863); *id.* at 693 (Nelson, J., dissenting).

213. *Id.* at 670.

214. *Id.*

forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States.²¹⁵

Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. "He must determine what degree of force the crisis demands." The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case.²¹⁶

Four ships and their cargo had been seized during the blockade, before Congress met.²¹⁷ Justice Nelson argued that since only Congress could declare war, the authority to institute a blockade belonged only to it and not to the President.²¹⁸ Justice Grier's response was that the President could decide what military steps to take in protecting the country.²¹⁹

Those seeking support for presidential initiatives to use military force have stretched the decision in the *Prize Cases*. First, they use it in support of the application of the "political question" doctrine to insulate presidential and congressional decisions from judicial review.²²⁰ It is argued that as long as Congress and the President

215. *Id.* at 668 (referencing U.S. CONST. art. 4, §4 with respect to the states).

216. *Id.* at 670.

217. Four cases were consolidated seeking rewards, or "prizes," for the separate captures of: the brig Amy Warwick, the schooner Crenshaw, the barque Hiawatha, and the schooner Brillante. *Id.* at 671.

218. In dissent, Justice Nelson argued that a blockade was not the way to put down an insurrection, stop an invasion, or enforce federal law; it was an action in a war that only Congress could declare. Until Congress met and war was declared, the President could not "authorize the capture and confiscation of the property of every citizen of the state." 67 U.S. at 693 (Nelson, J., dissenting). Among the justices concurring with Nelson in the dissent was Chief Justice Taney, whose views on property rights of slave owners had been expressed in *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

219. *The Prize Cases*, 67 U.S. at 668 (majority opinion).

If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be "*unilateral*."

Id. (emphasis added).

220. Memorandum in Support of the President of the United States' Motion to Dismiss at 25 n.11, *New Jersey Peace Action v. Obama*, No. 08-2315, 2008 WL

agree on war, any war, the Constitution is satisfied.²²¹ Second, it is also argued that the *Prize Cases* allow the President to lawfully wage war without a formal declaration of war.²²² Such arguments miss the primary point on which Justice Grier relied in the *Prize Cases*: *the President had earlier been granted authority from Congress under the Militia Acts to repress insurrections, repel invasions, and enforce Federal laws.*²²³ Therefore, the choices he made, for example, to impose a blockade instead of a naval bombardment of Confederate ports or an attempt at an invasion, were encompassed by that authority already granted by Congress.²²⁴

Third, presidential administrations argue that the *Prize Cases* support the position that agreement of Congress to give financial support to the troops after the President has commenced hostilities may constitute a “ratification” of his decision.²²⁵ Justice Grier’s decision in the *Prize Cases* did not rely on such a ratification to support Lincoln’s actions in using the military. The entire discussion of “ratification” is dicta, not necessary to the decision, as Justice Grier stated at the outset.²²⁶

4905432 (D.N.J. May 15, 2009), available at http://warpowers.us/081107_Def_Mot2Dismiss2.pdf.

221. See *Massachusetts v. Laird*, 451 F.2d 26 (1st Cir. 1971) (in connection with the AUMF concerning Vietnam).

222. Memorandum in Support of the President of the United States’ Motion to Dismiss at 35 n.15, *New Jersey Peace Action v. Obama*, No. 08-2315, 2008 WL 4905432 (D.N.J. May 15, 2009), available at http://warpowers.us/081107_Def_Mot2Dismiss2.pdf.

223. *The Prize Cases*, 67 U.S. at 647.

224. The framers expected the President would take immediate action under the militia acts, authorized in Article I, Section 8, Clause 15 to bring the militia to bear on any rebellion, invasion or interference with federal law.

225. See *Orlando v. Laird*, 443 F.2d 1039, 1041 (2d Cir. 1971); see also discussion *infra* Part IX.

226. *The Prize Cases*, 67 U.S. at 671 (“Without admitting that such an act was necessary under the circumstances, it is plain that if the President had in any manner assumed powers which it was necessary should have the authority or sanction of Congress, that on the well known principle of law [“every consent given to what has already been done, has a retrospective effect and equals a command”] this ratification has operated to perfectly cure the defect.” (emphasis and translation added)).

Justice Grier’s reference in the *Prize Cases*, to Justice Story’s discussion in *Brown v. United States*, 12 U.S. 110 (1814), concerning ratification is inapposite. In the *Prize Cases*, Justice Grier suggests that Justice Story had concluded that “the Sovereign” could retroactively authorize a citizen to appropriate enemy property in the United States. *Id.* at 671. But in *Brown*, Justice Story stated “no subject can legally commit hostilities, or capture property of an enemy, when, either expressly or constructively, the sovereign has prohibited it. But suppose he does, I would ask if the sovereign may not ratify his proceedings; and thus, by a retroactive operation, give validity to them?” *Brown*, 12 U.S. at 133. Justice Story went on to elaborate: “The subject seizes at his peril, and the sovereign decides, in the last resort, whether he will approve or disapprove of the act.” *Id.* Chief Justice Marshall, for the majority, held that a bare

Furthermore, the statute purporting to “ratify” the President’s actions expressly stated that the actions were “approved and in all respects legalized and made valid.” It was not necessary to discern “approval” or “ratification” from a statute that was designed for some other purpose.²²⁷

Spain

The next war declared by Congress was the 1898-1902 war with Spain that gave the United States the Philippines, Puerto Rico, and Guam, plus suzerainty over Cuba.²²⁸ This was the only war declared without a roll call vote in Congress.

Twentieth Century: Global Power

In the twentieth century Presidents Theodore Roosevelt, Woodrow Wilson and Franklin Delano Roosevelt sought major roles in international affairs.²²⁹ At the same time European empires engaged in a scramble for control of African and Asian colonies.²³⁰ President Theodore Roosevelt’s “Great White Fleet” was a signal to other world powers of the arrival of American military influence.²³¹

declaration of war did not of itself determine that Congress had decided to authorize the seizure in question. *See id.* at 128-29. The difference between the Justices was only with respect to whether the declaration of war implicitly authorized the seizure. The *Brown* decision left that issue to be specified by Congress. *Brown* does not suggest that the President has any “inherent power,” nor does it imply that Congress may ratify a Presidential decision to use military force by financing hostilities that he had no statutory right to commence.

227. In *Mitchell v. Laird*, Judge Wyzanski, for himself and Chief Judge Bazelon, wrote in dissent that:

This court cannot be unmindful of what every schoolboy knows: that in voting to appropriate money or to draft men a Congressman is not necessarily approving of the continuation of a war no matter how specifically the appropriation or draft act refers to that war. . . . An honorable, decent, compassionate act of aiding those already in peril is no proof of consent to the actions that placed and continued them in that dangerous posture.

488 F.2d 611, 615 (D.C. Cir. 1973).

228. HERRING, *supra* note 142, at 176-299.

229. *See generally id.* at 337-537.

230. *See generally* THOMAS PAKENHAM, *THE SCRAMBLE FOR AFRICA: THE WHITE MAN'S CONQUEST OF THE DARK CONTINENT FROM 1876 TO 1912* (1990).

231. Sixteen steam-powered, steel battleships, painted white, divided into four squadrons, circumnavigated the globe, sailing out of Hampton Roads, Virginia on December 16, 1907 and returning February 22, 1909. *The Cruise of the Great White Fleet*, DEP'T OF THE NAVY (Feb. 5, 2011), <http://www.navy.mil/gwf/thejourney/begins.htm>. The fleet, with support and escort ships had 14,000 sailors including four senior officers who had served during the Civil War and were about to retire, covered 43,000 nautical miles with twenty ports-of-call on six continents. *Id.* The goodwill tour projected US military influence farther than before, peacefully demonstrating organizational skill, resource capability, military might, and the ability to fly the flag

His intervention in Central and Latin America demonstrated his interest in influencing, without acquiring, those nations.²³² “Minor” military actions were common during the nineteenth and early twentieth century, and did not generate litigation.²³³

Wilson’s first term focused on domestic matters,²³⁴ but his second term emphasized his interest in having the United States seek peace in Europe by strengthening the military and encouraging the League of Nations. Wilson persuaded Congress to declare war against Germany in 1917, and fresh U.S. troops helped produce the armistice in 1918.²³⁵ Republicans defeated Wilson’s effort to create a League of Nations to preserve peace, making isolation a guiding principle in the

almost anywhere by sea. *Id.*; Ellen C. Collier, *Instances of Use of United States Forces Abroad 1798-1993*, THE NAVAL HISTORICAL CENTER, <http://www.history.navy.mil/wars/foabroad.htm> (last visited Nov. 17 2010).

232. In 1902, Britain and Germany had made loans to Venezuela, which had become delinquent. Venezuela seemed unable, or unwilling, to repay their debt. In response, two of the major European countries were preparing to combine forces to use their military muscle to collect the money owed. As an alternative, the Roosevelt Corollary to the Monroe Doctrine was developed to maintain regional stability by warning Europe and informing the Americas that the U.S. would intervene anywhere in Latin America, where there were significant financial problems. *American President: An Online Reference Resource, Theodore Roosevelt*, MILLER CENTER OF PUBLIC AFFAIRS, <http://millercenter.org/academic/americanPresident/roosevelt/essays/biography/5> (last visited April 21, 2010); *Theodore Roosevelt’s Corollary to the Monroe Doctrine (1905)*, OUR DOCUMENTS: 100 MILESTONE DOCUMENTS FROM THE NATIONAL ARCHIVE, <http://www.ourdocuments.gov/doc.php?flash=old&old=56> (last visited April 21, 2010).

233. A 1993 compilation by the Congressional Research Office of the Library of Congress and published by the Naval Historical Center lists 234 military engagements. Decisions for some, but not all, were made by congressional statute prior to engagement, either as formal declarations of war or by following the procedure approved in *Bas v. Tingy*.

The majority of the instances listed were brief Marine or Navy actions prior to World War II to protect U.S. citizens or promote U.S. interests. A number were actions against pirates or bandits. Some were events, such as the stationing of Marines at an Embassy or legation, which later were considered normal peacetime practice. Covert actions, disaster relief, and routine alliance stationing and training exercises are not included here, nor are the Civil and Revolutionary Wars and the continual use of U.S. military units in the exploration, settlement, and pacification of the West.

Collier, *supra* note 231.

234. Wilson was President of Princeton University (1902 – 1910) and governor of New Jersey (1911-1913). After his 1912 election to the presidency, he passed the first progressive income tax, the Federal Reserve Act of 1913, the Federal Trade Commission Act of 1914, the Clayton Antitrust Act of 1914, and the Federal Farm Loan Act of 1916. See *American President: An Online Reference Resource, Woodrow Wilson*, MILLER CENTER OF PUBLIC AFFAIRS, <http://millercenter.org/academic/americanPresident/wilson> (last visited Feb. 25, 2010).

235. See Woodrow Wilson, *President Woodrow Wilson’s Fourteen Points* (Jan. 8, 1918), available at http://avalon.law.yale.edu/20th_century/wilson14.asp.

1920s.

In the 1930s, President Franklin Roosevelt repeated Wilson's build up of U.S. military power as Germany, frustrated by the economic consequences of the previous war, elected Hitler who then seized dictatorial powers, rearmed, subjugated neighboring nations, and embarked on an enslavement and extermination program of the Jews and other disfavored groups.²³⁶ U.S. isolationism went down in flames when economic negotiations with Japan deadlocked and the Emperor's military bombed Pearl Harbor on December 7, 1941. The United States Congress promptly declared war on Japan. Due to treaty obligations with Japan, Germany declared war on the United States. Immediately, Congress declared war on Germany. As the war continued, and events made it clear that other enemies would have to be fought, the President went back to Congress to ask for an expansion of the scope of the war, and he received additional declarations of war.²³⁷

In his Fireside Chat on December 9, 1941, Roosevelt committed the nation to an expanded role in world affairs:

In my message to the Congress yesterday I said that we "will make it very certain that this form of treachery shall never again endanger us." In order to achieve that certainty, we must begin the great task that is before us by abandoning once and for all the illusion that we can ever again isolate ourselves from the rest of humanity.²³⁸

Congress made the determination for war, identified the enemies, and directed the President to engage all of the nation's resources.²³⁹ This was the last time that a President properly proceeded under a congressional declaration of war.

VIII. PRESIDENT-COMMENCED WARS – 1950-2010

AUMFs: Politics and War

Since World War II, when Congress made its last declaration of war, domestic politics has played a more open role in presidential decisions to use military force. The United States engaged in nine

236. See generally PAUL JOHNSON, A HISTORY OF THE JEWS 423-517 (1987). "In addition to the mass murder of well over a million Jewish men, women and children, and tens of thousands of Polish victims, Auschwitz also served as a camp for the racial murder of thousands of Roma and Sinti and prisoners of several European nationalities." AUSCHWITZ-BIRKENAU: WORLD HERITAGE, MEMORIAL AND MUSEUM AUSCHWITZ-BIRKENAU, http://en.auschwitz.org.pl/m/index.php?option=com_content&task=view&id=436&Itemid=19 (last visited Feb. 25, 2011).

237. ELSEA & GRIMMETT, *supra* note 10, at 3.

238. President Franklin D. Roosevelt, Fireside Chat (Dec. 9, 1941), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=16056>.

239. ELSEA & GRIMMETT, *supra* note 10, at 5-6.

military actions in: Korea (1950-1953), Vietnam (1964-1973), Grenada (1983), Panama (1989), First Iraq War (1991), Haiti (1994), Kosovo and the Federal Republic of Yugoslavia (1999), Afghanistan, Al Qaeda and the Taliban (2001), and the Second Iraq War (2003).²⁴⁰

In some of these situations, Presidents claimed authority to act on their own, or relied on congressional financial support after entering into hostilities to justify their actions. In others, like Vietnam, Iraq I, Iraq II, and Afghanistan, Presidents have acted pursuant to an AUMF, which has shifted the decision, responsibility, and acclaim for war to the President's discretion, inevitably involving presidential politics.

The period of enhanced presidential power and congressional acquiescence began with the Cold War in 1946.²⁴¹ Within the framework established during WWII for a United Nations and a system of international trade, "communism" and "capitalism" competed through the creation of separate versions of a more attractive society. Hostilities did not often take the form of heated battle, hence the term "cold war." This was akin to the era when the framers of the Constitution and the people of the young nation were surrounded by enemies. They knew the difference between resolving hostilities by force or by other means, and made clear that a declaration of war was required of Congress only when force was to be used. What Charles Pinckney and other delegates to the Constitutional Convention were concerned about—a standing army and the increased power of the Presidency—became the reality of the Cold War. Without amendment of the Constitution, Congress started implementing what Madison had recommended and the Constitutional Convention had defeated: authorizing the President to make the determination on going to war.

Democratic President Harry Truman avoided confrontation when the Soviets blockaded Berlin, overcoming that challenge with an airlift from June 24, 1948 to May 12, 1949.²⁴² He supported the "Marshall Plan" to rebuild Western Europe and aided Greece and Turkey against Communist uprisings. When his poll numbers were down in 1948, Clark Clifford advised the President that, "The worse matters get, up to a fairly certain point—real danger of imminent war—the more there is a sense of crisis. *In times of crisis, the American citizen tends to back up his President.*"²⁴³ Truman took the advice and emphasized Cold War issues en route to winning the 1948

240. *Id.* at 9-18.

241. NEIL SHEEHAN, A FIERY PEACE IN A COLD WAR: BERNARD SCHRIEVER AND THE ULTIMATE WEAPON 51-114 (2009).

242. PERRET, *supra* note 11, at 106-118; *see also* SHEEHAN, *supra* note 241, at 95-99.

243. Memorandum from Clark Clifford to the President, at 15 (Nov. 19, 1947); PERRET, *supra* note 11, at 106.

presidential election.²⁴⁴

In June 1950, when North Korea invaded South Korea, Truman, advised by Dean Acheson and the other “wise men,” promptly ordered U.S. troops to defend South Korea.²⁴⁵ Truman, calling these hostilities a “police action,” did not seek a declaration or authorization from Congress.²⁴⁶ He considered the conflict between North and South Korea as part of the Cold War with the Soviet Union.²⁴⁷ He took this step out of as much concern for U.S. prestige in Europe as for events in Asia.

The nature of presidential politics in the years since 1950 has changed. The election cycle is now a permanent part of our culture rather than an event that occurs once in four years.²⁴⁸ This change helps explain how Presidents, without declarations of war by Congress, have taken all of these recent military actions. Supreme Court Justice Robert Jackson provided part of the explanation in the *Steel Seizure* case of 1952, an offshoot of President Truman’s decision not to consult Congress when he sent troops to repel an invasion of South Korea by North Korea in 1950. Justice Jackson explained that the

rise of the party system has made a significant extraconstitutional supplement to real executive power. No appraisal of his necessities is realistic which overlooks that he heads a political system as well as a legal system. Party loyalties and interests, sometimes more binding than law, extend his effective control into branches of government other than his own and he often may win, as a political

244. Three years after the end of WWII, Democratic President Harry S Truman won re-election with his running mate, Alben W. Barkley of Kentucky, in a narrow victory over Republican Presidential candidate Thomas Dewey and vice-Presidential candidate, Earl Warren.

245. WALTER ISAACSON & EVAN THOMAS, *THE WISE MEN: SIX FRIENDS AND THE WORLD THEY MADE* 505-34 (1986); DAVID HALBERSTAM, *THE COLDEST WINTER: AMERICA AND THE KOREAN WAR* 89-101 (2007); DEAN ACHESON, *PRESENT AT THE CREATION: MY YEARS IN THE STATE DEPARTMENT* 402-425 (1969).

246. If anything, he relied on United Nations Security Council resolutions, despite the UN Participation Act which reserved to Congress the authority to send troops into hostilities. FISHER, *supra* note 76, at 81-104; WILLS, *supra* note 22, at 105-19; ACHESON, *supra* note 245, at 415 (reflecting on the decision and saying that “congressional approval would have done no harm. . . . [B]ut the process of gaining it might well have done a great deal. July—and especially the first part of it—was a time of anguished anxiety Congressional hearings on a resolution of approval at such a time, opening the possibility of endless criticism, would hardly be calculated to support the shaken morale of the troops or the unity that, for the moment, prevailed at home. The harm it could do seemed to me far to outweigh the little good that that might ultimately accrue.”).

247. HERRING, *supra* note 142, at 635-50. In December of that year he sent four divisions of troops to Europe. *Id.* at 646.

248. See *THE PERMANENT CAMPAIGN AND ITS FUTURE*, *supra* note 19.

leader, what he cannot command under the Constitution²⁴⁹

In 1950, Congress was Democratic and did not challenge Truman's judgment on taking the nation to war in Korea. But the steel industry did challenge him when he authorized the seizure of major steel producers in an effort to prevent a labor dispute that he claimed would hinder war production.²⁵⁰ After more than half a century, this case warrants close attention.

