War Powers and the Constitution: An Invitation to Struggle

Thomas J. Dixon

Abstract

The intention of the Framers when allocating war powers between the political branches must be divined from materials as enigmatic as Pharaoh's dreams[1]*. In his book "The Powers of War and Peace", John Yoo asserts "the president need not receive a declaration of war before engaging the U.S. Armed Forces in hostilities. Rather, the Constitution provides Congress with enough tools through its control over funding to promote or block presidential war initiatives."*[2] *At first blush this proposition may not seem controversial from a purely functionalist point of view, as modern practice has arguably established a working system of the foreign affairs in the area of war powers that does not require ex ante congressional approval before the Executive can initiate armed conflict. Executive branch defenders maintain that the Constitution's original design is obsolete and not apt to govern modern warfare.*[3] *The prevailing academic theories that advocate the primacy of Congress on questions of war-making reject such propositions on the basis that they lack fidelity to the text and original understanding of the Declare War Clause in the Constitution. Yoo's major contribution to this debate is that he seeks to engage the originalists on their own turf by resort to text, structure and original understanding of the Declare War Clause. Using these modalities of interpretation, Yoo asserts that the pro-Congress reading of the Constitution is erroneous as the expression "declare War" in Article I of the Constitution is a narrow, juridical power intended only to permit a new set of legal arrangements to be created by the legislative branch.*[4] *Yoo concludes that the President has independent and plenary power to initiate war, subject to no judicial checks and to only two legislative constraints: impeachment, and the power to deny funding after the President commits the nation to war.*[5] *The Executive is otherwise free to pursue an unfettered military agenda. This Paper challenges that formalist analysis.*

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[1] *Youngstown Sheet & Tube Co. v. Sawyer* 343 U.S. 579 (1952) (Jackson J) at p. 634.
[2] John Yoo, *The Powers of War and Peace*, (University of Chicago Press, 2005) at pp 8-9 (hereinafter, "**Yoo**").
[3] See Yoo *supra* at page 10.
[4] John C. Yoo, *UN Wars, US War* Powers, Chicago Journal of International Law: Vol. 1: No. 2, Art. 15 at p 364.
[5] John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, California Law Review, 84 (March): 167-305 at page 174.

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Introduction

The distribution of war-making powers under the Constitution has been has the subject of much scholarly debate. While these debates have continued without the emergence of a clear winner[6], there has been a marked arrogation of power by the Executive Branch since the last occasion on which Congress formally declared a state of war to exist.[7]

The capacity of Congress to commence wars and condition Executive action in respect of armed conflicts was never seriously disputed up until the 1950s.[8] Since that time, however, various administrations have claimed certain exclusive constitutional powers in respect of war-making. These claims have taken various forms, but typically rely upon Article II of the Constitution, including the Commander-in-Chief power, the power in respect of foreign affairs[9], and any residual prerogative power.[10] At the same time, such claims necessarily read down the Article I power to 'declare War'[11].

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[6] *Youngstown Sheet & Tube Co. v. Sawyer* 343 U.S. 579 (1952) (***Youngstown***); "*A century and a half of partisan debate and scholarly speculation yields no net result, but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other*." at p 634-635 per Jackson J (concurring). Jackson was of the view that "*A Hamilton may be matched against a Madison*" (footnote 4/1); for a contrary view of see William R. Casto, *Pacificus and Helvidius Reconsidered*, Northern Kentucky Law Review Vol 28:3 p 612 (2001) at page 635: "*At the beginning of the century, Edward Corwin misread the [Pacificus-Helvidius] essays and pronounced them to be a fundamental dispute over the general meaning of the "executive Power" clause. A few decades later, Robert Jackson considered the essays - perhaps under the influence of Corwin's earlier analysis.*"

[7] Being on 2 June 1942 in the course of WWII, against Romania, Bulgaria and Hungary. Since the Washington Administration, Congress has enacted 11 separate formal declarations of war in five different wars. Each declaration has been preceded by a Presidential request either in writing or before a joint session of Congress: Elsea, J.K. & Weed M.C., *Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications,* Congressional Research Service (April 18, 2014) at pages 4-5.