The *Steel Seizure* case is the clearest Supreme Court decision denying the President a wartime authority that had not been granted by Congress. President Truman's failure to secure the approval of Congress to commence military hostilities became a central issue in the steel industry's challenge of the Truman administration's seizure of the major steel companies on April 8, 1952. The industry sued on the basis that the government had no constitutional authority to seize their operation. A district court agreed and issued an injunction against the seizure.²⁵¹ The Supreme Court denied Truman's authority to seize the industry in its June 2, 1952 decision.²⁵²

Justice Hugo Black's terse opinion for the six-member majority made two points. First, he concluded that the seizure constituted legislation. Under the Constitution, he reasoned that all legislative power rested in Congress.²⁵³ Second, not only was there no congressional act supporting Truman's action, there was clear indication that Congress opposed government seizures of industries in order to resolve labor disputes; that idea had been rejected in the Taft-Hartley Act of 1947 which was enacted over a veto by Truman.²⁵⁴

249. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring). Justice Jackson's concern over enhanced presidential power to take the nation to war was reinforced recently. See RONALD BROWNSTEIN, *THE SECOND CIVIL WAR: HOW EXTREME PARTISANSHIP HAS PARALYZED WASHINGTON AND POLARIZED AMERICA* (2007). Brownstein's thesis is that the two major parties have increased their demands that members of congress conform to party lines rather than thinking for themselves, thereby immobilizing Congress from addressing a series of important social problems. This added pressure for party conformity further enhances presidential influence on taking the nation to war. See BACEVICH, *supra* note 19.

250. *Steel Seizure*, 343 U.S. at 582. "[T]he President having, on his own responsibility, sent American troops abroad . . . has invested himself with 'war powers.'" *Id.* at 642 (Jackson, J., concurring).

251. *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F.Supp. 569, 577 (D.D.C. 1952).

252. *Steel Seizure*, 343 U.S. at 589.

253. *Id.* at 585, 629-33.

254. *Id.* at 586 ("[T]he use of the seizure technique to solve labor disputes in order to prevent work stoppages was not only unauthorized by any congressional enactment; prior to this controversy, Congress had refused to adopt that method of settling disputes. When the Taft-Hartley Act was under consideration in 1947, Congress rejected an amendment which would have authorized such government seizures in

In addition, the opinion noted that the administration's claim that other Presidents had engaged in similar action could not alter the constitutional authority that rested with Congress.²⁵⁵ Four of the justices who agreed with Justice Black's analysis relied on the concept that Congress had previously rejected government seizure of corporations as an acceptable method of dealing with "emergency" labor disputes.²⁵⁶

Justice Robert Jackson, concurring, created a three-part analysis of the relative powers of Congress and the President.²⁵⁷ In explaining his conclusion, Justice Jackson responded to the following four arguments the Solicitor General made in defense of President Truman's action by claiming to rely on the executive power.

“§ 1. *The executive Power shall be vested in a President . . .*”

In response to the contention that Article II, Section 1 “constitutes a grant of all the executive powers of which the

cases of emergency.”).

255. *Id.* at 588-89 (“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 is 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 in any Department or Officer thereof.’”).

256. *Id.* at 589-610 (Frankfurter, J., concurring); *id.* at 639-40 (Jackson, J., concurring); *id.* at 656-660 (Burton, J., concurring); *id.* at 662-666 (Clark, J.). For a recent analysis of the *Steel Seizure Case*, see NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 354-68 (2010).

257. The three-part test offered by Jackson begins as follows:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.
2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.

Id. at 636-37 (Jackson, J., concurring). Finally,

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. . . . Presidential claim to [such] a power . . . must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Id. at 637-38. Justice Jackson concluded that President Truman's seizure of the steel mills fell within his third category. *Id.* at 639. President's men often treat the “twilight zone” as if it were a permanent situation. See YOO, *supra* note 96, at 1-29. That view is not consistent with the Supreme Court's duty to “say what the law is.” Once an issue in the ‘twilight zone’ has been resolved, that issue moves into the sunlight of settled law.

Government is capable,”²⁵⁸ Jackson explained:

The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image. . . . I cannot accept the view that this clause is a grant in bulk of all conceivable executive power but regard it as an allocation to the presidential office of the generic powers thereafter stated.²⁵⁹

“§ 2. *The President shall be Commander in Chief of the Army and Navy . . .*”

As to the provision in Article II, Section 2 that “The President shall be Commander in Chief of the Army and Navy of the United States,” Jackson responded:

[T]his loose appellation is sometimes advanced as support for any presidential action, internal or external, involving use of force, the idea being that it vests power to do anything, anywhere, that can be done with an army or navy. . . .

But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation’s armed forces to some foreign venture.²⁶⁰

That military powers of the Commander-in-Chief were not to supersede representative government of internal affairs seems obvious from the Constitution and from elementary American history. . . . His command power is . . . subject to limitations consistent with a constitutional Republic whose law and policy-making branch is a representative Congress. The purpose of lodging dual titles in one man was to insure that the civilian would control the military, not to enable the military to subordinate the presidential office. No penance would ever expiate the sin against free government of holding that a President can escape control of

258. *Steel Seizure*, 343 U.S. at 640 (Jackson, J., concurring).

259. *Id.* at 641. Justice Jackson also suggested that if Article II, Section 1 were originally intended to be read so broadly, then “it is difficult to see why the forefathers bothered to add several specific items . . .” *Id.* at 640-41.

260. *Id.* at 641-42 (explaining that the particular method of enlarging Presidential mastery over internal affairs that concerned him, in this case, was that (1) “the President having, on his own responsibility, sent American troops abroad,” then (2) tried to take private property, to “seize the means of producing a supply of steel”—rather than relying on the method chosen by Congress of “free private enterprise collectively bargaining with free labor”—to equip the troops).

executive powers by law through assuming his military role.²⁶¹

§ 3. *President “shall take Care that the Laws be faithfully executed”*

Regarding Article II, Section 3’s prescription that the President “shall take care that the laws be faithfully executed,”²⁶² Jackson wrote:

That authority must be matched against words of the Fifth Amendment that “No person shall be . . . deprived of life, liberty, or property, without due process of law” One gives a governmental authority that reaches so far as there is law, the other gives a private right that authority shall go no farther. These signify about all there is of the principle that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules.²⁶³

§ 4. *President’s “Inherent Powers” necessary to act in emergencies*

Responding to a “nebulous, inherent powers” argument by the Solicitor General, Jackson wrote: “The plea is for a resulting power to deal with a crisis or an emergency according to the necessities of the case, the unarticulated assumption being that necessity knows no law.”²⁶⁴ Jackson concluded:

They [the Framers] knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies. Aside from suspension of . . . the writ of habeas corpus in time of rebellion or invasion . . . they made no express provision for exercise of extraordinary authority because of a crisis. I do not think we rightfully may so amend their work, and, if we could, I am not convinced it would be wise to do so”²⁶⁵

With the statement of the *Steel Seizure* case, the possibility of a delegation of greater power by Congress to the President became

261. *Id.* at 644-46.

It also was expressly left to Congress to “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions” Such a limitation on the command power, written at a time when the militia rather than a standing army was contemplated as the military weapon of the Republic, underscores the Constitution’s policy that Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy.

Id. at 644.

262. U.S. CONST. art. 2, § 3.

263. *Steel Seizure*, 343 U.S. at 646 (Jackson, J., concurring).

264. *Id.*

265. *Id.* at 650.

more appealing to both the presidency and the Congress.

The Birth of the AUMF

Five-star general Dwight D. Eisenhower, whose armies had won the war in Europe, became the Republican candidate for President. He won the 1952 presidential election announcing “I will go to Korea.”²⁶⁶ He negotiated the solution of “two Koreas” that persists to this day.²⁶⁷ In 1955, he asked Congress for an Authorization for the Use of Military Force, to protect Formosa from potential Chinese aggression.²⁶⁸ This resolution set the pattern for subsequent AUMFs from Vietnam in 1964 to Iraq in 2002. This first modern Authorization for Use of Military Force permitted the President to

employ the Armed Forces of the United States *as he deems necessary* for the specific purpose of securing and protecting Formosa and the Pescadores against armed attack, this authority to include the securing and protection of such related positions and territories of that area now in friendly hands and the taking of such other measures *as he judges to be required or appropriate* in assuring the defense of Formosa and the Pescadores.²⁶⁹

Eisenhower interposed the fleet between the People’s Republic of China (PRC) and Formosa (now called Taiwan, ROC). The issue was resolved without violence, and there was no litigation over Congress’ authority to permit the President to make such decisions.²⁷⁰ Eisenhower also made important and long range decisions that set a pattern of toppling unfriendly leaders in the Middle East and Latin America using the CIA rather than the military.²⁷¹ As he retired to his farm in Gettysburg, he reflected on what had happened on his watch:

266. HALBERSTAM, *supra* note 245, at 626. For results, see *id.* at 624-45.

267. HERRING, *supra* note 142, at 651-70.

268. HERRING, *supra* note 142, at 636-37.

For right-wing Republicans, Chiang’s most ardent supporters, who were deeply frustrated by Truman’s shocking victory in 1948, the fall of China provided a political windfall. . . . critics like the ambitious young California congressman Richard M. Nixon charged that Communist sympathizers within the U.S. government had undermined support for Chiang . . . [and] a heretofore obscure Republican senator from Wisconsin, Joseph R. McCarthy, in a major speech in Wheeling, West Virginia, claimed to have the names of some 206 Communists working in the State Department. . . . A Cold War culture of near hysterical fear, paranoiac suspiciousness, and stifling conformity began to take shape. Militant anti-communism increasingly poisoned the political atmosphere at home and made negotiations with the Soviet Union unthinkable.

Id.

269. 84 Cong. Ch. 4, 69 Stat. 7 (1955) (emphasis added).

270. HERRING, *supra* note 142, at 651-64.

271. WILLS, *supra* note 22, 177-82.

We have been compelled to create a permanent armaments industry of vast proportions This conjunction of an immense military establishment and a large arms industry is new in the American experience. The total influence – economic, political, even spiritual – is felt in every city, every State house, every office of the Federal government. We recognize the imperative need for this development. Yet we must not fail to comprehend its grave implications

In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist.²⁷²

Eisenhower left another serious problem to his successor, Democratic President John F. Kennedy. In Cuba, Fidel Castro's insurgents had overthrown the dictator Batista and confiscated much American owned property. The CIA had prepared an invasion by American-trained Cuban refugees. In April 1961, the first year of his presidency, Kennedy decided to allow the invasion to proceed, if it could be done without air support. The landing force was wiped out; there was no uprising against Castro.²⁷³

A few months later, the Soviet Union sought to place ballistic missiles in Cuba with Castro's assistance. Kennedy rejected an air assault on Cuba, ordered a blockade of the ships carrying missiles to Cuba, sent U.S. Ambassador Adlai Stevenson to the United Nations with photographic proof of missiles on Soviet ships, and placed U.S. forces on alert.²⁷⁴ Since Soviet missiles could already reach eastern American cities, it has been suggested that one reason Kennedy acted so "tough" was that "the Congressional elections were only a few weeks off, and the Republicans would surely stage a profitable uproar if Kennedy failed to get the missiles out of Cuba."²⁷⁵

Sanity prevailed in the Kennedy White House, over the possibility of a nuclear escalation. During days of intense negotiations with the Kremlin, the confrontation was diffused, over

272. DWIGHT D. EISENHOWER: 1960-61: CONTAINING THE PUBLIC MESSAGES, SPEECHES, AND STATEMENTS OF THE PRESIDENT, JANUARY 1, 1960, TO JANUARY 20, 1961 at 1038 (1961). Cf. George Washington, Farewell Address (1796) *available at* http://avalon.law.yale.edu/18th_century/washing.asp ("[O]vergrown military establishments . . . under any form of government, are inauspicious to liberty."); *see also* BACEVICH, *supra* note 19, at 32-34 (crediting Eisenhower with a rare explicit discussion of the political consequences of the buildup of American military power).

273. GORDON M. GOLDSTEIN, LESSONS IN DISASTER: MCGEORGE BUNDY AND THE PATH TO WAR IN VIETNAM 35-40 (2008).

274. *See generally* HERBERT J. MULLER, ADLAI STEVENSON: A STUDY IN VALUES 271-89 (1967).

275. *Id.* at 289.

strong objections from the military.²⁷⁶

On another front, Kennedy added to the numbers of American military advisors originally sent to Vietnam by Eisenhower. The French authority in Vietnam was being challenged by the Vietnamese, with the aid of China.²⁷⁷ The French base at Dien Bien Phu was under siege for almost two months. At the end, the French withdrew.²⁷⁸ Vietnam was divided into North and South.²⁷⁹ President Eisenhower sent some token support, by sending advisors to the South Vietnamese. President Kennedy increased the level of support, doubling “troop” levels in 1961 and again in 1962,²⁸⁰ in order

276. ISAACSON & THOMAS, *supra* note 245, at 619-30; SHEEHAN, *supra* note 241, at 442-51; Arthur Schlesinger Jr., *Forward* to ROBERT F. KENNEDY, *THIRTEEN DAYS: A MEMOIR OF THE CUBAN MISSILE CRISIS* (W. W. Norton & Company 1999).

277. Ho Chi Minh originally organized Vietnamese refugees in China. See Jeff Drake, *How the U.S. Got Involved in Vietnam*, VIET VET BLOG (1994), <http://www.vietvet.org/jeffviet.htm> (not purporting to be an academic study, but providing some insight into the history of the Vietnam war from the perspective of an American soldier who was there pursuant to the Tonkin Gulf AUMF.)

278. BILL FAWCETT, *HOW TO LOSE A BATTLE* 311-16 (2006).

279. The French started colonizing Indochina in 1862. On May 7, 1954, Dien Bien Phu surrendered to the “Communist controlled” Viet Minh. The parties conferenced in Geneva, Switzerland from April 26 to July 21, 1954. The result was an agreement that the French would recognize the “full independence and sovereignty” of Vietnam, Laos and Cambodia, formerly parts of Indochina. Vietnam was divided at the 17th parallel; French forces would withdraw to the South and the Viet Minh would go north of that line. This was to be overseen by representatives from India, Canada, and Poland. The United States did not sign the agreement, but said it would not disturb the agreement. The government of South Vietnam did not sign the agreement either, but made preparations for self-rule, including the integration into society of 900,000 refugees, mostly Catholic, from the North. At that point, the Army of the Republic of Vietnam (ARVN) had about 250,000 members and almost no officers, as the French had supplied the officer corps. The United States created and entered into the South East Asia Treaty Organization (“SEATO”), to pledge military support to South Vietnam. At the request of the South Vietnamese, the French withdrew their mission for the army in April 1956 and for the Air Force in May 1957. After that, South Vietnam relied on the United States. According to South Vietnamese intelligence, North Vietnam was active in the South through the Viet Cong. The increasing number of hostile encounters throughout 1960 supports this position. JACOB VAN STAAVEREN, USAF HISTORICAL DIV. LIAISON OFFICE, *USAF PLANS AND POLICIES IN SOUTH VIETNAM 1961 – 1963* 1-5 (1965), available at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB248/usaf_61-63.pdf.

280. The buildup was gradual with advisors, trainers, and material, as this report on the use of helicopters demonstrates:

[F]rom the standpoint of an airmobility study, one can consider the first phase as a learning period a time [sic] when U. S. Army pilots were teaching Army of the Republic of Vietnam commanders and soldiers how to effectively employ helicopter tactics, while at the same time the pilots were learning by experience, trial and error. As more and more helicopters became available, we built additional aviation units to help the Vietnamese Army become as mobile as the enemy.

to continue the previous policy of containing the “Communists” and demonstrate his toughness in the face of a continuing anti-communist Republican assault spurred on by nostalgic memories of the House Un-American Activities Committee and Senator Joe McCarthy.

Kennedy explained his worry both about their presence and the reaction he expected from Republicans if he tried to withdraw the advisors, saying “If I tried to pull out completely now from Vietnam we would have another Joe McCarthy Red Scare on our hands. But I can do it after I’m reelected.”²⁸¹

Kennedy was assassinated before that election. The new President, Lyndon Johnson, felt impelled to carry on what he thought were Kennedy’s policies, and increased the number of military advisors. He too acted out of fear of being viewed as weak in facing the prospect of Southeast Asia falling under Communist rule.²⁸² He secured political support from a Democratic Congress in the “Gulf of Tonkin Resolution” of 1964.²⁸³ The resolution, adopted by Congress on August 10, 1964, provided that: “The United States is . . . 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.*”²⁸⁴ The resolution was rushed through Congress, although the evidence of Vietcong attack on U.S. warships in international waters was dubious at best.²⁸⁵

This second phase of the war was characterized by battalion-size air assaults of selected Vietnamese units, including the paratroopers, the rangers, and the regular infantry. It was the success of this phase that forced the enemy to increase his effort in South Vietnam.

JOHN J. TOLSON, DEPT. OF THE ARMY, VIETNAM STUDIES: AIR MOBILITY 1961-1971 25-26 (1989), *available at* <http://www.history.army.mil/books/vietnam/airmobility/airmobility-ch02.html>. The first major commitment of helicopters was on 11 December 1961. *Id.*

281. PERRET, *supra* note 11, at 196; *see also* GOLDSTEIN, *supra* note 273, at 236-37.

282. PERRET, *supra* note 11, at 223-37, 249-85.

283. Pub. L. No. 88-408, 59 Stat. 1031 (1964).

284. H.R.J. Res 1145, 88th Congress (1964) (emphasis added).

285. The chronology with regard to the Vietnam War is found in the Congressional Record covering August 4-7, 1964. *See* 110 CONG. REC. 18132-33, 18406-07, 18458-59, 18470-71 (1964).

On August 4, 1964, President Johnson went on television and informed the American people that two U.S. navy destroyers (the USS Maddox, named for Captain William A. T. Maddox, the USMC, and the Turner Joy) had been attacked in the “international waters” of the Gulf of Tonkin.

On August 5, 1964, Johnson delivered a message to Congress seeking a resolution “to meet (this) Communist aggression” and assured the Congress that he “intends no rashness, and seeks no wider war.” *Id.* at 18132. On August 6, 1964, the Senate Foreign Relations and Armed Services Committees met in joint session and began

Johnson won that year's presidential election promising to hold off on any war in the Asian jungles.²⁸⁶ He had no intention of using the AUMF authority until the presidential election was over.²⁸⁷ After the election, he sent nearly half a million American troops into that futile war. The resolution followed the language of Eisenhower's authority in 1955 and crystallized the style for the AUMF that has since been used in five significant United States wars. On its face, it allows the President to make the decision that Congress is tasked with making in the Constitution.²⁸⁸

Because of increased public hostility to the war in Vietnam, Johnson declined to run for reelection in 1968. His Vice President, Hubert Humphrey, did not disassociate himself from the war, ran and was defeated by Richard Nixon.

Nixon pledged "to end the war and win the peace in the Pacific," but had no plan other than expanding the war during years of negotiation while troops died.²⁸⁹ They were still dying in 1972 when

"taking testimony" (without adequate cross-examination). *Id.* at 18336 (statement of Rep. John Monagan).

On August 7, 1964, less than nine hours after Committee hearings and floor debate began, the House and Senate passed a joint resolution finding, as a matter of fact, that "naval units of the Communist regime in Vietnam, in violation of the principles of the Charter of the United Nations and of international law, have deliberately and repeatedly attacked United States naval vessels lawfully present in international waters, and have thereby created a serious threat to international peace. . . ." *Id.* at 18538.

The House voted 416-0 and the Senate voted 88-2 in favor of the resolution. The Congressman from Eastern Kentucky, Eugene Siler, would have voted "no" but the vote was unanimous because he was convinced to refrain from voting on condition that a representative who would have voted "yes" also did not vote. *See id.* at 18553-55.