[8] Louis Fisher, *Presidential War Power*, (University Press of Kansas, 2013, 3rd Ed.) at page 104: "*President Truman's commitment of U.S. troops to Korea in 1950 represented a direct assault on the constitutional authority of Congress. No president in the past had taken the country to war without first receiving a declaration or authorization from Congress*".

[9] See (eg) Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, Yale L.J. 231, 252-54 (2001).

[10] Akhil Reed Amar, *America's Constitution, A Biography*, (Random House, 2005), Chapter 2, page 47: "*The old Congress possessed only powers "expressly" conferred by the Articles. The new Congress would enjoy powers "herein granted," both in explicit terms and by fair implication*."; *cf* John Locke, *Second Treatise of Civil Government* (1690) at Chapter XIV, section 160: "*This power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it, is that which is called prerogative: for since in some governments the lawmaking power is not always in being, and is usually too numerous, and so too slow, for the dispatch requisite to execution.*"

[11] The "**Declare War Clause**".

Congress's last concerted attempt to attenuate the arrogation of Executive war-making power was in 1973 when the presidency of Richard M. Nixon was approaching its nadir. Having been made aware of the extent of Executive branch deception in the course of the Vietnam War following the release of the Pentagon Papers,[12] and revelations concerning the escalation of the conflict into Cambodia and Laos[13], Congress sought to rein in the presidency by enacting the *War Powers Resolution of 1973*[14]. Yet no President since that time has formally conceded the constitutional validity of the War Powers Resolution[15]. Every President has taken the view that the Resolution is an impermissible infringement on the President's Article II powers as Commander-in-Chief.[16] Ironically, pro-Congress scholars also maintain the Resolution is unconstitutional, but in their case the vice lies in the 'gift to the President of sixty (actually ninety) free days to fight any war he likes' – a result they say is not permitted by the Constitution.[17]

The ramifications of a constitutional state of affairs in which the Executive assumes broad war-making powers beyond the reach of both Congress and judicial review may once have appeared startling.[18] Yet such views have come to exert a profound influence on modern US foreign policy. A short time after John Yoo wrote *The Continuation of Politics by Other Means* (in which he advocated presidential primacy in matters of war powers based on a narrow reading of the Declare War Clause), he became a principal adviser within the Office of Legal Counsel at the Department of Justice in the G. W. Bush administration.[19]

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[12] *New York Times Co. v. United States* 403 U.S. 713 (1971) at page 717 per Black J (concurring).
[13] Daniel Ellsberg, *Lying About Vietnam*, New York Times, Opinion, 29, 2001.
[14] Public Law 93-148, 87 Stat. 555 – 7 November, 1973; codified at 50 U.S.C. §§ 1541–1548 (1994).
[15] An exception may be the *Mayaguez* Incident in 1975; On May 12, 1975, the U.S. merchant vessel Mayaguez was seized by Cambodian naval forces. The United States thereafter undertook a variety of diplomatic and military actions in an effort to secure the release of the ship and its 40 crewmembers. An hostilities report was submitted within the 40 hour time period required by s. 4 of the War Powers Resolution, but there was 'less than full compliance' with consultation requirements: see The Comptroller General of the United States*, The Seizure of the Mayaguez-A Case Study of Crisis Management*, May 11, 1976, p. 56 at page 71.
[16] Grimmett, R.F., *War Powers Resolution: Presidential Compliance*, Congressional Research Service (September 25, 2012) at page 2.
[17] John Hart Ely, *War and Responsibility – Constitutional Lessons of Vietnam and its Aftermath*, (Princeton University Press, 1995) (hereinafter "**Ely"**) at page 116; Robert F. Turner, *War and the Forgotten Executive Power Clause of the Constitution: A Review Essay of John Hart Ely's War and Responsibility*, 34 Va. J. Int'l L. 903 (Summer 1994) at p 969.
[18] See (e.g.) Jackson J in *Youngstown* at p 642: "*Nothing in our Constitution is plainer than that declaration of a war is entrusted only to Congress. Of course, a state of war may, in fact, exist without a formal declaration. But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President .. 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.*"
[19] John C. Yoo, *The Continuation of Politics by Other Means*, 84 Cal. L. Rev. 167, 173–74 (1996).