Senator Wayne Morse said that:

I believe that history will record that we have made a great mistake in subverting and circumventing the Constitution of the United States . . . I believe this resolution to be a historic mistake. I believe that within the next century, future generations will look with dismay and great disappointment upon a Congress which is now about to make such a historic mistake.

Id. at 18470.

A document made public in 2010 confirmed the falsity of the charges of unprovoked attacks on United States ships. *See* Elisabeth Bumiller, *Records Show Doubts on '64 Vietnam Crisis*, N.Y. TIMES, July 14, 2010, at A8.

286. *See* GOLDSTEIN, *supra* note 273, at 97-143. At the same time that Lyndon Johnson was convincing everyone that he could successfully fight the communists in Southeast Asia, he was also running a campaign that portrayed his opponent, Barry Goldwater, as a warmonger who would be more likely to blow up the world in a nuclear mushroom cloud.

287. DORIS KEARNS GOODWIN, *LYNDON JOHNSON AND THE AMERICAN DREAM 196-97* (1991).

288. H.R.J. Res 1145, 88th Congress (1964).

289. RICK PERLSTEIN, *NIXON LAND: THE RISE OF A PRESIDENT AND THE FRACTURING OF AMERICA* 239 (2008).

Nixon won reelection with the slogan “peace is at hand.”²⁹⁰

Under pressure from Congress and the public, an agreement on ending the war and restoring peace was signed in January 1973 and combat troops were withdrawn by the end of March. Ultimately, Congress ordered the end of combat activities in Southeast Asia on August 15, and the President complied.²⁹¹

That same year, Congress enacted the War Powers Resolution of 1973, over President Nixon’s veto. The resolution has been a failure, in part because it accepted the erroneous notion popularized by the lower federal courts that the “collective judgment” of the President and Congress was the foundation for the relations of the two branches, rather than the founders thesis that the power to declare war rested in the Congress and not the President. The War Powers Resolution has been a failure; it is not further discussed in this paper.²⁹²

In 1984, Republican President Reagan assigned marines to a multilateral force in Lebanon. They were withdrawn after a car bombing killed 241 marines. The withdrawal, in advance of the presidential elections of that year, may have been prompted by electoral concerns over Reagan’s aggressive foreign policy toward the Soviet Union.²⁹³ Later, his administration was embroiled in the “Iran-Contra” affair.²⁹⁴ In this complex arrangement, the Reagan administration evaded statutes prohibiting the use of appropriated

290. PERRET, *supra* note 11, at 294.

291. Senators Frank Church (Idaho) and Clifford Case (NJ) sponsored an amendment to prohibit use of the military in Vietnam, Laos, and Cambodia after August 15, 1973. It passed the Senate 64-26 and the House 278-124. This was the first time the House voted for a funds cut-off; the Senate had passed them previously. Ground troops had been withdrawn before the vote, bombing stopped on August 15. AMY BELASCO ET AL., CONG. RESEARCH SERV., RL 33803, CONGRESSIONAL RESTRICTIONS ON U.S. MILITARY OPERATIONS IN VIETNAM, CAMBODIA, LAOS, SOMALIA, AND KOSOVO: FUNDING AND NON-FUNDING APPROACHES (2007), available at <http://www.fas.org/sgp/crs/natsec/AL33803.pdf>.

292. For critiques of the WPR, see FISHER, *supra* note 76, at 144-153; IRONS, *supra* note 76, at 196-214; BACEVICH, *supra* note 21, at 152-53; WILLS, *supra* note 22, at 187-96; Alfred W. Blumrosen & Steven M. Blumrosen, *Baker-Christopher Proposal of 2008 Violates the Constitutional Requirement that Congress Declare War*, available at http://warpowers.us/090101_Comment_Baker-Christopher.pdf (last visited Feb. 25, 2011).

293. See Christopher S. Randolph, Jr., *The Effects of Electoral Concerns on Presidential Foreign Policy: The Case of Ronald Reagan*, 2 VANDERBILT UNDERGRADUATE RESEARCH JOURNAL, no. 1 (2006); John Mueller, *American Public Opinion and Military Ventures Abroad: Attention, Evaluation, Involvement, Politics, and the Wars of the Bushes*, Address at the 2003 Annual Meeting of the American Political Science Association (Aug. 13, 2003), available at <http://ics.leeds.ac.uk/papers/pmt/exhibits/2049/APSA2003Mueller.pdf>.

294. PERRET, *supra* note 11, at 303-04; FISHER, *supra* note 76, at 249-55.

funds by the contras in Nicaragua and the transfer of arms to Iran.²⁹⁵

In 1990, John Sununu advised President George H. W. Bush's Republican supporters "that a short successful *war would be pure political gold* for the President and would guarantee his re-election."²⁹⁶ Iraq invaded Kuwait in August 1990. Bush, after securing an AUMF from Congress, put together the international coalition that rescued Kuwait from Iraq's invasion. The war ended on February 28, 1991, considerably before the U.S. elections.²⁹⁷

Democratic President Bill Clinton's two terms included the military operations begun by President Bush in Somalia; extensive involvement in conflicts in Eastern Europe involving Yugoslavia, Kosovo, Bosnia, and Serbia; and an engagement in Haiti. His actions were usually associated with activities by the United Nations or NATO.²⁹⁸

*A Study: 9/11, the Second Iraq War, and the National Security
Statement of "Preventive War"*

In his diary during the night of September 11, 2001, President Bush wrote "The Pearl Harbor of the 21st century took place today."²⁹⁹ He told Washington Post reporter/editor Bob Woodward: "September the 11th obviously changed my thinking a lot about my responsibility as President. Because September the 11th made the security of the American people the priority . . . a sacred duty for the President."³⁰⁰ At the National Cathedral on September 14, Bush said,

295. HERRING, *supra* note 142, at 878-79. On December 24, 1992, in his pardon of Secretary of Defense Caspar W. Weinberger and Elliott Abrams, Duane R. Clarridge, Alan Fiers, Clair George, Robert C. McFarlane following investigation by Independent Counsel Lawrence E. Walsh, President George H.W. Bush explained: "the actions of the men I am pardoning took place within the larger Cold War struggle. . . . When earlier wars have ended, Presidents have historically used their power to pardon to put bitterness behind us and look to the future." Grant of Executive Clemency, Proclamation 6518, 57 Fed. Reg. 62,145 (Dec. 24, 1992), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=20265>.

296. IRONS, *supra* note 76, at 206 (emphasis added).

297. Paul Lewis, *Allies, at U.N., Seek Formal Cease-Fire, Retaining Right to Attack*, N.Y. TIMES, March 1, 1991, at A8.

298. These engagements are discussed in detail in RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RL 32267, THE WAR POWERS RESOLUTION: AFTER THIRTY FOUR YEARS 29-45 (2008). For a detailed description of Clinton's activities with NATO, Europe and Kosovo, see Sidney Blumenthal, *Clinton's War: What Kosovo Can Teach Us Now*, 35 WASHINGTON MONTHLY 32 (May 2003); DAVID HALBERSTAM, WAR IN A TIME OF PEACE: BUSH, CLINTON, AND THE GENERALS 387-480 (2001); Campbell v. Clinton, 203 F.3d 19 (D.C. Cir. 2000) (describing the confused state of Congress over air strikes in the Balkans in 1999).

299. BOB WOODWARD, PLAN OF ATTACK 24 (2004).

300. *Id.* at 27. In August, 2002, Bush told Woodward, "I will seize the opportunity to achieve big goals." *Id.* at 162.

“our responsibility to history is already clear: to answer these attacks and rid the world of evil.”³⁰¹ Bush’s vision, according to Woodward, “includes an ambitious reordering of the world through preemptive and, if necessary, unilateral action.”³⁰²

As early as September 12, he proposed that Congress resolve:

That the President is authorized to use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, harbored, committed, or aided in the planning or commission of the attacks against the United States that occurred on September 11, 2001, *and to deter and preempt any future acts of terrorism or aggression against the United States*.³⁰³

The italicized language in the last two lines of his proposal was set apart from the earlier part of the statement by the emphasized “and.” Had “and” remained in the resolution, the President would have been authorized to attack nations, organizations and persons anywhere in the world based solely on his judgment that they might in the future consider engaging in aggression against the United States. This would have been a true “blank check” for preemptive strikes, anywhere in the world.

Congress did not adopt the italicized language in the form proposed by the President, objecting to the scope of the italicized language.³⁰⁴ The congressional objections were accommodated in two

301. BOB WOODWARD, BUSH AT WAR 67 (2002) (“The President was casting his mission and that of the country in the grand vision of God’s master plan.”).

302. *Id.* at 341. Part of President Bush’s view of the world may have come from the first film that he and Laura choose for “movie night in the Family Theater” of the White House where they watched a then-new movie called “Thirteen Days,” with Sen. Teddy Kennedy and some members of his extensive family. GEORGE W. BUSH, DECISION POINTS 273 (2010); *Cf.*, Robert F. Kennedy’s first-hand account of the Cuban Missile Crisis, by the same name in KENNEDY, *supra* note 276.

303. RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RS 22357, AUTHORIZATION FOR USE OF MILITARY FORCE IN RESPONSE TO 9/11 ATTACKS (P.L. 107-40): LEGISLATIVE HISTORY 2-5 (2006) (emphasis added).

304. *See id.* at 3, 6. In December 2005, Tom Daschle, Democratic Senate majority leader 2001-02, published an Op-Ed piece in the Washington Post describing negotiations between the White House and Congress. Tom Daschle, *Power We Didn’t Grant*, WASH. POST, Dec. 23, 2005, at A21. He explained that on September 12, 2001, Bush officials sought Congressional authorization for the use of military force to, in their words, “deter and pre-empt any future acts of terrorism or aggression against the United States.” *Id.* But Congress refused, finding the request “too broad and ill defined,” instead choosing on September 14 to use language that authorized President Bush to use “all necessary and appropriate force against those nations, organizations or persons [the President] determines planned, authorized, committed or aided” the 9/11 attacks. *Id.* Daschle explained, “With this language, Congress denied the President the more expansive authority he sought and insisted that his authority be used specifically against Osama bin Laden and al-Qaeda Even so, a strong bipartisan majority could not agree to the administration’s request for an

ways. First, the objectionable language was removed from the text of the proposed AUMF, and placed in the preamble. The lawyers who negotiated this change knew that Congress can adopt a law only through words that are intended to be binding. A preamble—the portion of a statute headed “Whereas”—is not “law.”³⁰⁵ It is an explanation of why Congress has decided to enact the legislation that follows. Second, the language that remained was limited to identify as “targets” those nations, organizations and individuals that had some connection to 9/11.³⁰⁶ President Bush could have and, yet, did not seek to name Al Qaeda or the Taliban in the authorization, even though the FBI and CIA had already identified them as the planners and attackers of 9/11.³⁰⁷

While Congress denied that “blank check,” after President Bush signed the amended resolution, he spoke as if his original proposal had been adopted.³⁰⁸ The Justice Department said that Congress “[recognized] . . . the authority of the President under the Constitution to take action to deter and prevent acts of terrorism against the United States.”³⁰⁹

The AUMF that was adopted on September 18, 2001, is so vague it may not constitute a declaration of war under any circumstances. As John Hart Ely observed in 1993, “a ‘Declaration of war’ includes the element of specificity . . . ‘Go to war against whomever you want’

unprecedented grant of authority.” *Id.* The administration simply took the power anyway, and argued in hindsight that the AUMF gave it the right to wiretap US citizens, that “those powers were inherently contained in the resolution . . . but at the time, the administration clearly felt they weren’t or it wouldn’t have tried to insert the additional language.” *Id.*

305. NORMAN J. SINGER, 1A SUTHERLAND STATUTORY CONSTRUCTION § 20:3 (6th ed. 2006); Grimm, *supra* note 303, at 3-4, 6.

306. As passed, it authorizes the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” Grimm, *supra* note 303, at 6.

307. See THE 9/11 COMMISSION REPORT, FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (AUTHORIZED EDITION) 71-107 (2004); JOHN FARMER, THE GROUND TRUTH: THE UNTOLD STORY OF AMERICA UNDER ATTACK ON 9/11 1-71 (2009).

308. The legal distinction between preamble and statutory text was unimportant to the President. Bush later said: “I wasn’t interested in lawyers, I wasn’t interested in a bunch of debate. I was interested in finding out who did it and bringing them to justice. I also knew that they would try to hide, and anybody who provided haven, help, food, would be held accountable by the United States of America.” Remarks at a Townhall Meeting in Ontario, California, 1 PUB. PAPERS 12 (Jan. 5, 2002).

309. Statement on Signing the Authorization for Use of Military Force, 2 Pub. Papers 1125 (Sept. 18, 2001).

would not have counted.”³¹⁰

Congress, in the aftermath of 9/11, passed all responsibility to a willing President. Even though Congress had tried to limit the scope of the war, to terrorists who had some connection with the attack of 9/11, President Bush ignored that congressional decision denying him the freedom of action he had sought. A year later, when he signed the resolution authorizing war against Iraq on September 18, 2002, he also announced his National Security Strategy statement, NSS-002.³¹¹ In the statement, he made no mention of the constitutional requirement that only Congress can declare war.³¹² The tone of the 2002 document celebrated America:

The United States possesses unprecedented – and unequalled – strength and influence in the world. Sustained by faith in the principles of liberty, and the value of a free society, this position comes with unparalleled responsibilities, obligations, and opportunity.

. . . .

The U.S. national security strategy will be based on a distinctly American internationalism that reflects the union of our values and our national interests. The aim of this strategy is to help make the world not just safer but better.³¹³

The introduction to the National Security Strategy of 2002 elaborated: “America will act against such emerging threats before they are fully formed History will judge harshly those who saw this coming danger but failed to act. In the new world we have entered, the only path to peace and security is the path of action”³¹⁴

310. ELY, *supra* note 76, at 26.

311. THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 2002 (September 2002) [hereinafter NSS-2002], *available at* http://www.au.af.mil/au/awc/awcgate/nss/nss_sep2002.pdf. Bush reaffirmed the same basic views in his 2006 revision of the Strategy. THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 2006 (September 2006), *available at* <http://www.dam.army.pentagon.mil/site/dig/documents/NationalSecurityStrategy-MAR06.pdf>.

312. WOODWARD, PLAN OF ATTACK, *supra* note 299, at 27, 130-33 (vividly describing the evolution of the preemptive war plan, and the way in which the President influenced its evolution and support within the administration).

313. NSS-2002, *supra* note 311, at 1.

314. *Id.* at intro. Key phrases in the Strategy define the preventive war concept: First, “We must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and our allies and friends. . . . We cannot let our enemies strike first.” *Id.* at 14. In addition, the Strategy announces, “The greater the threat, the greater is the risk of inaction and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.” *Id.* at 14-15.

The bold announcement of “preventive” or “preemptive” war sent shock waves through the national and international communities. This idea was new for most Americans, who assumed we were a peaceful nation unless attacked.³¹⁵ It coupled willingness to use preemptive force against terrorist nations with insistence that the less developed world be “capitalist friendly.” Thus, the national security strategy reached beyond seeking out terrorists before they attacked the United States, and suggested that other nations adopt our then-current version of capitalism.³¹⁶ Since a nuclear or biological weapon always appears to be threatening, the nations targeted by the preventive war policy may include our allies who have such weapons, as well as the “unaligned nations” that have them, our old “cold war” enemies, and all nations seeking them now or in the future, especially if they have begun enrichment programs that could be used for either peaceful or hostile purposes. In other words, the preventive war principle can be turned against every nation that has or seeks nuclear or biological warfare capabilities; and every such country might well have felt threatened by the NSS-2002.

President Barack Obama’s 2010 National Security Strategy has none of the sharp edges of the Bush policy statements that focused on preventive war and unilateral action.³¹⁷ While the fifty page document promises enhanced defensive systems, the emphasis is on cooperation with friendly nations and assistance to weaker

315. A view expressed in the Militia Acts authorizing Presidential actions in the event of invasion, insurrection or failure of federal law. *See supra* Part V.

316. There are many versions of “capitalism” that America has followed during it’s more than 200 years of existence. Bush-style capitalism is not the only way the American economy can, and has operated. The American experience with capitalism has taken many forms, sometimes exclusively favoring the very rich, other times paying more attention to larger segments of the population. The Supreme Court has changed its mind about economic matters most openly during the presidency of Franklin Delano Roosevelt. *See* FELDMAN, *supra* note 256, at 103-21. In the past twenty years, American public opinion has swung sharply in favor of programs that were rejected by the Bush administration. In March 2007, the Pew Research Center issued a report on twenty years of change in “Political Values and Core Attitudes.” Its summary includes:

Increased public support for the social safety net, signs of growing public concern about income inequality, and a diminished appetite for assertive national security policies have improved the political landscape for the Democrats as the 2008 Presidential campaign gets underway. . . . More Americans believe that the government has a responsibility to take care of people who cannot take care of themselves, and that it should help more needy people even if it means going deeper into debt.

PEW RESEARCH CENTER, TRENDS IN POLITICAL VALUES AND CORE ATTITUDES: 1987-2007: POLITICAL LANDSCAPE MORE FAVORABLE TO DEMOCRATS 1-2 (2007).

317. *See* THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 2010 (May 2010), available at http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

nations.³¹⁸ Operationally, Obama has shifted military resources from Iraq toward Afghanistan and the Taliban that has migrated toward Pakistan. Nonetheless, his administration has continued to rely on the AUMFs issued in 2001 for 9/11 and 2002 for the Second Iraq War, without public consideration of whether the “usual suspects” remain the appropriate suspects after ten years.

President Bush had used the preventive war principle to obtain an AUMF to invade Iraq based on false allegations that Iraq had aided Al Qaeda in the attack of 9/11, had WMD, and was close to a nuclear weapon.³¹⁹ This was similar to the way President Johnson

318. *See id.* On February 15, 2011 President Obama held a press conference in which he further discussed his approach to national security. In response to a question posed by Ed Henry about developments in Egypt that had toppled, without much public United States intervention, a regime that had been friendly to the United States for thirty years, the President explained that his position is neither the strident bravado of the Bush era nor the interventionist approach of Theodore Roosevelt, but is designed to protect a broad array of United States interests without paternalistically forcing or encouraging other countries to accept a ruler who is hand-picked in Washington, as happened with Diem in South Vietnam. In the past, strong-arm forms of global domination have offended “local” peoples and spawned anti-American resentment. As the President explained:

What we didn't do was pretend that we could dictate the outcome in Egypt, because we can't. So we were very mindful that it was important for this to remain an Egyptian event; that the United States did not become the issue, but that we sent out a very clear message that we believed in an orderly transition, a meaningful transition, and a transition that needed to happen not later, but sooner.

He suggested that part of judging whether this was a success or failure is to look at the result: “[W]e ended up seeing . . . a peaceful transition, relatively little violence, and relatively little, if any, anti-American sentiment, or anti-Israel sentiment, or anti-Western sentiment.” Yet, he made it clear that the United States supports its values:

[A]s we uphold these universal values (greater opportunity, freedom of speech, and a free press), we do want to make sure that transitions do not degenerate into chaos and violence. That's not just good for us; it's good for those countries. The history of successful transitions to democracy have generally been ones in which peaceful protests led to dialogue, led to discussion, led to reform, and ultimately led to democracy.

President Barack Obama, Press Conference at the South Court Auditorium (Feb. 15, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/02/15/press-conference-President>.

319. DIRECTOR OF CENTRAL INTELLIGENCE AGENCY, NATIONAL INTELLIGENCE ESTIMATE: IRAQ'S CONTINUING PROGRAMS FOR WEAPONS OF MASS DESTRUCTION (2002) [hereinafter IRAQ'S CONTINUING PROGRAMS], *available at* <http://www.gwu.edu/~narchiv/NAEBB/NAEBB80/wmd15.pdf> (“We judge that Iraq has continued its weapons of mass destruction (WMD) programs in defiance of UN resolutions and restrictions. Baghdad has chemical and biological weapons as well as missiles with ranges in excess of UN restrictions; if left unchecked, it probably will have a nuclear weapon during this decade.”); *see also* WOODWARD, PLAN OF ATTACK, *supra* note 299, at 194-201; MICHAEL ISIKOFF & DAVID CORN, HUBRIS: THE INSIDE STORY OF SPIN, SCANDAL, AND THE SELLING OF THE IRAQ WAR 132-68 (2006) (noting also that perhaps only half a dozen Senators had read the report before the vote on the AUMF).

had obtained an AUMF for Vietnam from Congress based on misinformation concerning Vietnamese attacks on “innocent” U.S. naval ships in the Gulf of Tonkin.³²⁰ In both situations, American lives, treasure, and world standing were lost.

The President did not seek a congressional declaration of war in either of these situations.³²¹ Had he done so, every member of Congress might have felt more personally involved in the decision, since their constituents could have held them accountable at the next election. Congress might have more closely examined the facts behind the presidential allegations. But since Presidents Johnson and Bush sought only Authorizations for the Use of Military Force, Congress was not asked to make a decision for war. With this history of presidential misdirection in two of the most mistaken and disastrous wars in our history, Congress should be skeptical of presidential desires for an AUMF and should demand clear proof of the claimed justification.

Karl Rove became Republican President George W. Bush’s full time political advisor early in 2001.³²² Rove saw Bush’s public ratings improve markedly after 9/11. “In January 2002, [at a] Republican National Committee meeting in Austin, Texas, Karl Rove stated that the GOP would make the President’s leadership in the war on terror the top issue for retaining control of the House and winning back the Senate in the midterms.”³²³ Rove predicted that the Party would make major gains because the voters “trust the Republican Party to do a better job of protecting and strengthening America’s military might and thereby protecting America.”³²⁴

320. GOLDSTEIN, *supra* note 273, at 121-43. PETER L. BERGEN, *THE LONGEST WAR: THE ENDURING CONFLICT BETWEEN AMERICA AND AL-QAEDA* 313 (2011) (“For Obama’s key political advisors – David Axelrod; his chief of staff, Rahm Emanuel; and Biden – the ghost hovering over the discussion of any ramping-up of the Afghan war effort was that of Lyndon Johnson, who had destroyed his presidency as he expanded the American involvement in Vietnam, Riedel (the former CIA officer who was called out of retirement by the President to conduct a review of Afghan/Pakistan policy) recalls, ‘They are just very, very mindful that a Democratic President with big ideas for domestic change can see all of that destroyed in a war in Asia that destroys the party in the process. . . . Biden does not want to be the Hubert Humphrey. He doesn’t want to be the guy who went along with something which he profoundly disagreed with, but he went along with it because he was a loyal supporter of the President.’”).

321. Congress could have declared war without a request, of course. In fact, on September 13, 2001, nine representatives sponsored an unsuccessful motion which purported to be a declaration of war. *See* H.J. Res 62, 107th Cong. (2001).

322. BOB WOODWARD, *STATE OF DENIAL* 15-16 (2006).

323. SCOTT MCCLELLAN, *WHAT HAPPENED: INSIDE THE BUSH WHITE HOUSE AND WASHINGTON’S CULTURE OF DECEPTION* 112 (2008).

324. *Id.*; *see also* ISIKOFF & CORN, *supra* note 319, at 22; RON SUSKIND, *THE ONE PERCENT DOCTRINE: DEEP INSIDE AMERICA’S PURSUIT OF ITS ENEMIES SINCE 9/11* at 78 (2006); RICHARD CLARKE, *AGAINST ALL ENEMIES: INSIDE AMERICA’S WAR ON TERROR*

Rove's statement sent a message to members of the President's party to support the President's "war on terrorism" just as the Democrats had supported Johnson's Gulf of Tonkin Resolution in 1964. In both situations, the party of the President did not inquire into the reasoning or the wisdom used to promote the wars.³²⁵

In September 2002, the Bush administration beat the drums of war against Iraq through television appearances by senior officials. By October 2, 2002, the Bush administration exercised its political influence on Congress. That morning, the CIA released a National Intelligence Estimate with a first paragraph that misleadingly stated, "Baghdad has chemical and biological weapons."³²⁶ This positive statement was followed by pages of qualifications and doubts, and a dissent from the State Department Intelligence Bureau questioning the evidence concerning Iraq's moves toward nuclear weapons.³²⁷

At 1:15 that same afternoon—which meant that no one would have had time to review the entire new document from the CIA—President Bush and congressional leaders of both parties announced bi-partisan support for the AUMF against Iraq.³²⁸

186, 242 (2004); FRANK RICH, *THE GREATEST STORY EVER SOLD: THE DECLINE AND FALL OF TRUTH IN BUSH'S AMERICA* 215 (2007); BERGEN, *supra* note 320, at 131-152.

325. ELY, *supra* note 76, at 15-19.

326. IRAQ'S CONTINUING PROGRAMS, *supra* note 319. This document references the Bureau of Intelligence and Research's ("INR") "alternate view" which, among other things, considered "the claims of Iraqi pursuit of natural uranium in Africa [to be] highly dubious." *Id.*

327. See *id.* (showing only declassified portions).

328. Futilely, a few, mainly Democrats, protested the Rose Garden fait accompli and lack of Congressional investigation. In the Senate, Democrat Robert Byrd of West Virginia rose to remind citizens that the Constitution gives Congress, not the President, the power to declare war. "Nowhere, nowhere in this Constitution . . . is it written that the President has the authority to call forth the Militia to pre-empt a perceived threat." See 148 CONG. REC. S 9874 (Oct. 3, 2002). Congresswoman Eleanor Holmes Norton, Democrat, District of Columbia, reminded the House of Representatives on October 8 of their constitutional responsibilities: "[T]his vote would be an unconstitutional delegation of the exclusive power of Congress to declare war. It is shocking to give away the unique life and death power to declare war bestowed on Congress by the Framers." 148 CONG. REC. H 7242 (Oct. 8, 2002). Carl Hulse, *Threats and Responses: The Democrats; Endorsement by Gephardt Helps Propel Resolution*, N.Y. TIMES, Oct. 3, 2002, at A14 described the Rose Garden gathering as a "celebration of the agreement between President Bush and House leaders on the language of the resolution" and quoted one frustrated Democratic representative, Jose E. Serrano of New York, as saying: "Some members are saying that it was kind of shocking to see the display of unity at the White House lawn when so many of us were still grappling with the issue." *Id.* Full transcript of the press conference is available at *President, House Leadership Agree on Iraq Resolution*, THE WHITE HOUSE – PRESIDENT GEORGE W. BUSH, <http://georgewbush-whitehouse.archives.gov/news/releases/2002/10/print/20021002-7.html> (last visited Feb. 7, 2011).

The Rose Garden press conference began at 1:15 p.m. and ended at 1:34 p.m. The die had been cast in nineteen minutes. At the end of the press conference, the President announced that the debate in Congress “should now begin.” Congress then proceeded to have their week of “debate” over a matter that was already resolved. The facts asserted by the President were not tested in the legislative forum.

After a week of speeches, Congress adopted Bush’s resolution that recited the “constitutional authority” he tried to claim in the 9/11 AUMF and authorized him to determine whether to use force against Iraq.³²⁹

Why did the Democratic majority in the Senate, along with the Democratic leadership in the House, vote with the Republican President? One reason may have been the Democrats’ continued fear of being viewed as “soft” on our enemies. The McCarthy Era seemed to have caused the country to forget that Democrat Franklin

329. Authorization for Use of Military Force Against Iraq Resolution of 2002, H.R. Res. 114, 107th Cong. (2002) (enacted), provided:

Whereas the President has authority under the Constitution to take action in order to deter and prevent acts of international terrorism against the United States, as Congress recognized in the joint resolution on Authorization for Use of Military Force (Public Law 107-40); and Whereas it is in the national security interests of the United States to restore international peace and security to the Persian Gulf region: Now, therefore, be it Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, . . . SEC. 3(a) AUTHORIZATION—The President is authorized to use the Armed Forces of the United States *as he determines* to be necessary and appropriate in order to—

(1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq. (Emphasis added.)

President Bush spoke to the United Nations on September 12, 2002. He included the phrase “Saddam Hussein has defied all these efforts and continues to develop weapons of mass destruction. The first time we may be completely certain he has a — nuclear weapons is when, God forbid, he uses one.” The White House Press Release, President’s Remarks at the United Nations General Assembly (Sept. 12, 2002). In response to U.S. pressures, Iraq agreed to allow inspectors to return. On November 8, the UN Security Council adopted Resolution 1441, which “Recalls . . . that the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations,” and “*Decides* to remain seized of the matter.” S.C. Res. 1441, ¶¶ 13-14, U.N. Doc. S/RES/1441 (8 November 2002). Although the phrase “serious consequences” connoted further action, in the UN world those consequences did not include armed invasion. UN Secretary General Annan and American international law scholars have argued that “serious consequences” did not authorize the invasion of Iraq by the United States and that the invasion may have been illegal under the UN Charter. *Iraq War Illegal, Says Annan*, BBC NEWS (Sept. 16, 2004), http://news.bbc.co.uk/2/hi/middle_east/3661134.stm; *International Law Scholars Appeal to UN Secretary General - Open Letter Urges Adherence to International Law in Iraq Dispute*, PEACE MOVEMENT AOTEAROA (Mar. 10, 2003), <http://www.converge.org.nz/pma/cra0979.htm>.

Roosevelt won World War II and Democrat Truman dropped atomic bombs on two major Japanese cities, fought communist expansion in Europe, defeated a Russian blockade of Berlin using airpower, and rushed troops to Korea in 1950. This same fear influenced President Kennedy to increase the number of forces in Vietnam and Lyndon Johnson to escalate the war in Vietnam that he believed was not winnable.³³⁰ The loss of the 1972 election by George McGovern, who opposed war in Vietnam, scarred Democrats for more than thirty years.³³¹ The fears of Democratic politicians in 2002 concerned the risk that Republican President Bush would argue that they were soft on terrorism and beat them in the 2004 election.

The authorization endorsed at the Rose Garden gathering utilized the formula invented for President Eisenhower's Formosa crisis to relieve members of Congress of the constitutional obligation that Charles Pinckney had insisted upon on June 1, 1787. No member of Congress would be personally responsible for the thousands of deaths of Americans and the many thousands of deaths of Iraqis because they had not voted for war, they had voted to "let George decide to do it."

President Bush's rationale for attacking Iraq lacked foundation, as did the "Gulf of Tonkin resolution" that ratcheted up the Vietnam War. Iraq had no weapons of mass destruction, was not near producing nuclear weapons, and had no connection with the 9/11 attack on the United States.³³² Louis Fisher has recently examined presidential misleading of the public in connection with wars.³³³ We have now seen two major wars leading to national disasters, Vietnam and the Second Iraq War, commenced by Presidents of both parties without any serious examination by Congress of their claims that justified the war. Congress should by now understand its responsibility to assure the citizenry that there is serious cause for military hostilities desired by the President. Our history since 1950 makes clear that it is folly to entrust the decision for war to one person, and wisdom to diffuse it among the members of Congress, and place a time limit that will force congressional reconsideration on all such authority.³³⁴

330. GOODWIN, *supra* note 287, at 251-53.

331. George McGovern had been awarded the Distinguished Flying Cross in WWII. *George McGovern*, NDDb, <http://www.nddb.com/people/903/000022837/> (last visited Feb. 6, 2011).

332. See generally RICH, *supra* note 324; ISIKOFF & CORN, *supra* note 319; PERRET, *supra* note 11, at 339-63; FARMER, *supra* note 307.

333. FISHER, *supra* note 76; see also HERRING, *supra* note 142, at 940-61 (providing a compressed study of the Iraq War of 2003).

334. The ability of President Bush to transfer American fear and hatred of bin Laden and Al Qaeda to Saddam Hussein's Iraq has a compelling parallel in George

The Bush administration had made multiple uses of the AUMF, first in the week of September 11, 2001, seeking the perpetrators and supporters of Al Qaeda in Afghanistan, and then in the following year, seeking Saddam Hussein's regime in Iraq. The legality of the AUMF in both situations had been firmly buttressed by the lower federal courts in cases arising out of the Vietnam War.

IX. JUNE 1, 1787 WAS IGNORED WHEN FEDERAL COURTS REVIEWED
THE VIETNAM RESOLUTION OF 1964

The Gulf of Tonkin Resolution of 1964 that authorized the President to undertake the Vietnam War "as he determines" generated litigation that distorted the Framers' intent.³³⁵ Two cases reached the Supreme Court, which affirmed without writing opinions on the merits.³³⁶ At least eleven cases reached the courts of appeals, which wrote many opinions.³³⁷ These courts at first avoided confronting claims that the resolution violated the Constitution. They used several techniques of evasion. Prominent was the analysis that the issue involved a "political question" that was the business of the President and Congress, who were said to have "joint" interests that foreclosed courts from interfering.³³⁸ An equally potent approach was to find that plaintiffs had no standing to litigate these cases because they were civilians, military personnel, or legislators.³³⁹ Only

Orwell's novel, *1984*. See generally GEORGE ORWELL, 1984 (1949). *1984* envisioned the world divided into three military powers. *Id.* To keep citizens docile, one power was always at war with one of the other two powers. *Id.* The people were so smothered by government propaganda that during a campaign of fear and hatred against country number one, the people were told – and accepted – that the enemy was – and always had been – country number two. *Id.* Similarly, Bush succeeded in shifting the energy behind U.S. hatred of Al Qaeda and bin Laden to Hussein and Iraq. See Frank Rich, *The Ides of March 2003*, N.Y. TIMES, Mar. 18, 2007, § 4, at 12 ("March 6, 2003 President Bush holds his last prewar news conference. The New York Observer writes that he interchanged Iraq with the attacks of 9/11 eight times, 'and eight times he was unchallenged.'").

Unlike the government described in *1984*, the administration could not control all news sources. Evidence that Iraq was descending into uncontrollable chaos was reported. See, e.g., BOB WOODWARD, *STATE OF DENIAL: BUSH AT WAR PART III* (2006). The administration tried to manage the media, spending millions in the process, but their influence did not translate into the effective control that Orwell had prophesied in 1984. RICH, *supra* note 324, at 30-33, 104-11, 336.

335. H.R.J. Res 1145, 88th Congress (1964).

336. *Massachusetts v. Laird*, 400 U.S. 886 (1970); *Atlee v. Richardson*, 411 U.S. 911 (1973).

337. See *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973) (citing the Vietnam War cases decided as of 1973).

338. See *Massachusetts v. Laird*, 451 F.2d 26, 33 (1st Cir. 1971).

339. The view of the lower federal court judges at the beginning of the Vietnam War was that they did not have jurisdiction over the issue. By the end of that war, federal judges acknowledged that they had jurisdiction in cases claiming the war illegal

one district judge protested that the evasion of this issue was literally tearing the nation apart.³⁴⁰

Increasing public hostility to the war led one court of appeals to criticize the protesters for “being wasteful of judicial time” by going to court in 1967.³⁴¹ By 1971, two other circuits produced substantive decisions: the Second Circuit (New York) in *Orlando v. Laird* and the First Circuit (Boston) in *Massachusetts v. Laird*.³⁴² These three decisions typify the court rulings rendered in connection with the Vietnam War, and as the Supreme Court never reviewed them, they stand as good law today. They were all wrongly decided, essentially because they did not consider the separation of power over war established on June 1, 1787.

because it was not declared by Congress. Nevertheless, they found procedural reasons to refuse to decide the merits of their claims. JOHN C. BONIFAZ, WARRIOR KING: THE CASE FOR IMPEACHING GEORGE W. BUSH 31-65 (2003). See *Berk v. Laird*, 429 F.2d 302, 304-06 (2d Cir. 1970) (“The [government’s] position is essentially that the President’s authority as Commander in Chief, in the absence of a declared war, is co-extensive with his broad and unitary power in the field of foreign affairs. . . . If this were the case, Berk’s claim would not be justiciable because the congressional power to ‘declare’ a war would be reduced to an antique formality, leaving no executive ‘duty’ to follow constitutional steps which can be judicially identified.”). Berk, an Army private first class who had enlisted a year earlier, received orders on April 29, 1970, to report to Fort Dix to be sent to Vietnam. On June 3, he filed suit seeking a preliminary injunction. The court found that “since orders to fight must be issued in accordance with proper authorization from both branches under some circumstances, executive officers are under a threshold constitutional ‘duty (which) can be judicially identified and its breach judicially determined.’” *Id.* at 305 (quoting *Baker v. Carr*, 369 U.S. 186, 198 (1962)). The court denied the injunction; and remanded for further proceedings, confirming that Berk “raises a claim which meets the general standard of justiciability set out in *Powell v. McCormack* . . . and *Baker v. Carr* . . . but must still be shown to escape the political question doctrine.” *Id.* at 306.

340. In one of the first Vietnam war cases, *Mottola v. Nixon*, 318 F. Supp. 538 (N.D. Cal. 1970), District Judge Sweigert, questioned why there had been no resolution of “whether the President may otherwise initiate or continue a war operation . . . without requesting as soon as reasonably possible, and receiving, a congressional declaration of war.” *Id.* at 541. “In all these cases the Supreme Court has denied petitions seeking its review of the questions involved. . . . [T]he serious questions raised by these cases remain undecided by the Supreme Court.” *Id.* at 546. Judge Sweigert pleaded that “we are of the opinion that the courts, eschewing indecision, inaction or avoidance on such grounds as ‘no standing,’ ‘sovereign immunity’ and ‘political question,’ should discharge their traditional responsibility for interpreting the Constitution of the United States.” *Id.* at 553-54. Judge Sweigert’s decision to allow plaintiffs to proceed with their litigation was reversed by the Ninth Circuit Court of Appeals because the petitioners lacked standing to litigate the issue. See *Mottola v. Nixon*, 464 F.2d 178 (9th Cir. 1972).

341. See *Luftig v. McNamara*, 373 F.2d 664, 665 (D.C. Cir. 1967).

342. *Orlando v. Laird*, 443 F.2d 1039 (2d Cir. 1971); *Massachusetts v. Laird*, 451 F.2d 26 (1st Cir. 1971).