Yoo was integral in formulating legal policies for the War on Terror[20], and rendered advice including that "*the President has the constitutional authority to introduce U.S. armed forces into hostilities when appropriate, with or without specific congressional authorization*".[21] The acceptance of his doctrinal claims led to some of the most controversial policy initiatives of the Bush presidency.[22] Under the aegis of the modern presidency's war powers, American citizens have been subjected to; detention without trial[23], mass (warrantless) domestic surveillance programs[24], targeted killings abroad[25], "rendition"[26], and "enhanced interrogation" techniques.[27]

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[20] Stuart Streichler, *Mad about Yoo, or, Why Worry about the Next Unconstitutional War?*, Journal of Law & Politics Vol. XXIV:93(2008) at pp 93-94.

[21] *Application of War Powers Act to War on Terrorism: Hearing Before the Senate Judiciary Subcommittee on the Constitution*, April 17, 2002 (statement of John Yoo. Deputy Assistant Attorney General, Office of Legal Counsel, United States Department of Justice); see also John Yoo, *War By Other Means: An Insider's Account on the War on Terror*, (Atlantic Monthly Press, 2006).

[22] Alexander, J.C., *John Yoo's War Powers: The Law Review and the World* Cal. Law. Rev. Vol 100:331 (2012) "*In the humid environment of the Bush OLC, Yoo's theory of presidential war powers flourished like Audrey*" referring to the man-eating plant in *Little Shop of Horrors* at page 337; see also Barron, D.J. & Lederman, M.S., *The Commander in Chief at the Lowest Ebb – Framing the Problem, Doctrine, an Original Understanding*, Harvard Law Review, Vol 121 January 2008, no.3, 689-804, at p 706.

[23] In *Rasul v. Bush* 542 U.S. 466 (2004), the Court rejected the President's claim that it would be an unconstitutional interference with the President's commander-in-chief power to interpret the *habeas corpus* statute to encompass actions filed on behalf of Guantánamo detainees. In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Government argued that the President had Article II powers to detain enemy combatants (including US Citizens) notwithstanding that an Act of Congress was directed at preventing Executive detention (the Non Detention Act: 18 U.S.C. §4001(a)). The Court did not have to address this submission as it found, by majority, that such detention was within the scope of the 2001 Authorization for Use of Military Force: Pub. L. No. 107-40, §2 (a), 115 Stat. 224, 224 (2001); Stephen I. Vladeck, *A Small Problem of Precedent: 18 U.S.C. 4001(a) and the Detention of U.S. Citizen "Enemy Combatants"*, 112 Yale L.J. 961 (2003) at p. 968.

[24] *Klayman v. Obama* 957 F. Supp. 2d 1 - Dist. Court, Dist. of Columbia 2013 per Judge Leon "*I cannot imagine a more 'indiscriminate' and 'arbitrary' invasion than this systematic and high-tech collection and retention of personal data on virtually every single citizen for purposes of querying and analyzing it without prior judicial approval*.."; *cf American Civil Liberties Union v. Clapper*, No. 13-3994 (S.D. New York, December 28, 2013).

[25] Bruce Ackerman, *The Decline and Fall of the American* Republic, (Belknap Press, Cambridge Mass., 2010) "*The "torture Memos" generated by the Office of Legal Counsel under George W. Bush symbolize the extraordinary collapse of executive constitutionalism at moments of crisis*" at page 143; Alford R.P., *The Rule of Law at the Crossroads: Consequences of Targeted Killing of Citizens*, Utah Law Review, 2011, vol. 1203 at p 1272: "*The executive branch now has the final say on the constitutionality of its decision to kill an American citizen, since it asserts that no court has jurisdiction to review its opinion*"; see also *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 9 (D.D.C. 2010).

[26] Bruce Ackerman, *The Decline and Fall of the American Republic*, (The Belknap Press, 2013) at p 143 referred to "*the shocking outbreak of presidential illegality in the war on terror. The "torture memos" generated by the Office of Legal Counsel under George W. Bush symbolize the extraordinary collapse of executive constitutionalism at moments of crisis. It would be a tragic mistake to view this episode as a momentary aberration in the life of the modern presidency. To the contrary, it was an entirely predictable consequence of the President institutional setup – which puts the meaning of national security law at the mercy of a politicized Office of Legal Counsel and a super politicized White House Council.*"

[27] Harold H. Koh, *Can the President be Torturer in Chief?,* Indiana Law Journal, Vol 81:1145, (2006) at p. 1159: "*If this law authorizes the President to kill terrorists, why should it not also authorize the President to use torture as "necessary and appropriate" force to extract information from terrorists? The obvious answer is because it is never "necessary or appropriate" to use torture in a War on Terror*.".