Luftig v. McNamara

Luftig v. McNamara, decided in 1967 by the District of Columbia Court of Appeals, upheld the dismissal of a suit for declaratory judgment and injunction to end the Vietnam War because it was not authorized by Congress.³⁴³ Judge Frank M. Coffin joined in the short per curium opinion that expressed the view of the three judges with blunt confidence. The district court had dismissed the complaint because the plaintiffs sought “judicial review of political questions beyond its jurisdiction and that it was an unconsented suit against the United States.”³⁴⁴ The court of appeals wrote:

The District Court was, of course, eminently correct . . . these propositions are so clear that no discussion or citation of authority is needed. The only purpose to be accomplished by saying this much on the subject is to make it clear to others comparably situated and similarly inclined that *resort to the courts is futile, in addition to being wasteful of judicial time, for which there are urgent legitimate demands.*

It is difficult to think of an area less suited for judicial action than that into which Appellant would have us intrude. The fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power; these matters are plainly the exclusive province of Congress and the Executive.³⁴⁵

The court cited five cases in support of the principle it stated, none of which concerned or addressed the power of congress to declare war.³⁴⁶ The opinion does not mention the June 1, 1787 discussion at the Convention nor does it provide any analysis of the history of the Declare War Clause.

343. *Luftig*, 373 F.2d at 665-66.

344. *Id.* at 665 (affirming *Luftig v. McNamara*, 252 F. Supp. 819 (D.D.C. 1966)).

345. *Id.* at 665-66 (emphasis added).

346. The five opinions cited were: *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950) (holding that Germans tried by the U.S. military for aiding Japanese in China after the German surrender were not entitled to habeas corpus when taken to U.S. occupied Germany); *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (concluding that foreign airline certification required by Congress to be approved by President not subject to judicial review); *Eminente v. Johnson*, 361 F.2d 73 (1966) (alien seeking damages from U.S. without consent); *Pauling v. McNamara*, 331 F.2d 796 (1963) (holding no jurisdiction to enjoin nuclear testing approved by Congress and President); *Pauling v. McElroy*, 278 F.2d 252 (1960) (similar to *Pauling v. McNamara*). None of these cases justify the sweep of the *Lustig* opinion because the Constitutional provision in art. I, § 8, cl. 11 specifically allocates the power to declare war to the Congress. U.S. CONST. art. I, § 8, cl. 11.

Orlando v. Laird

The other two “typical” decisions, *Orlando v. Laird* and *Massachusetts v. Laird*, were decided within three months of each other in 1971.³⁴⁷ Once again, the judges were unaware of or chose to disregard the history behind the discussion of June 1-4, 1787 that addressed the issue of which branch would decide on war, as well as interpretations of the Supreme Court in the early years of the Constitution. Every federal court of appeals, and all but one district court, behaved as if June 1-4 never took place, and that only the discussion on August 17, 1787 was relevant. As of this writing, the analyses in this article have only been presented in one case, *New Jersey Peace Action v. Obama*.³⁴⁸ In that case, the district court’s opinion did not discuss the analysis, dismissing because plaintiffs had no standing and the issue was a “political question” beyond the reach of the courts.³⁴⁹ The court of appeals affirmed the dismissal on grounds of “redressability” and “standing.”³⁵⁰ The Supreme Court denied the petition for certiorari.³⁵¹

Only one federal district judge has ever referred to the Pinckney-Madison exchange on June 1, 1787 in connection with the AUMF concerning the Vietnam War.³⁵² In *Orlando v. Laird*,³⁵³ District Judge Dooling wrote:

Neither the language of the Constitution nor the debates of the time leave any doubt that the power to declare and wage war was pointedly denied to the presidency. In no real sense was there even an exception for emergency action and certainly not for a self-defined emergency power in the presidency. The debates, so often strangely—to our ears—devoid of respect for and alive with fears of the presidency that the Convention was forming, are clear in the view that (as Wilson put it) the power to make war and peace are

347. *Orlando v. Laird*, 443 F.2d 1039 (2d Cir. 1971); *Massachusetts v. Laird*, 451 F.2d 26 (1st Cir. 1971).

348. *New Jersey Peace Action v. Obama*, 2009 WL 1416041 (D.N.J. 2009), *aff’d*, 379 Fed App’x 217 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 937 (2011).

349. *New Jersey Peace Action v. Obama*, 2009 WL 1416041 (D.N.J. 2009).

350. *New Jersey Peace Action v. Obama*, 379 Fed App’x 217 (3d Cir. 2010).

351. *New Jersey Peace Action v. Obama*, 131 S. Ct. 937 (2011).

352. One other district court judge has found June 1. On August 29, 1973, Chief Judge John Sirica of the DC District Court published his opinion in an action to compel President Nixon to produce certain records in connection with the break-in at the Watergate headquarters of the Democratic National Committee. Judge Sirica wrote that: “Early in the Convention of 1787, the delegates cautioned each other concerning the dangers of lodging immoderate power in the executive department.” Judge Sirica then inserted footnote 4, citing to the same June 1 discussion at 1 FARRAND, RECORDS, *supra* note 5, at 64-69 that we have analyzed in this article. In re Subpoena to Nixon, 360 F. Supp. 1, 4 (D.D.C. 1973).

353. 317 F. Supp 1013 (E.D.N.Y. 1970).

legislative.³⁵⁴

Nevertheless Judge Dooling concluded that the continued and increasing funding by Congress of the war in Vietnam constituted clear congressional approval and that the use of the phrase “declare war” was unnecessary.³⁵⁵ Although Judge Dooling recognized the argument that “the Executive has rendered the Congress impotent to withhold the grudging and involuntary appropriations and implementing laws relied on as constituting its authorization of combat activities in Southeast Asia . . . and do not reflect a will to ratify usurped initiatives,”³⁵⁶ he went on to assert:

That, however, is simply a charge of Congressional pusillanimity. Such evidence . . . could only disclose the motive and could not disprove the fact of authorization. . . . The Constitution presents the Congress with the opportunity for it, but it cannot compel the making of unpopular decisions by the members of Congress [I]t may as much reflect the necessities of national government today as the failure of the Congress itself to function effectively in the affirmative formation of national policy.³⁵⁷

Of course, it is the natural caution of legislators concerned about their jobs that the delegates to the Constitutional Convention were relying on to provide the impetus for reining in the ambitions of Presidents. If Congress is too uncertain of the risks in declaring war that members would not record their votes for their constituents to see, then the level of public support is probably not sufficient for the nation to take on that war.

When the *Orlando* case reached the court of appeals, Judge Dooling’s crisp grasp of the significance of June 1 was ignored, while his approach – that Congress’ continued funding of the Vietnam War constituted the equivalent to a declaration of war – was adopted. The court of appeals concluded that:

354. *Id.* at 1016 (quoting 1 FARRAND, RECORDS, *supra* note 5, at 65, 73). Though Judge Dooling cited the page with Pinckney’s question, he did not cite pages 66-67 where Madison successfully moved to delete “so much of the clause before the Committee as related to the powers of the Executive.” 1 FARRAND, RECORDS, *supra* note 5, at 67. These powers were the executive war powers of the Articles of Confederation that Pinckney feared would make the presidency into a monarchy with military control. *See supra* Part II. Judge Dooling did proceed to discuss the Committee on Detail proposal on August 17 that Congress have the power to “make war” and the ultimate modification of this to “declare war.” *Orlando*, 317 F. Supp. at 1016-17.

355. *Orlando*, 317 F. Supp. at 1018 (“The Constitution does not simply make the power to declare war a legislative power . . .”).

356. *Id.* at 1019.

357. *Id.* The definition of pusillanimity is “cowardliness, cravenness, dastardliness, gutlessness, poltroonery, cowardice, spinelessness.” *Pusillanimity*, MERRIAM-WEBSTER, <http://mw1.merriam-webster.com/dictionary/pusillanimity>.

The framers' intent to vest the war power in Congress is in no way defeated by permitting an inference of authorization from legislative action furnishing the manpower and materials of war for the protracted military operation in Southeast Asia.

The choice, for example, between an explicit declaration on the one hand and a resolution and war-implementing legislation, on the other, as the medium for expression of congressional consent involves 'the exercise of a discretion demonstrably committed to the . . . legislature' and therefore, invokes the political question doctrine.³⁵⁸

At one time, the political question doctrine had frequently been seen as a bar to examining challenges to the AUMF. In 1962, Justice William Brennan clarified the application of the political question doctrine in *Baker v. Carr*.³⁵⁹ In applying *Baker* to the "declare war"

358. *Orlando v. Laird*, 443 F.2d 1039, 1042-43 (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1962)) ("As we see it, the test is whether there is any action by the Congress sufficient to authorize or ratify the military activity in question. The evidentiary materials produced at the hearings in the district court clearly disclose that this test is satisfied.").

359. *Baker v. Carr*, 369 U.S. 186, 217 (1962). Justice Brennan outlined the elements of the "political question" doctrine:

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department . . .

Id. at 217. Measuring the June 1, 1787 discussion at the Convention against this standard leads us to the conclusions discussed below. Our analysis is in italics, and the elements of the political question doctrine as outlined by Justice Brennan are in regular type:

The Congressional power to declare war is as direct a "textually demonstrable constitutional commitment" as is imaginable once June 1, and the later history is understood. It is joined by the power in Congress to authorize Presidents to "call forth" the Militia for three specific purposes. June 1, August 6 and August 17 discussions at the Constitutional Convention confirm the text that the decision to take the nation to war is legislative, not executive. "[O]r a lack of judicially discoverable and manageable standards for resolving it." Id. The decision as to which branch, President or Congress, may decide to take the nation to war is identified by the Constitution itself.

"[O]r the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." Id. The policy decision to take the nation to war is not at issue; the only question is whether the Congress or the President has the authority to make the determination.

"[T]he impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government." Id. The Constitution itself specifically allocates the power to take the nation to war to Congress. "[O]r an unusual need for unquestioning adherence to a political decision already made." Id. The substantive decision on which body may decide to take the nation to war is not complex. Disentangling forces already engaged in hostilities is a separate

issue nine years later, however, the Orlando Court did not understand *Bas v. Tingy*.³⁶⁰ As we have seen, Congress demonstrated in 1798 that it has full power to direct a limited war, as part of its authority to “declare war.”³⁶¹ Its actions between 1798 and 1800 were confirmed as constitutional in no uncertain terms by Justices Bushrod Washington, Samuel Chase, and William Patterson.³⁶² *Bas* exemplified a situation in which Congress chose a limited form of warfare. The Supreme Court not only upheld this congressional action, but Justice Washington pointed out that “[s]uch a declaration by congress might have constituted a perfect state of war, which was not intended by the government.”³⁶³ Justice Chase went so far as to congratulate the Congress: “The acts of congress have been analyzed to show, that a war was not openly denounced against France, and that France is no where expressly called the enemy of America: but this only proves the circumspection and prudence of the legislature.”³⁶⁴

Despite this Supreme Court support for legislative choice, the court in *Orlando* believed that the “choice” that created a political question was “between an explicit declaration [of war] . . . and a resolution and war-implementing legislation.”³⁶⁵ The court declared that:

If there can be nothing more than minor military operations conducted under any circumstances, short of an express and explicit declaration of war by Congress, then extended military operations could not be conducted even though both the Congress and the

problem. “[O]r the potentiality of embarrassment from multifarious pronouncements by various departments on one question.” *Id.* *There is no embarrassment in correcting an error of interpretation of the Constitution.*

Justice Brennan concluded his analysis with the following statement:

Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence. The doctrine of which we treat is one of ‘political questions,’ not one of ‘political cases.’ The courts cannot reject as ‘no law suit’ a bona fide controversy as to whether some action denominated ‘political’ exceeds constitutional authority. The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing.

Id.

360. *Bas v. Tingy*, 4 U.S. 37 (1800).

361. See *supra* text accompanying notes 179-91. Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447, 452-53 (2011).

362. *Id.*

363. *Bas*, 4 U.S. at 41.

364. *Id.* at 45.

365. *Orlando v. Laird*, 443 F.2d 1039, 1043 (2d Cir. 1971).

President were agreed that they were necessary and were also agreed that a formal declaration of war would place the nation in a posture in its international relations which would be against its best interests. For the judicial branch to enunciate and enforce such a standard would be not only extremely unwise but also would constitute a deep invasion of the political question domain.³⁶⁶

This paragraph reflects judicial ignorance of the “Quasi War” with France from 1798-1800 and the clear decision in *Bas v. Tingy* by the Supreme Court.³⁶⁷

Further, District Judge Dooling’s reference to June 1, 1787 was not mentioned in the court of appeals opinion.³⁶⁸ The court did not understand that Congress could “declare war” without using those “magic words,” but rather by defining its objective in specific terms. The suggestion that Congress is incapable of considering the subtleties of foreign affairs is belied by national experience and the decision in *Bas v. Tingy*.

The Supreme Court declined to review the *Orlando* decision.³⁶⁹

Massachusetts v. Laird

The third case, *Massachusetts v. Laird* was filed by the State in the Supreme Court, which promptly dismissed it over the objection of three Justices.³⁷⁰ Massachusetts then filed essentially the same complaint in the Federal District Court in Boston, alleging that a state law applied to the Secretary of Defense and other officers of the

366. *Id.* (emphasis added).

367. *See supra* notes 189-91 and accompanying text.

368. *Id.*

369. *Orlando v. Laird*, 443 F.2d 1039 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971) (“Mr. Justice DOUGLAS and Mr. Justice BRENNAN are of the opinion that certiorari should be granted.”).

370. The Supreme Court is given original, but not exclusive jurisdiction, to cases “in which a State shall be a Party.” U.S. CONST. art. III, § 2, cl. 2. The State of Massachusetts had adopted a statute against requiring Massachusetts citizens to participate in the Vietnam War on grounds of its unconstitutionality. *Massachusetts v. Laird*, 400 U.S. 886, 887, 900 (1970). Their complaint was dismissed. *Id.* Justice William Douglas dissented from the dismissal in an extensive opinion:

This motion was filed by the Commonwealth of Massachusetts against the Secretary of Defense, a citizen of another State. . . . It requests that the United States’ participation be declared ‘unconstitutional in that it was not initially authorized or subsequently ratified by Congressional declaration . . . I believe that Massachusetts has standing and the controversy is justiciable. At the very least, however, it is apparent that the issues are not so clearly foreclosed as to justify a summary denial of leave to file.

Id. at 886-87. “The question of an unconstitutional war is neither academic nor ‘political.’ These cases have raised the question in adversary settings. It should be settled here and now.” *Id.* at 900. Justice Harlan and Justice Stewart joined in Justice Douglas’ dissent and would have ordered a hearing on questions of standing and justiciability. *Id.* at 886.

federal government that prevented citizens of Massachusetts from being ordered into the Vietnam War because the war had not been declared by Congress.³⁷¹ Chief Judge Wyzanski, who was assigned the case, was influenced in his decision by the fact that the Supreme Court did not take the case in the first instance.³⁷² He was also influenced by the decisions in *Luftig v. McNamara* and *Orlando v. Laird* to conclude that the complaint was “non-justiciable” or was “without merit.”³⁷³ He decided in light of these precedents that “it is not profitable for another judge to go over the same ground again.”³⁷⁴ Ironically, since Presidents started using AUMFs to put boots on the ground in foreign lands, this ground has been reviewed by only two federal judges: Judge Dooling in the warpowers context and Judge Sirica in the area of separation of powers.³⁷⁵

Judge Wyzanski’s decision was appealed to the First Circuit Court of Appeals. That court’s opinion was written by Circuit Judge Coffin, who in 1967 had advised those who challenged the Vietnam War to go home and leave the courts to more important business.³⁷⁶ He stated the issue with clarity and brevity.³⁷⁷ “The question sought to be raised in this action is whether the United States involvement in Vietnam is unconstitutional, a war not having been declared or

371. *Massachusetts v. Laird*, 327 F. Supp. 378, 379 (D. Mass. 1971).

372. *Id.* at 379.

[I]t is difficult to escape the inference, in the light of the dissenting opinion of Mr. Justice Douglas and the explanations given by Mr. Justice Harlan and Mr. Justice Stewart for their dissenting votes, that the six justices who joined in denying Massachusetts leave to file its complaint . . . had concluded that Massachusetts lacked standing and that the controversy lacked justiciability.

Id.

373. *Id.* at 379-80.

But if this court is not technically bound by the Supreme Court’s action in *Massachusetts v. Laird*, it regards it as inappropriate, except in a case where he is virtually certain that he is on sound ground, for a district judge to refuse to follow the virtually unanimous authority of the lower federal courts to the effect that the issue here sought to be presented is non-justiciable. . . . *Luftig v. McNamara*, [373 F.2d 664 (1967)], has an authority to which a district judge must give particular weight. The now Chief Justice of the United States, (then Circuit Judge Burger), Circuit Judge Coffin of the Court of Appeals of this First Circuit, and Circuit Judge Miller, affirmed a dismissal of a suit for a declaratory judgment and injunctive relief brought by an Army private to enjoin the Secretary of Defense and others from sending him to Vietnam.

Id.

374. *Id.* at 381. Judge Wyzanski did not mention June 1.

375. See *supra* note 352 and accompanying text.

376. See *supra* text accompanying note 345.

377. *Massachusetts v. Laird*, 451 F.2d 26 (1st Cir. 1971).

ratified by the Congress.”³⁷⁸

Acknowledging that the question was “*so dominant in the minds of so many*,” the Court stated that it would not sidestep the constitutional issue but would proceed to rule “*as a matter of constitutional interpretation, if at all possible*.”³⁷⁹

Then the Court made the same errors as all other courts of appeals; it did not find the material from June 1, 1787. Neither had historians and academic legal analysts.³⁸⁰ “[P]laintiffs devoted one paragraph of their lengthy brief,” to the “critical factor of textual commitment,” the court noted.³⁸¹ It is not possible to summarize June 1 – 4 in one paragraph.³⁸²

Judge Coffin did recognize that in 1962 the Supreme Court in *Baker v. Carr* outlined criteria to determine when the judiciary should not defer to the other branches on the basis of the “political question doctrine.”³⁸³ The first criterion was “whether there is a ‘textually demonstrable constitutional commitment of the issue to a coordinate political department of government.’”³⁸⁴

The court closely studied August 17, 1787 and found that:

While the fact of shared war-making powers is clearly established by the Constitution, . . . a number of relevant specifics are missing. The Constitution does not contain an explicit provision to indicate whether these interdependent powers can properly be employed to sustain hostilities in the absence of a Congressional declaration of war. Hence this case.³⁸⁵

Then comes this remarkable paragraph based on judicial unawareness of the votes on June 1, the discussion of the following days, and the long explanation in *Bas v. Tingy*.³⁸⁶ Our comments are interspersed in bracketed italics:

The brief debate of the Founding Fathers sheds no light on this. [Footnote refers only to the debate of August 17, nothing about June 1-4]. All we can observe, after almost two centuries, is that the extreme supporters of each branch lost; [There were no “extreme supporters,” “delegates were unified that the President should not have the powers of war”³⁸⁷] Congress did not receive the power to “make war” [the word “make” was changed to “declare” in response to Pinckney’s point that Congress would not constantly be in session and the Madison-Gerry motion that the President be able to repel “sudden

378. *Id.* at 28.

379. *Id.* at 31.

380. *See supra* note 76.

381. *Laird*, 451 F.2d at 31.

382. *See supra* Part II.

383. *See Baker v. Carr*, 369 U.S. 186, 217 (1962).

384. *Laird*, 451 F.2d at 31.

385. *Id.* at 32.

386. 4 U.S. 37 (1800).

387. *See supra* text accompanying notes 62-73.

attacks”³⁸⁸; the executive was given the power to repel attacks and conduct operations; the Congress was given the power to ‘declare’ war - and *nothing was said about undeclared hostilities*.³⁸⁹

Judge Coffin assumed that “undeclared hostilities” created a category separate from “declared war.” Then he asked, “Under these circumstances, what can we say was ‘textually committed’ to the Congress or to the executive?”³⁹⁰ He concluded that, “strictly speaking, we lack the text.”³⁹¹ Apparently, the text that states “Congress shall have the power . . . to declare war” was not sufficient for Judge Coffin.³⁹²

He quoted *Baker v. Carr*: “deciding whether a matter has in any measure been committed . . . to another branch of government . . . is itself a delicate exercise in constitutional interpretation.”³⁹³ This permission to interpret the Constitution, rather than just quote from it, when searching for “text” that commits a power to one branch of government rather than another, was reiterated by Judge Coffin: “surely our task is more than parsing. We must have some license to construe the sense of the Constitutional framework.”³⁹⁴

In pursuing his “sense of a Constitutional framework,” Judge Coffin’s opinion relied on the following three points, instead of the history of the Constitution.

Without noting the Supreme Court’s description in *Bas v. Tingy* that the “power to declare war” encompasses “all hostilities between nations,” Judge Coffin pursued his discovery of “undeclared hostilities.” He found it in the fact that the Framers were aware that there could be “hostilities beyond repelling attack and without a declaration of war” by relying on Alexander Hamilton’s post-convention observation in *Federalist No. 25* that “formal denunciation of war has of late fallen into disuse.”³⁹⁵ This was written while Hamilton was arguing for a standing army in time of peace so the nation could be prepared for hostilities prior to either a declaration of war or “the presence of an enemy within our territories.”³⁹⁶ There is no dispute about Judge Coffin’s position that there could be situations, other than a sudden attack, when the Congress would not declare war and, yet, the President would order the use of armed force. He did not mention that the Framers had

388. See *supra* notes 136-37.

389. *Laird*, 451 F.2d at 32 (emphasis added).

390. *Id.*

391. *Id.*

392. *Id.* at 30 (alteration in original).

393. *Id.*

394. *Id.*

395. *Id.* at 32-33.

396. *Id.* at 33

agreed upon text that empowered Congress to provide for calling up a trained and prepared Militia to suppress insurrection, thwart invasion, quell domestic violence, or enforce federal law.³⁹⁷ Judge Coffin did not mention the Militia.

Judge Coffin notes, correctly, “that the Congressional power to declare war implies a negative: no one else has that power.”³⁹⁸ Then, he asks “is the more general negative implied—that Congress has no power to support a state of belligerency beyond repelling attack and short of a declared war?”³⁹⁹ Not only does he not mention the militia or the Supreme Court’s statement in *Bas* that “war” as used in the Constitution includes “all hostilities between nations,” he does not mention the Supreme Court decision in *Talbot*, authored by Chief Justice John Marshall, who wrote: “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 enquiry.”⁴⁰⁰ Instead, Judge Coffin looked only to the words in Article I, Section 8, Clause 11 and asserted that the delegates could have chosen more specific language to say that only Congress has the power to commence war.⁴⁰¹

“It is clear that there can be an ‘enemy’, even though our country is not in a declared war. The hostilities against France in 1799 were obviously not confined to repelling attack. This was an authorized but undeclared state of warfare.”⁴⁰² But, the very cases Judge Coffin cites, *Bas v. Tingy* and the *Prize Cases*, stand for the opposite of his thesis. Those cases demonstrate that the gap between repelling sudden attacks and committing to all-out war was filled when Congress exercised its power to declare war by passing statutes that limited the scope of war before the President took action against French shipping, and by passing the militia acts to pre-authorize the President to take command when the Militia is called out to protect the country.

The Framers added to the congressional power to declare war, the power to grant letters of marque and reprisal.

397. See *supra* note 148 and accompanying text.

398. *Laird*, 451 F.2d at 33.

399. *Id.*

400. *Talbot v. Seeman*, 5 U.S. 1, 19 (1801).

401. *Laird*, 451 F.2d at 33 (“The drafters of the Constitution, who were not inept, did not say, ‘power to commence war.’ Nor did they say, ‘No war shall be engaged in without a declaration by Congress unless the country is ‘actually invaded, or in such imminent Danger as will not admit of delay.’ Nor did they resort to other uses of the negative as they so often did elsewhere. And the ‘declare’ power was not, like the ‘judge’ power of the House of Representatives, Article I, Section 5, in a context limited by another specific provision, such as that specifying the three qualifications of a Representative.” (internal citations omitted))

402. *Id.* (internal citations omitted).

Were this a power attendant to and dependent upon a declared war, there would be no reason to specify it separately. . . . Nevertheless, this is a power to be invoked only against an enemy. It is clear that there can be an “enemy,” even though our country is not in a declared war.⁴⁰³

Judge Coffin quoted Justice Washington’s opinion in *Bas v. Tingy*, in a footnote which described the difference between solemn perfect war and “imperfect war,” as if the Declare War Clause was limited to “perfect wars.”⁴⁰⁴ But his opinion does not cite Justice Washington’s immediately preceding sentence that, “every contention by force between two nations, in external matters, under the authority of their respective governments, is not only war, but public war,” nor his next comment, “Still however, it is *public war*, because it is an external contention by force . . . authorised by the legitimate powers.”⁴⁰⁵ Nor did Judge Coffin quote Justice Chase: “Congress is empowered to declare a general war or congress may wage a limited war; limited in place, in objects, and in time,”⁴⁰⁶ or mention similar statements by Justice Patterson.⁴⁰⁷ Nor does Judge Coffin’s opinion describe the statutes that Congress enacted and President Adams approved, before he engaged in this imperfect war.⁴⁰⁸

On the basis of these three points, Judge Coffin concluded:

As to the power to conduct undeclared hostilities, beyond emergency defense, then we are inclined to believe that the Constitution, in giving some essential powers to Congress and others to the executive, committed the matter to both branches, whose joint concord precludes the judiciary from measuring any specific action against any specific clause in isolation.⁴⁰⁹

Had he read further in the *Federalist Papers* to *Federalist No. 69*, he would have found the following comment by Alexander Hamilton, whom he mentioned four times in his opinion:

The President is to be commander in chief of the army and navy of the United States. . . . [which] would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy; while that of

403. *Id.*

404. *Id.* at 33 n.11. (“Justice Washington stated that ‘If [a war] be declared in form, it is called solemn, and is of the perfect kind.’ but that ‘hostilities may subsist between two nations, more confined in its nature and extent being limited to places, persons and things; and this is more properly termed imperfect war.’”).

405. *Bas v. Tingy*, 4 U.S. 37, 40 (1800). (emphasis added).

406. *Id.* at 43.

407. *See supra* note 187.

408. *Compare* *Massachusetts v. Laird*, 451 F.2d 26 (1st Cir. 1971), *with* *An Act to Suspend the Commercial Intercourse between the United States and France*, 1 Stat. 565 (1798).

409. *Laird*, 451 F.2d at 33.

the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies—all which, by the Constitution under consideration, would appertain to the legislature.⁴¹⁰

It was in *Federalist No. 26* that Hamilton showed his recognition that the electorate could control events through their representatives.⁴¹¹

The invention in *Massachusetts v. Laird* of a “joint concord” which precludes the judiciary from measuring any specific action against any specific clause in isolation violates separation of powers and the right of the electorate to vote, as is more fully discussed in the next Part of this Article.⁴¹²

Massachusetts v. Laird ignored the constitutional history of June 1 and “misinterpreted” *Bas v. Tingy* by omitting language that made clear that congressional power to declare war included every contention by force, whether general and limited war, thus the term “declare war” was not limited to a formal statement called a declaration of war.⁴¹³ In addition, June 1, 2, and 4 established that taking the nation to war was a legislative, not an executive, function;⁴¹⁴ this judgment answers Judge Coffin’s question.

If “nothing was said about undeclared hostilities” on August 17, it was because it was understood at the time that “war” included “every contention by force,” lesser as well as greater military actions authorized by Congress, as *Bas v. Tingy* so eloquently made clear.⁴¹⁵ The June 1 discussions provide necessary background to understand what happened on August 17. The *Massachusetts v. Laird* court, lacking that background, reached an erroneous conclusion. It follows from June 1, and the nearly contemporaneous explanation in *Bas*, that all armed combat in which the United States seeks to engage with another nation must be “declared” by Congress. It also follows that this “declaration” need not be a declaration of “total war,” but may be an “authorized limited war,” and in the form of a statute

410. THE FEDERALIST No. 69, at 369 (Alexander Hamilton) (J.R. Pole ed., 2005); cf. James Wilson, *supra* text at note 131 (“[T]he important power of declaring war is vested in the legislature at large: this declaration must be made with the concurrence of the House of Representatives: from this circumstance we may draw a certain conclusion that nothing but our national interest can draw us into a war.”).

411. THE FEDERALIST NO. 26, at 141 (Alexander Hamilton) (J.R. Pole ed., 2005) (“The legislature . . . will be *obliged* . . . to deliberate upon the propriety of keeping a military force on foot; to come to a new resolution on the point; and to declare their sense of the matter, *by a formal vote in the face of their constituents*.”).

412. See *infra* Part XI.

413. See *supra* Part II.

414. See *supra* text accompanying notes 61-93.

415. *Massachusetts v. Laird*, 451 F.2d 26, 32 (1st Cir. 1971); see also *Bas v. Tingy*, 4 U.S. 37, 37-39 (1800).

setting out the limits of U.S. involvement.⁴¹⁶ If only Congress has the power to declare war, and “war” includes every contention by force, then there is no category of “undeclared hostilities.”

The federal court decisions upholding the Vietnam AUMF dishonored the judgment of the founding generation and unleashed deadly consequences. We have described how fearful the American people were of the prospect of creating a king in the guise of a President of a republic, and how the adoption and ratification process forced the Framers to be responsive to public opinion of the time.⁴¹⁷ The Framers had made clear that the President could not choose to take the nation to war. Had “presidential war powers” been plausible, opponents of the Constitution would have pounced on it. Even Patrick Henry in his critical speech at the ratification convention in Virginia did not contend that the Constitution allowed this possibility.⁴¹⁸

In its closing paragraph, the *Massachusetts v. Laird* opinion answers the question it had raised at the beginning:⁴¹⁹

All we hold here is that in a situation of prolonged but undeclared hostilities, where the executive continues to act not only in the absence of any conflicting Congressional claim of authority but with steady Congressional support, the Constitution has not been breached. The war in Vietnam is a product of the jointly supportive actions of the two branches to whom the congeries of the war powers have been committed. Because the branches are not in opposition, there is no necessity of determining boundaries. Should either branch be opposed to the continuance of hostilities, however, and present the issue in clear terms, a court might well take a different view. . . .⁴²⁰

This paragraph is important for three reasons. First, this language shows that the court believed that its decision was based on the merits of the issue raised. It is not based on the “political question doctrine” that avoids a decision.⁴²¹ It is a direct interpretation of the Constitution. Second, the concept that an agreement between the President and Congress to create legislation can preclude judicial review is an abandonment of the constitutional authority and duty of the Judiciary.⁴²² Third, it has continued to be

416. As we have seen, the Framers had learned how to authorize Congress to permit the President to take military action without seeking further congressional approval in situations of invasion, rebellion or failure of enforcement of federal law. Congress exercised its authority in the Militia Acts. *See supra* Part V.

417. *See supra* Parts I and II.

418. 5 STORING, *supra* note 133, at 224-25.

419. *Laird*, 451 F.2d at 28.

420. *Id.* at 34.

421. *Id.* at 31, 34.

422. *Boumediene v. Bush*, 553 U.S. 723 (2008). This point was emphasized by Justice Kennedy in connection with the government’s argument that the limits on the

relied upon in cases concerning the AUMF in the Second Iraq War.⁴²³

Why Was "June 1" Not "Discovered" Earlier?

It is difficult to understand how so many attorneys, history and law professors, and judges failed to examine the discussion at the Constitutional Convention on June 1, 1787, concerning the power to take the nation to war, and how some students of constitutional history have continued to make the same mistake.

Several conditions may help explain this failure:

First, the plaintiff's lawyers in *Massachusetts v. Laird* did not discuss June 1 in their briefs to guide the judges. Even the seventy-four law professors did not emphasize its importance.⁴²⁴ But this was

suspension of Habeas Corpus did not apply to Guantanamo military base because Cuba retained ultimate sovereignty while the U.S. has exercised complete control for a hundred years:

The Government's view is that the Constitution had no effect there, at least as to noncitizens, because the United States disclaimed formal sovereignty in the formal sense of the term. The necessary implication of the argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint.

Id. at 765.

[Our] basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. Even when the United States acts outside its borders, its powers are not "absolute and unlimited" but are subject "to such restrictions as are expressed in the Constitution."

Id. (quoting *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885)).

Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another. The former position reflects this Court's recognition that certain matters requiring political judgments are best left to the political branches. The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say "what the law is."

Id. (citing *Marbury v. Madison*, 5 U.S. 137, 177 (1803)). "[T]he writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers. The test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain." *Id.* at 765-66.

^{423.} See *Doe v. Bush*, 323 F.3d 133 (1st Cir. 2003).

^{424.} *Id.* Seventy-four law professors filed an amicus brief in support of plaintiffs, in which they stated:

All the reasons presently offered to support placement of the war-initiating power into less fully representative hands were considered by the Framers, and all were rejected. Constitutional practice does not support the President's claim here. American history shows no recognition of the legitimacy of the President's initiating war. . . . Congressional records and historical writings evidence strongly that from the time of the framing of the

“high profile” litigation where careful briefing might have been expected.

Second, in 1970, the emphasis on the historical context in which the Constitution was written was not as pronounced as it is today.

Third, computerized legal research was not common. The standard research tools for today are Lexis and Westlaw, which began operations in 1973-1975.⁴²⁵

Fourth, lawyers and historians are trained to look for conflict in constitutional history to clarify issues. There was no conflict on June 1 on the issue of who should have the power to declare war. The agreement of all who spoke may have led readers to pay little attention to the discussion.

Fifth, the discussion took place on the third day of substantive deliberations at the Convention. Some may have thought that these discussions were merely preliminary to the more detailed matters examined later. This might explain the dubious footnote in the comprehensive study published in 2008 in the *Harvard Law Review*.⁴²⁶ It appears that the authors misread the crucial moment on June 1 when Madison moved to strip the Virginia Plan of its proposal that the President be given the executive rights vested in Congress by the Confederation.⁴²⁷ Pinckney’s motion “that so much of the clause . . . as related to the powers of the executive should be struck out”⁴²⁸ eliminated the prospect that had led Pinckney to fear the executive might have the “power of war and peace”⁴²⁹ in the first place.⁴³⁰ The reader could easily pass over this phrase and look for the outcome, rather than the maneuvering that took place that day.⁴³¹

Constitution through the following 160 years, it was universally understood that the power to initiate war was located in Congress and not in the President, and that before 1950 there were few instances of autonomous Presidential initiations of war and no instances of Presidential initiation of major wars.

Brief for Seventy-Four Concerned Law Professors as Amici Curiae Supporting Respondents, *Doe v. Bush*, 323 F.3d 133 (1st Cir. 2003); *see also* WORMUTH & FIRMAGE, *supra* note 76, at 9-10, 17-31, 144-51 (ignored in the court of appeals opinion).

425. History, LEXISNEXIS, www.lexisnexis.com/about-us/history.aspx; *Company History*, WESTLAW, www.west.thomson.com/about/history/default.aspx.

426. *See supra* note 77 and accompanying text.

427. 1 FARRAND, RECORDS, *supra* note 5, at 65; *see supra* notes 68-73 and accompanying text.

428. *Id.* at 67.

429. *Id.* at 65.

430. *See id.* at 64-67; *supra* Part II.

431. WORMUTH & FIRMAGE, *supra* note 76, at 17-18 (discussing June 1 in solid detail, except that it concludes “[t]he resolution was not brought to a vote”). Madison’s resolution was brought to a vote as his notes reveal. 1 FARRAND, RECORDS, *supra* note

The information concerning June 1 has been fully available since Professor Max Farrand's *Records of the Federal Convention* was published in 1911. We have wondered how it could have been ignored for so long. Our conclusion is that there was no reason for the judges and lawyers to focus on June 1 until the courts had decided cases like *Orlando v. Laird* and *Massachusetts v. Laird* upholding the AUMF for Vietnam in 1964. Prior to that time, the deliberations of June 1 did not warrant attention. In the early years, it would have seemed self-evident that Congress, not the President, controlled decisions concerning war. The discussion of June 1 itself was unknown until Madison's heirs made his notes public after his death in 1840.⁴³² Prior to 1955, there were declarations of war by Congress and occasional military actions taken by Presidents alone. But there was never an Authorization for the Use of Military Force outside of the Militia Acts.⁴³³

The first AUMF provided Eisenhower with authority to move the fleet to protect Formosa in 1955.⁴³⁴ The effort was successful and did not produce litigation. The first AUMF that produced judicial conflict was the Gulf of Tonkin Resolution that escalated the Vietnam War. When that AUMF was upheld, academics and lawyers concerned by the appearance of a new form of presidential power began to reexamine the constitutional debates. As best as we can determine, recognition of the significance of June 1 came from the academic and legal scholars starting in 1986.⁴³⁵

The Aftermath of the Laird Cases concerning the Vietnam AUMF

Notwithstanding the errors discussed above, the *Laird* cases have continued to be considered by the lower federal courts as virtually binding precedents supporting the continued use of AUMFs in more recent wars, including the October 2002 authorization for the Second Iraq War.⁴³⁶ This resolution was challenged shortly after it was adopted and before President Bush decided to attack Iraq in March of 2003. *Doe v. Bush* was brought in the Federal District Court in Boston before Judge Tauro, who, thirty years earlier, had

5, at 67. Eliot's debates on the Constitutional Convention for June 1 were too sparse to provide the information that Madison did. "Met pursuant to adjournment. The 7th resolve, that a national executive be instituted. Agreed to. To continue in office for seven years. Agreed to. A general authority to execute the laws. Agreed to. To appoint all officers not otherwise provided for. Agreed to. Adjourned to the next day." 1 FARRAND, RECORDS, *supra* note 5, at 70.

432. See LEVY, *supra* note 76, at 102.

433. See *supra* Part VII.

434. WORMUTH & FIRMAGE, *supra* note 76, at 67.

435. See sources cited *supra* note 76.

436. Authorization for Use of Military Force Against Iraq Resolution of 2002, H.R. Res. 114, 107th Cong. (2002) (enacted) (discussed *supra* note 329).

relied on the *Laird* cases to decide that the statutes surrounding the end of the Vietnam War involved “political questions” beyond the jurisdiction of the courts.⁴³⁷ He reached the same conclusion in 2002 concerning the AUMF authorizing the President to attack Iraq.