Harold Koh has described this modern system as one of "*executive initiative, congressional acquiescence, and judicial tolerance*".[28] To Bruce Ackerman, this period involved nothing short of "*the extraordinary collapse of executive constitutionalism*" during which time Congress's powers of appropriation and oversight were incapable of arresting the steady march toward executive hegemony.[29]

The debate is therefore joined on the issue of the true meaning of the Declare War Clause, and the stakes involve nothing less than the governance of the nation by an 'imperial President'[30] in a system closely replicating the early allocation of powers between the British parliament and the Monarch[31], or by a system where the locus of the war-making power resides in Congress.[32]

Part I of this Paper is dedicated to an analysis of the text, structure and original understanding[33] of Declare War Clause and arrives at the conclusion that, subject to an implicit power to repel sudden attacks, the Framers understood the distribution of war power under the Constitution to require that the President gain Congressional approval before committing the nation to war. As part of this analysis, there is consideration of ratification debates, early post-adoption practice, and the social and political forces that influenced the Constitution's adoption by "We the People", an aspect of the analysis that appears to be lacking in the discourse to date.[34]

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[28] Harold Hongju Koh, *The National Security Constitution: Sharing Power after the Iran-Contra Affair* (Mary-Christy Fisher, 1990) at page 117.

[29] Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 Mich. L. Rev. 447 (2011) at p. 485: "*Congress has lost the oversight capacity that made the power of the purse such a potent means of military control at the time of the Founding*"; *cf* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism* 118 Harvard Law Review 2047-2133 (2005).

[30] Arthur M. Schlesinger, *The Imperial Presidency: What the Founding Fathers Intended* (Houghton Mifflin, 2004)

[31] see Delahunty, R.J. and Yoo, J.C., *Making War*, Cornell Law Review, 93:123 (2007), pages 123-167.

[32] There are of course variations on these diametrically opposed positions involving shared or concurrent powers: see Barron, D.J. & Lederman, M.S., *The Commander in Chief at the Lowest Ebb – Framing the Problem, Doctrine, an Original Understanding*, Harvard Law Review, Vol 121 Jan. 2008, no.3, pages 689-804; some of the various permutations based on interpretation of the Declare War Clause are collected in Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 Yale LJ. 672 (1972) at p. 694.

[33] Brian F. Havel, *Forensic Constitutional Interpretation*, 41 Wm. & Mary L. Rev. 1247 (2000) at 1251; *cf* 1286; Ian C. Bartrum, *Metaphors and Modalities: Meditations on Bobbit's Theory of the Constitution*, 17 Wm. & Mary Bill Rts. J. 157 (2008) at page 158ff: This aspect concentrates principally on the three of Philip Bobbitt 'modalities' namely: (i) Historical (Intention of the Framers and ratifiers); (ii) Textual; (iii) Structural (relationships between institutions); (iv) Doctrinal (precedent); (v) Ethical (American Ethos); and (vi) Prudential (cost-benefit analysis)); see also Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747 (1999) at 778.

[34] *Cf* John Yoo, *The Powers of War and Peace*, (2005) at page 8: In order to support this thesis, Yoo states that he '*concentrates less on judicial precedent and more on text, structure, and history*'.

Part II examines the shift in the balance of constitutional power from the legislative branch to the presidency against the effort by Congress in 1973 erect a check on the Executive's power to involve the nation in armed conflicts. This analysis involves an assessment of the pragmatic considerations underlying decisions about the distribution of war powers, and assesses whether the accretion over time of functionally beneficial adaptations designed to achieve Executive aggrandizement has achieved political legitimacy.[35]

Part I – the Formalist Analysis of War Powers Under the Constitution

1. Identifying the Textual Issue

The intention of the Framers when allocating war powers between the political branches must be divined from materials as enigmatic as Pharaoh's dreams[36]. The literature is replete with examples of very able scholars who have reviewed the historical record only to arrive at dogmatic and often diametrically opposed positions as to where a bright line may be drawn in respect of the distribution of war powers.[37]