On appeal, Judge Tauro was upheld by the Court of Appeals, on the ground that since the President had not yet attacked Iraq, the case was not “ripe” for decision.⁴³⁸ When the President made clear he would attack Iraq, plaintiffs sought reconsideration of the decision. Reconsideration was denied, relying on *Massachusetts v. Laird*:

Plaintiffs have filed a ‘petition for rehearing on an emergency basis,’ relying on events which have occurred since the court’s Opinion of March 13, 2003. As we said in that opinion, ‘Ripeness doctrine involves more than simply the timing of the case. It mixes various mutually reinforcing constitutional and prudential considerations.’ Although some of the contingencies described in our opinion appear to have been resolved, others have not. Most importantly, Congress has taken no action which presents a ‘fully developed dispute between the two elected branches.’ Thus the case continues not to be fit for judicial review.⁴³⁹

In *New Jersey Peace Action v. Obama* in 2009, plaintiffs brought another challenge to the AUMF concerning Iraq, seeking a declaratory judgment.⁴⁴⁰ The plaintiffs included the discussion on June 1, 1787 in their complaint. Plaintiff’s trial brief included a detailed description of the June 1, 1787 discussion at the Convention. Counsel for plaintiffs made the point again at oral argument.⁴⁴¹

437. See *Drinan v. Nixon*, 364 F. Supp. 854 (D. Mass. 1973). Judge Tauro’s first memorandum opinion in *Doe v. Bush* concluded that “[t]his memorandum is consistent with this court’s opinion thirty years ago in the case of *Drinan v. Nixon*.” *Doe v. Bush*, 240 F. Supp.2d 95, 97 (D. Mass. 2003).

438. *Doe v. Bush*, 322 F.3d 109, 110 (1st Cir. 2003).

439. *Id.* (citing *Massachusetts v. Laird*, 451 F.2d 26, 34 (1st Cir. 1971)).

440. *New Jersey Peace Action v. Obama*, 2009 WL 1416041 (D.N.J. 2009), *aff’d*, 379 Fed App’x 217 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 937 (2011) (The authors served as advisors throughout the litigation.)

441. Prof. Frank Askin, director of Rutgers Law School Constitutional Litigation Clinic advised the Court that:

No court has ever examined the debates of the Constitutional Convention on that day, and that is where the founders made very clear what this country was all about, and what was the division of responsibility between the President and Congress in regard to going to war. And unfortunately, a lot of cases following *Massachusetts versus Laird* just automatically picked up on *Massachusetts versus Laird* and said, well, this is a shared power between Congress and the President. But going back to the founders, it was not, the decision to declare war was not a shared power.

Press Release, Rutgers School of Law – Newark, U.S. Supreme Court Asked by Rutgers School of Law—Newark Clinic to Hear Case Challenging Constitutionality of Iraq War (Nov. 4, 2010).

District Judge Jose Linares dismissed the complaint on the joint grounds of “lack of standing,” and the “political question doctrine.”⁴⁴² He did not address the issue of June 1, 1787. Plaintiffs appealed to the Third Circuit Court of Appeals raising the same issue. The court of appeals also ignored the June 1, 1787 discussion and denied standing because the alleged wrongs could not be redressed by a declaratory judgment.⁴⁴³ The significance of June 1, 1787 was raised again with the Supreme Court in plaintiffs’ Petition for Writ of Certiorari. The Petition was denied, without dissent. No appellate court has ever discussed it.⁴⁴⁴

X. VIETNAM ERA JUDICIAL ANALYSIS UNDERCUT BY MORE RECENT DECISIONS

The casual way that the cases in Part IX treated the history of the Constitution by silence about June 1, and reliance on August 17, cannot be reconciled with the rigorous approach to history of more recent Supreme Court decisions. The standards for legal-historical analysis of the constitutional era were recently reviewed in 2008 and 2010.⁴⁴⁵

Heller and McDonald

In *District of Columbia v. Heller*, the Supreme Court, through Justice Scalia, articulated a thorough review of the founding era in dealing with the Second Amendment.⁴⁴⁶ This amendment has a similarity of roots with the “declare war” clause.⁴⁴⁷ Both were adopted, in part, to protect the citizenry from abuse by a government that could become tyrannical.⁴⁴⁸

The first ten amendments (the Bill of Rights) were adopted in 1791, three years after the Constitution. In *Heller*, Justice Scalia amassed a detailed study of the circumstances surrounding the

442. *New Jersey Peace Action*, 2009 WL 1416041, at *6, 9.

443. *New Jersey Peace Action v. Obama*, 379 Fed App’x 217, 223 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 937 (2011). Court filings and decisions in this case are available at *Case Documents*, WAR POWER!, <http://warpowers.us/casedocs.htm>.

444. *Orlando v. Laird*, 317 F.Supp 1013, 1018 (E.D.N.Y. 1970). Only District Judge Dooling had discussed June 1 in connection with war in *Orlando v. Laird*.

445. See *District of Columbia v. Heller*, 554 U.S. 570 (2008). The *Heller* decision involved legislation of the District of Columbia prohibiting the possession and use of firearms within the District. *Id.* The *Heller* interpretation of the Second Amendment was later incorporated against state and local governments through the Fourteenth Amendment. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3021 (2010).

446. See *Heller*, 554 U.S. at 577-94. The Second Amendment provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II.

447. See *infra* note 504 and accompanying text

448. *Heller*, 554 U.S. at 661.

adoption of the Second Amendment that makes the *Massachusetts v. Laird* opinion appear shallow. His historical approach puts to shame the superficial historical examinations carried out in the three cases discussed in Part IX and identifies issues that must be addressed in such cases.

Those issues include:

1. *A careful defining of terms*:⁴⁴⁹ No court has considered what “declare” means in the context of presidential versus congressional powers.⁴⁵⁰ The term “declaration” had a specialized meaning in the Revolutionary Era. As previously noted, the definition of “war” in the Declare War Clause encompasses all military action, and does not require “magic words” or a formal “declaration of war.”⁴⁵¹

2. *Careful examination of pre-colonial and colonial history*:⁴⁵² The history of monarchical powers taking their nations to war was described by Paine in *Common Sense*, and by the theorists Montesquieu, Locke, and Blackstone, but is rarely considered by modern courts examining the meaning and weight to be given to the Declare War Clause. Early judges had no difficulty explicating the clause; they had lived in the environment of its adoption. Judges more than two hundred years later simply ignored it.

3. *Taking account of the supporters of the Declare War Clause*:⁴⁵³ The people of our revolutionary era determined to avoid a government that replicated kings of Europe whose ambitions and follies were paid for with the lives and fortunes of their subjects. The concept that separating powers within a new government would be more responsive to the nation than to a handful of rulers was the overriding hope of those who shaped and supported our Constitution. To that end, preventing the executive from acting like a king by taking the nation to war was an early order of business at the Convention. The Framers placed war in the hands of the people through their Congress, not the President. While technology has changed, aspirations of leaders and their followers continue as powerful aspects of the human condition. The original judgment about controlling war in 1787 is as valid today as it was between May

449. *Id.* at 648 (“We are guided by the principle that ‘[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.’ Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.”).

450. The First Circuit in *Massachusetts v. Laird* cited Alexander Hamilton’s THE FEDERALIST NO. 25 as noting that “the ceremony of a formal [declaration] of war has of late fallen into disuse.” 451 F.2d 26, 33 (1st Cir. 1971).

451. *Bas v. Tingy*, 4 U.S. 37, 45 (1800).

452. *See Heller*, 554 U.S. at 657-62.

453. *See id.* at 662-64.

and September of that extraordinary year.

4. *Taking account of the views of the Anti-Federalists in connection with ratification of the Constitution*:⁴⁵⁴ The interesting aspect of the Anti-Federalists concerning the power to declare war is that there is no such history. While the Anti-Federalists were concerned about a standing army and the President becoming a monarch, they never charged that under the new Constitution the President alone could take the nation to war, except under the defensive powers of the Militia Provisions and related statutes and to repel sudden attacks. Their silence concerning what might have been a winning argument against the Constitution is testimony that such a claim was untenable.⁴⁵⁵

5. *Examination of post-constitutional actions by the government*:⁴⁵⁶ The three branches of government converged in recognizing that Congress controlled and defined the use of military force in the “quasi war” with France under President Adams. It continued in Jefferson’s administration in his distinction between defensive action he could take against the Barbary Pirates, and offensive actions that were up to Congress.⁴⁵⁷ In 1792, 1795 and 1807, Congress followed the Constitution by authorizing Presidents to take defensive military actions in the event of resistance to federal laws, insurrections and invasions.

6. *Examination of early writers on the Constitution*:⁴⁵⁸ Two extracts from Supreme Court Justice Joseph Story’s *Commentaries on the Constitution of the United States* in 1833 demonstrate the similarity of objectives of the Second Amendment and the Declare War Clause in controlling the “usurpation and arbitrary power of rulers” and “demagogues.”⁴⁵⁹

The Second Amendment:

The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.⁴⁶⁰

The Declare War Clause:

454. See *id.* at 664-65.

455. See *supra* notes 125-34.

456. See *Heller*, 554 U.S. at 656-66.

457. FISHER, *supra* note 76, at 35-37.

458. See *Heller*, 554 U.S. at 665-668.

459. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833), available at http://www.constitution.org/js/js_005.htm.

460. *Id.* at Vol. III, Chapter XLIV § 1890.

War, in its best estate, never fails to impose upon the people the most burthensome taxes, and personal sufferings. . . . 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. It should therefore be difficult in a republic to declare war; but not to make peace.⁴⁶¹

In 1803 St. George Tucker, called by some the “American Blackstone,” summed up the attitude of the founding generation concerning the war power:

The power of declaring war, with all its train of consequences, direct and indirect, forms the next branch of the powers confided to congress, and happy it is for the people of America that it is so vested. . . . How rare are the instances of a just war! . . . The personal claims of the sovereign are confounded with the interests of the nation over which he presides, and his private grievances or complaints are transferred to the people; who are thus made the victims of a quarrel in which they have no part, until they become principals in it, by their sufferings

With us the representatives of the people have the right to decide this important question, conjunctively with the supreme executive who may . . . exercise a qualified negative on the joint resolutions of congress; but this negative is unavailing if two thirds of the congress should persist in an opposite determination; so that it may be in the power of the executive to prevent, but not to make, a declaration of war.⁴⁶²

Two years after *Heller* was decided, the Supreme Court in *McDonald v. City of Chicago* held that the Second Amendment right identified in *Heller* was also a Fourteenth Amendment right under the Due Process Clause of that amendment.⁴⁶³ *McDonald* also expanded standing rights to family members who suffered injury to themselves from worrying about the safety of their family and were denied access to handguns.⁴⁶⁴ The concern for the safety of family members who are in harm’s way because of a putative unconstitutional declaration of war seems indistinguishable from the harm to citizens in *McDonald*.

Chadha, Clinton, Hamdi and Hamden

In addition to the recent *Heller* and *McDonald* cases, the arguments that Congress may not delegate its power to declare war are buttressed by decisions in other cases decided more than a

461. *Id.* at Vol. III, Chapter XXI. § 1166.

462. 1 ST. GEORGE TUCKER, *supra* note 130, ¶ 11.

463. 130 S.Ct. 3020, 3050 (2010).

464. *Id.* at 3036.

decade after the courts of appeals upheld the AUMF in the Vietnam War era. In *INS v. Chadha* (1983), the Court invalidated a one house veto over decisions of the Attorney General to allow certain aliens to remain in the United States on grounds that the constitutional procedures required for the passage of a statute were violated.⁴⁶⁵ *Chadha* brushed aside the political question doctrine that had precluded consideration of the Declare War Clause in so many cases, declaring:

No policy underlying the political question doctrine suggests that Congress or the Executive, or both acting in concert and in compliance with Art. I, can decide the constitutionality of a statute; that is a decision for the courts.⁴⁶⁶

By the same token, the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives - or the hallmarks - of democratic government.⁴⁶⁷

The veto . . . doubtless has been in many respects a convenient shortcut; the “sharing” with the Executive by Congress of its authority over aliens in this manner is, on its face, an appealing compromise. . . . [I]t is obviously easier for action to be taken by one House without submission to the President; but it is crystal clear from the records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency. . . . There is unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process.

The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. . . . With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.⁴⁶⁸

In *Clinton v. City of New York*, the Supreme Court held that the “line item veto” act was invalid because it was inconsistent with the procedures in the Constitution for Congress and the President to

465. *INS v. Chadha*, 462 U.S. 919, 941-42 (1983).

466. *Id.* at 941-42. Further, “[t]he assent of the Executive to a bill which contains a provision contrary to the Constitution does not shield it from judicial review.” *Id.* at 942 n.13.

467. *Id.* at 944.

468. *Id.* at 958-59.

adopt a law.⁴⁶⁹ Justice Stevens wrote the majority opinion:

The procedures governing the enactment of statutes set forth in the text of Article I were the product of the great debates and compromises that produced the Constitution itself. Familiar historical materials provide abundant support for the conclusion that the power to enact statutes may only “be exercised in accord with a single, finely wrought and exhaustively considered, procedure.”⁴⁷⁰

Justice Kennedy explained:

Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.

Separation of powers was designed to implement a fundamental insight: concentration of power in the hands of a single branch is a threat to liberty.

....

... The conception of liberty embraced by the Framers . . . used the principles of separation of powers and federalism to secure liberty in the fundamental political sense of the term.

....

... The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow.

....

... By increasing the power of the President beyond what the Framers envisioned, the statute compromises the political liberty of our citizens, liberty which the separation of powers seeks to secure.⁴⁷¹

These Supreme Court opinions provide an opportunity to reexamine the “political question” doctrine that has shielded the AUMF from constitutional review since the 1967 case of *Luftig v. McNamara* when Judge Coffin told those seeking to question the constitutionality of the Vietnam War to go away so the court could concentrate on important issues. After *Heller*, *McDonald*, *Chadha*, and *Clinton*, it appears that the issue will not go away.

In addition, there are two recent decisions of the Supreme Court, *Hamdi v. Rumsfeld*⁴⁷² and *Hamdan v. Rumsfeld*,⁴⁷³ involving person who have been arrested and detained as terrorists. In each case, the Court has carefully avoided reaching any conclusion about the

469. *Clinton v. City of New York*, 524 U.S. 417, 448 (1998).

470. *Id.* at 439-40.

471. *Id.* at 450-52.

472. 542 U.S. 507 (2004).

473. 548 U.S. 557 (2006).

constitutionality of the AUMF of September 18, 2001.⁴⁷⁴

The issues of standing that have justified the dismissal of many AUMF cases will be resolved once June 1 is identified as crucial in interpreting the Declare War Clause. Any person or organization whose activities are affected by a decision to go to war will have standing to challenge such an action as unconstitutional. The Supreme Court may separate the right from the remedy, and issue a declaratory judgment, leaving Congress and the President to comply with its decree as it did in the decision in *Brown v. Board of Education*.⁴⁷⁵

474. See *Hamdi*, 542 U.S. at 517 (“we conclude that the AUMF is explicit congressional authorization for the detention of individuals in the narrow category we describe (assuming without deciding, that such authorization is required) and that the AUMF satisfied §4001(a)’s requirement that a detention be ‘pursuant to an Act of Congress’ (assuming, without deciding that § 4001(a) applies to military detentions.)”); *Hamdan*, 548 U.S. at 559 (“Neither the AUMF nor the DTA can be read to provide specific, overriding authorization for the commission convened to try Hamdan. Assuming the AUMF activated the President’s war powers . . . and that those powers include authority to convene military commissions in appropriate circumstances . . . there is nothing in the AUMF’s text or legislative history even hinting that Congress intended to expand or alter the authorization set forth in UCMJ Art. 21.”).

475. *Brown v. Board of Educ. of Topeka*, 347 U.S. 483, 495-96 n.13 (1954) (“We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on . . . (a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or (b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?”); *Brown v. Board of Educ. of Topeka*, Kan. 349 U.S. 294, 301 (1955) (“[T]he cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases.”); see *Green v. County Sch. Bd. of New Kent Cnty., Va.*, 391 U.S. 430, 438-39 (1968) (“In determining whether respondent School Board met that command by adopting its ‘freedom-of-choice’ plan, it is relevant that this first step did not come until some 11 years after *Brown I* was decided and 10 years after *Brown II* directed the making of a ‘prompt and reasonable start.’ This deliberate perpetuation of the unconstitutional dual system can only have compounded the harm of such a system. Such delays are no longer tolerable, for ‘the governing constitutional principles no longer bear the imprint of newly enunciated doctrine.’ . . . Moreover, a plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is also intolerable. ‘The time for mere ‘deliberate speed’ has run out,’ . . . ‘the context in which we must interpret and apply this language (of *Brown II*) to plans for desegregation has been significantly altered. . . . The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*.”).

Separating a decision on the law and on the remedy was also followed by the Supreme Court in *City of Los Angeles v. Manhart*, 435 U.S. 702, 719-23 (1978) (holding that common practices of retirement plans of paying higher benefits to men than

XI. CITIZEN'S RIGHT TO ELECT LEGISLATORS, BASED ON THEIR VOTE ON TAKING THE NATION TO WAR

Ben Franklin, the oldest, wisest, most seasoned delegate made perhaps the most profound statement at the Convention as it concluded its work in September, 1787, when Ms. Elizabeth Powel, a socialite with a profound interest in political affairs, inquired of Franklin:⁴⁷⁶

“Well Doctor what have we got a republic or a monarchy?”

“A republic,” replied the Doctor, “if you can keep it.”⁴⁷⁷

The Constitution created a government that was properly called a republic because the citizens would elect their representatives for limited terms and the powers of government were divided between legislative, executive and judicial branches. The legislature was divided into a Senate representing the states selected for six year terms by state legislatures and a House of Representatives elected by the people for two-year terms.⁴⁷⁸ An electoral college selected the President for a four-year term.⁴⁷⁹ The judiciary with lifetime tenure was appointed by the President with the consent of the Senate.⁴⁸⁰

Each house of Congress could make its own rules within the

women, or charging women more for the same benefits as men violated the Civil Rights Act of 1964) (“The . . . presumption in favor of retroactive liability can seldom be overcome, but it does not make meaningless the district courts’ duty to determine that such relief is appropriate. For several reasons, we conclude that the District Court gave insufficient attention to the equitable nature of Title VII remedies. Although we now have no doubt about the application of the statute in this case, we must recognize that conscientious and intelligent administrators of pension funds, who did not have the benefit of the extensive briefs and arguments presented to us, may well have assumed that a program like the Department’s was entirely lawful.”).

476. The 1765 Powel House, a mid-Georgian brick building in the heart of the historic Society Hill neighborhood, was the home of Samuel Powel, Philadelphia’s last mayor under the British crown and first mayor after the birth of the United States. The house was once a favorite haunt of George Washington, Benjamin Franklin and John Adams. RICHARD R. BEEMAN, *PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION* 194-99 (2010).

Looking back on the summer of 1787 and on her role as hostess for the Convention delegates, Elizabeth spoke of her pride in having been “associated with the most respectable, influential members of the convention that framed the Constitution, and that the all important Subject was frequently discussed at our House.” Nor did she hold back on giving her own views on that “important subject.” Indeed, she made it clear to those in her circle that she was both proud and unafraid of engaging Washington and other convention delegates about the seminal topic of that summer.

Id. at 196.

477. 3 FARRAND, *RECORDS*, *supra* note 5, at 128.

478. U.S. CONST. art. I, §§ 2-3.

479. *Id.* art. II, § 1, cl. 3.

480. *Id.* art. II, § 2, cl. 2; art III, § 1.

constitutional structure. Both were required to keep and publish a journal of proceedings, unless secrecy was required, and one-fifth of the members present could require a roll call vote on any question.⁴⁸¹ Thus, constituents could learn how their representatives voted on any issue that twenty percent of the members present thought important enough to record. Hamilton, in *Federalist No. 26*, concluded that representatives would have to cast their votes “in the face of their constituents.”⁴⁸² Whether this provision is considered a “right” or a “procedure,” it enabled voters to know how their representatives acted on “important issues” without relying on the candidates’ word. In consequence, legislators were encouraged to be mindful of the constituent’s interests.⁴⁸³

But when Congress agrees on a resolution authorizing the President to use military force in his discretion, this constitutional protection for voters disappears. Congress no longer makes the decision to take the nation to war. Representatives are no longer responsible. The President makes the determination.

What happened to the separation of powers designed by the Framers that precluded the President from making the decision on whether to go to war? As we have seen, the courts of appeals brushed this issue aside because they concluded that Congress and the President “shared war powers” jointly, or the issue was a “political question.” As long as the two branches agreed, there was no constitutional issue; or, if there was one, then the political question doctrine shielded it from judicial review.

The Separation of Powers as a Principle of Constitutional Interpretation

In the years since the court of appeals decisions in the 1970s upholding the AUMF, the Supreme Court has shown revived interest in the “separation of powers” that was explained by Alexander Hamilton in *Federalist No. 78* and adopted by Chief Justice Marshall in *Marbury v. Madison* in 1803.⁴⁸⁴

The basic issue in *Marbury* was whether a statute that extended the original jurisdiction of the Supreme Court beyond that provided in the Constitution could be valid.⁴⁸⁵ Chief Justice Marshall’s response was a resounding “no.”⁴⁸⁶

481. *Id.* art. I, § 5, cl 3.

482. THE FEDERALIST NO. 26, at 141 (Alexander Hamilton) (J.R. Pole ed., 2005).

483. See *supra* notes 126-30 and accompanying text.

484. *Marbury v. Madison*, 5 U.S. 137, 176-78 (1803) (establishing the Supreme Court as the final interpreter of the Constitution).

485. *Id.* at 176.

486. *Id.* at 176-77 (“The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what

It has been clear from 1803 that the “separation of powers” doctrine would constitute a fundamental principle of interpretation of the Constitution. As we have seen, under that principle, the President has no power to take the nation to war unless that action is authorized in advance by Congress itself or has been recognized in advance in accordance with the “calling forth” of the Militia.

The Fifth-Fourteenth Amendment Analysis

Another approach reaches the same conclusion as the “separation of powers” analysis. The question in late 1787 and 1788 was whether the Constitution would be approved by the state conventions called for that purpose. Hamilton, Madison, and Jay wrote the *Federalist Papers* to explain the new and complex plan that had evolved over the summer. The Anti-Federalists, less well organized, opposed increases in federal power.⁴⁸⁷ Their most biting criticism was the absence of a Bill of Rights. The response was that a bill of rights was unnecessary because the federal government’s powers were limited to those expressed in the Constitution. This answer was not convincing because the government itself would interpret those powers, and might do so expansively to the detriment of the citizens.⁴⁸⁸

While New York and Virginia considered voting against ratification of a Constitution that was without a Bill of Rights, its supporters offered to support a Bill of Rights, after the Constitution was approved. This promise was intended to avoid the risk of a new convention that might reopen all of the questions that had been resolved during the summer. Divisions between states might have arisen anew, and might not have been solvable by the compromises that had worked during the Convention. If that happened, the union might have dissolved.⁴⁸⁹ This risk was greater than the conventions

purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation . . . It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.”)

487. See *Brutus’ Essay I*, in THE ANTI FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 278 (Ralph Ketcham ed., 1986) (1787).

488. For an excellent survey of the period from 1765 to 1791, see Jack N. Rakove, *Introduction* to FOUNDING AMERICA, DOCUMENTS FROM THE REVOLUTION TO THE BILL OF RIGHTS, at xi-xxv (Jack N. Rakove ed., 2006).

489. See *supra* note 86. Dissolution of the Union was near during the Constitutional Convention of 1787 over the slavery issue. See SLAVE NATION, *supra* note 31, at 171-202.

of New York and Virginia would take. They voted for the Constitution and hoped that the Federalists would keep their word.

After ratification, pressure eased for a Bill of Rights, but James Madison, then a member of Congress from Virginia, pressed forward on the issue and prevailed in 1791.⁴⁹⁰

From the perspectives of some who worried about extensive federal power—including the slave owners in the south and land owners in the north—the most important amendment was the fifth: “No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”⁴⁹¹

In prohibiting deprivations of “life, liberty or property without due process of law,” did the term “due process of law” mean to include specific procedures written into the Constitution concerning relations between the branches of the new government?

This question was addressed in *Marbury v. Madison*, the opinion of the Supreme Court that fleshed out many of the bare bones of the Constitution. Chief Justice John Marshall wrote:

The judicial power of the United States is extended to all cases arising under the constitution. Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into?

. . . .

In some cases then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read, or to obey?

. . . .

“No person,” says the constitution, “shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.”

Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

. . . .

490. RICHARD LABUNSKI, JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS 178 (2006); WOOD, *supra* note 43, at 65-72.

491. The substance of this amendment was in Madison’s proposed amendments, LABUNSKI, *supra* note 490, at 266; in amendments proposed in the House Report, *id.* at 270; in the amendments passed by the House, *id.* at 272; in amendment passed by the Senate, *id.* at 276; and the amendments proposed by Congress to the States on September 25, 1789, *id.* at 279.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.⁴⁹²

Did the constitutional provision granting Congress the power to declare war create a process that was due to the people or was it part of the “political” category also recognized by the Chief Justice?

By the constitution. . . the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience.

. . . The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. . . .

But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

. . . [W]here a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.⁴⁹³

When the Constitution provided Congress with the power to declare war, did it give the people the right to have Congress take the nation to war or could Congress transfer that power to the President, though the Constitution forbade it? The deliberations that began on June 1, 1787 are dispositive. The Constitutional Convention determined that the power to declare war could not be given by Congress to the President, except as the Constitution authorized the Congress to provide in advance for specified situations. The power itself was “legislative.” The President has no “legislative” power.⁴⁹⁴ Therefore Congress could not transfer that power to him any more than Marbury could sue Secretary of State Madison in the Supreme Court rather than a federal district court, or than the President could

492. *Marbury v. Madison*, 5 U.S. 137, 178-80 (1803) (this language mirrors that in *THE FEDERALIST* NO. 78 (Alexander Hamilton)).

493. *Id.* at 165-66.

494. A congressional declaration of war or direction to the President to take hostile military action against another country, must also be approved by the President before it becomes a law, unless the Congress overrides the presidential veto. U.S. CONST. art I, § 3.

seize steel companies during war without congressional authority.⁴⁹⁵

From the adoption of the Constitution, voters had the right to evaluate their federal representatives on the basis of the legislator's views on taking the nation to war. The AUMF destroys or dilutes that right by taking the vote away from the representative and allowing the President to make such decisions. This exercise of the electorate's right to vote on the issue of taking the nation to war was emphasized at the Constitutional Convention and in ratifying conventions. Since Congress had this duty to vote on war, the voters had a corresponding right to consider their representatives' votes on war. The AUMF destroys or dilutes that right, denying voters their Fifth Amendment rights.

The nature of the right to vote has been extensively examined under the Due Process Clause of the Fourteenth Amendment, applicable to state and local governments. These twin due process clauses have been interpreted similarly.⁴⁹⁶ The test for recognizing a substantive right under the Fourteenth Amendment's Due Process Clause was described by Chief Justice Rehnquist in 1997 as follows:

Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," . . . ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," . . . Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest. . . . Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decisionmaking," . . . that direct and restrain our exposition of the Due Process Clause.⁴⁹⁷

Thus there may be an enforceable "fundamental right" to constitutionally required procedures when the right is "deeply rooted and carefully described." Both of these conditions apply to an AUMF. For more than 100 years, the Fourteenth Amendment's Due Process Clause has protected the rights of citizens to vote. That right, as we have seen, includes influencing and electing representatives based on their views on taking the nation to war. By denying citizens the right to have their representatives vote on the issue of war, the President and Congress have denied both the Fifth and Fourteenth

495. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588-89 (1952).

496. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (holding the District of Columbia subject to the equal protection requirement of the Fourteenth Amendment because "due process" embraces elements of equal protection concepts).

497. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

Amendment. Representatives no longer vote on that issue; they vote to let the President decide that issue.

Ironically, on June 15, 1964, in *Reynolds v. Sims*, the Supreme Court, sitting across the street from Congress, explained that the right to vote was the “essence of a democratic society.”⁴⁹⁸ Two months later, Congress, on August 17, 1964, enacted the Gulf of Tonkin AUMF that deprived voters of their rights to influence their representatives on whether to take the nation to war.⁴⁹⁹

Chief Justice Earl Warren wrote in *Reynolds*:

[T]he Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. . . . It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote, and to have their votes counted. . . . Racially based gerrymandering, and the conducting of white primaries, both of which result in denying to some citizens their right to vote, have been held to be constitutionally impermissible. And history has seen a continuing expansion of the scope of the right of suffrage in this country. The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.⁵⁰⁰

The AUMF that disregards the constitutional duty of Congress to declare war, coupled with the opportunity for legislators to evade their responsibility to the voters, is precisely a danger to the debasement of the right of suffrage described by Chief Justice Warren. The AUMF neatly removes an obligation that the founders had assigned to Congress so that the public could make their views on going to war felt by their representatives. The enhanced power of the President as political leader, noted sixty-five years ago by Justice Jackson, may influence legislators to hew the “party line,” rather than the interest of their constituents.⁵⁰¹ It is time for the courts to honor the Constitution without hiding behind the political question doctrine.

The AUMF eliminates the citizen's opportunity to advise, reward or punish legislators depending on how they vote on declaring war, a right the Constitution confers on citizens. This right ultimately

498. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

499. ELY, *supra* note 76, at 15-26.

500. *Reynolds*, 377 U.S. at 554-55.

501. Both Hamilton and St. George Tucker emphasized the importance of constituent interest in the “standing army” issue. See *supra* notes 126-130 and accompanying text.

involves life or death, as important as the budgetary rights involved in *Clinton v. New York*,⁵⁰² the individual rights of a person subject to deportation in *INS v. Chadha*,⁵⁰³ and the right to own a gun for self defense at home in *District of Columbia v. Heller*.⁵⁰⁴ It meets all the criteria of a “fundamental right.”

In Chief Justice Rehnquist’s terms, it is “objectively, deeply rooted in this Nation’s history and tradition,” and is “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if they were sacrificed.”⁵⁰⁵ The Declare War Clause on its face and from the history of June 1 creates a mandatory process for the decision to go to war.⁵⁰⁶ The statutory AUMF is inconsistent with that process. Therefore, it violates both Article I, Section 8 and the Fifth Amendment. Congress and the President could resolve the “declaration of war” issue by adopting a limited authorization for the use of force in the manner suggested in *Bas v. Tingy*. Other formulas may fit as well or better. The key is to make sure that the decision is made by Congress—and by no one else.

The AUMF is exactly what Congress and the President might have achieved under one of Madison’s withdrawn proposals on June 1, 1787. Charles Pinckney led the Convention to reject the idea that Presidents might declare war, or permit Congress to authorize the President to take the nation to war.⁵⁰⁷ This rejection should carry the AUMF down with it. Pinckney’s struggle to “keep a republic” on June 1, 1787 should be recognized as a major contribution to the making of America.

The fact that June 1, 1787 has been ignored for so long and by so many federal courts of appeals does not matter. The Constitution cannot be amended by the actions of the President and Congress.⁵⁰⁸

The Supreme Court has the flexibility to reject the opinions of courts of appeals when the matter comes before it.⁵⁰⁹

CONCLUSION

We have placed a heavy burden on June 1-4, 1787 to correct the

502. 524 U.S. 417 (1998).

503. 462 U.S. 919 (1983).

504. 554 U.S. 570 (2008).

505. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

506. John Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579, 591 (1984).

507. See *supra* text accompanying notes 61-73.

508. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588-89 (1952).

509. See *Adarand Constructors v. Peña*, 515 U.S. 200, 231 (1995) (“Remaining true to an ‘intrinsically sounder’ doctrine established in prior cases better serves the values of *stare decisis* than would following a more recently decided case inconsistent with the decisions that came before it.”).

errors of a dozen courts of appeals that have convinced each other that the power of Congress to “declare war” really means the opposite of what it says—that the Framers intended to share these powers between Congress and the President. This supposed “sharing” of “joint” powers has produced two of America’s most damaging wars, killed more than 60,000 Americans and uncounted others, and piled an enormous debt on the United States with no visible gain to the country.

We cannot prove that these two disasters would not have happened if Congress had taken the responsibility that June 1 imposed on its members. But there is one modest glimmer of hope in the otherwise tragic story of politics, law and war that has permeated this article. On September 12, 2001, when the President of the United States asked for the authority to “deter and pre-empt any future acts of terrorism and aggression against the United States,” something very important happened both in the Capitol and the White House.⁵¹⁰ Facing the enormous pressure that the 9/11 atrocities generated to give the President unlimited authority to protect the nation, members of Congress and their staffs resisted turning the entire war power over to the President. They forced changes to limit the presidential “blank check” demands as a response to 9/11.⁵¹¹ Weak as they proved to be the following year in adopting the AUMF against Iraq, they did manage to confine the President’s claim to unlimited power, in the immediate impact of the 9/11 carnage.

The Congress must decide whether to take military action against an enemy even if we are faced with a “sudden attack” and the President has responded with military force. Most of the information on which Congress will rely will come from the President.⁵¹² The 9/11 Resolution was rushed through the House and Senate by September 14. The Senate voted 98-0; and the House acted later in the day.⁵¹³ The Gulf of Tonkin Resolution was passed by Congress on August 7, 1964 based on incidents that may have occurred on August 2 and 4.⁵¹⁴ In both situations the Congress was put under extraordinary

510. Nancy Kassop, *The War Power and its Limits*, 33 PRESIDENTIAL STUD. Q. 509 (2003), available at www.uvm.edu/~dguber/pols21/articles/kassop.htm.

511. See *supra* text accompanying notes 303-09.

512. The President has a wealth of resources that are designed to provide intelligence on those threatening attacks. For a discussion of the history of the National Security Council, see *National Security Council*, THE WHITE HOUSE, <http://www.whitehouse.gov/nsc/history.html>.

513. ELSEA & GRIMMETT, *supra* note 10, at 3. Similar pressure was placed on Congress so that the 2002 resolution against Iraq would be approved before the 2002 congressional elections.

514. GOLDSTEIN, *supra* note 273, at 121-43.

pressure by the President that precluded careful consideration.⁵¹⁵ One lesson from these two experiences is clear: Congress must carefully evaluate its response to a President's claims of serious attacks on the United States.

Professor Phillip Bobbit has focused on the difficulties of assigning "blame" for a terrorist attack from an uncertain source, and the dangerous consequences of a rush to judgment.⁵¹⁶ An attack against our water supply, electrical grid, or the transportation system, where the perpetrators plant phony evidence that the plot originated in Russia, China, or Iran could lead us to a nuclear response that would "bomb us all" into the stone age. This would suit only those who believe that western civilization is an abomination.

Congress must be alert to determine what actions a President plans to take after a "terrorist incident" against the United States, and satisfy itself and the public that the President has not "rushed to judgment" about the culprits and their backers. The President's claim that time is of the essence, is rarely the case. In connection with the Second Iraq War, the President pressured Congress to act favorably just before the bi-annual election in 2002, then waited five months to commence hostilities. The Gulf of Tonkin Resolution was rushed through on flimsy evidence in August, 1964. Johnson had no intention of using it until after the presidential elections in November, so he could run for election on a policy of keeping our boys out of Vietnam.⁵¹⁷ After his victory, he made the decision to deploy more than half a million troops to Vietnam.

Congress should gird itself for negotiations with the White House and for serious reviews of the facts, rather than the meaningless speechmaking that accompanied the 2002 AUMF against Iraq or the worry about the political consequences of a serious review of the Gulf of Tonkin Resolution.

Congress has a problem of resources.⁵¹⁸ The presidential staff

515. In the Iraq situation, on October 11, 2002, the CIA issued a ninety-two page document that legislators would not have had time to review before they met with the President, and the leaders of both parties who spoke in support of the resolution. With that done, Congress took a week of speeches to confirm the issued settled by the leadership in advance. *See supra* text accompanying notes 326-29.

516. *See generally* PHILLIP BOBBITT, TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY 72-84, 146-47, 402-04 (2008); *see* David Sanger, *In Digital Combat, U.S. Finds no Easy Deterrent*, N.Y. TIMES, Jan. 26, 2010 at A1, (describing difficulties in identifying the source of a cyberattack on national power grids, communications systems, or financial networks).

517. GOLDSTEIN, *supra* note 273, at 121-43.

518. Congress, in 1984, created the Institute of Peace "to increase the nation's capacity to manage international conflict without violence." *Our Mission*, UNITED STATES INSTITUTE OF PEACE, <http://www.usip.org/about-us/about-us> (last visited Feb. 25, 2011). Perhaps this resource should be consulted before the Congress allows a

consists of thousands of professionals in the Departments of Justice, Defense, State and the Intelligence agencies.⁵¹⁹ Congress needs a stand-by committee of experts on both war and diplomacy to evaluate proposals for military action.⁵²⁰ While we believe that Presidents and Congresses will continue to rely on the AUMF because it simplifies life at both ends of Pennsylvania Avenue, we also believe that the AUMF has served the nation so badly that we cannot continue to rely on the Vietnam War cases. Congress may reform itself, but at the moment, hope lies with a judiciary that may yet absorb the significance of June 1, 1787.

There are other views on how to remedy the ineffectiveness of the Declare War Clause. Political Science Professor Peter Irons concludes that only a “slow, incremental grassroots activism that marked the civil rights movement in its struggle against Jim Crow laws” can bring Congress to comply with the Constitution.⁵²¹ Prolific analyst Louis Fisher concludes that a reform in education of the young to understand the limits of presidential power can lay a foundation for a change in perceptions concerning the balance of powers between the President and Congress, and that legislators should “participate in the daily grind of overseeing administration policies, passing judgment on them, and behaving as a coequal, independent branch.”⁵²²

We believe that the judgment of Congress must be brought to bear on the issue of war, and that this cannot be accomplished alone through patient evolutionary processes or in a willingness of Congress to reform itself.⁵²³ It is high time for the judiciary—which has stumbled badly—to recognize that the world is as hazardous today as in 1787-88, and that the dangers of personal and political ambition are magnified by modern politics and technology. The original understanding of the Constitution will serve us better than the system that brought us the Vietnam War and the war in Iraq. The appropriate remedy is a declaratory judgment, making clear that members of Congress must take personal responsibility for commencing war, as the nation was promised in 1787.

President to resort to war.

519. See *National Security Council*, *supra* note 512.

520. See THE 9/11 COMMISSION REPORT, *supra* note 307, at 419-22 (Recommendation 13.4).

521. See IRONS, *supra* note 76, at 273.

522. FISCHER, *supra* note 76, at 280.

523. Bruce Ackerman and Oona Hathaway have outlined a series of institutional reforms that Congress could adopt to regulate its relation with a President who seeks an AUMF, or a declaration of war. See Ackerman & Hathaway, *supra* note 361, at 510-14.