The debate commences with the constitutional text. The putative imprecision in the text of the Constitution has famously been described as giving rise to "*an invitation to struggle for the privilege of directing American foreign policy*".[38]

Congress may by dint of Article I "*declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water*." Congress also possesses the authority to "*raise and support Armies*", to "*provide and maintain a Navy*", to "*make Rules for the Government and Regulation of the land and naval Forces*", "*[t]o provide for calling forth the*

[35] J. Andrew Kent, *Congress's Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 Tex. L. Rev. 843 at p 945.
[36] Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer* 343 U.S. 579 (1952) stated that "*Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.*" at pp 634.
[37] Some of these divergent views are collocated in: Fisher L., *Presidential War Power* (University Press of Kansas, 2013, Third Edition) from page 14; Prakash, S., *Unleashing the Dogs of War: What the Constitution Means by "Declare War"*, Cornell Law Review, Vol 93:45 (2007), pages 45-122; Barron, D.J. & Lederman, M.S., *The Commander in Chief at the Lowest Ebb – Framing the Problem, Doctrine, an Original Understanding*, Harvard Law Review, Vol 121 January 2008, no.3, pages 689-804.
[38] Edward S. Corwin, *The President, Officer and Powers 1787-1957* (NYU Press, 1957) at page 171. Corwin lists four functional reasons for favoring Executive primacy, including (i) unity of office; (ii) secrecy in dispatch; (iii) superior sources of information; and (iv) presidential availability and flexibility.

Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions" and to "*provide for organizing, arming, and disciplining, the Militia*."[39]

A general grant of executive power is vested in the President by Article II of the Constitution. The only relevant enumerated power provides that "*[t]he 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*".[40]

The 'pro-Congress' position maintains that only the legislative branch can initiate military hostilities.[41] The text, structure and history of the Declare War are said to support this outcome. While John Hart Ely acknowledged that the original understanding of the Constitution's framers and ratifiers could often be '*obscure to the point of inscrutability*', he took the view that, in respect of war powers, "*in this case, however, it isn't.*" "*The debates, and early practice, establish that … all wars, big or small, "declared" in so many words or not – most weren't, even then – had to be legislatively authorized*".[42] The view that it is the province of Congress to initiate and define the scope of hostilities has strong precedential support dating back to the early days following ratification.[43]

A tectonic shift in the accepted constitutional allocation of war powers occurred with the advent of the Cold War, and the conflict on the Korean peninsula in 1950.[44] A new

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[39] Article I, section 8.
[40] Article II, section 2.
[41] Eg, John Hart Ely, *War and Responsibility – Constitutional Lessons of Vietnam and its Aftermath*, (Princeton University Press, 1995) at pages 3-9; Fisher L., *Presidential War Power* (University Press of Kansas, 2013, Third Edition) pp 310-311; Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by "Declare War"*, Cornell Law Review, Vol 93:45, 2007, pages 45-122; Barron, D.J. & Lederman, M.S., *The Commander in Chief at the Lowest Ebb – Framing the Problem, Doctrine, an Original Understanding*, Harvard Law Review, Vol 121 January 2008, no.3, pages 689-804.
[42] Ely *War and Responsibility – Constitutional Lessons of Vietnam and its Aftermath*, (Princeton University Press, 1995) at page 3.
[43] Eg, *Bas v Tingy*, 4 US (4 Dall) 37 (1800); *Talbot v Seeman*, 5 US (1 Cranch) 1 (1801); *Little v Barreme*, 6 U.S. 170 (1804); and thereafter in *The Prize Cases* 67 US (2 Black) 635 (1862).
[44] "*Korea was a watershed*": John Hart Ely, *Suppose Congress wanted a War Powers Act that Worked*, Columbia Law Review, Vol 88, Nov 1988 No.7, pages 1379-1431 at p 1391; see also Louis Fisher, *Presidential War Power* (University Press of Kansas, 2013, Third Edition) at p. 104: "*President Truman's commitment of US troops to Korea in 1950 represented a direct assault on constitutional authority of Congress. No President in the past had taken the Country to war without first receiving a declaration or authorization from Congress*". The Truman Administration's defended its position by enumerating (in a State Department memorandum) some 85 instances of armed conflict engaged in without congressional approval. Later, in the Johnson Administration, the State Department Legal Adviser's Office produced a memorandum collecting over 125 incidents in which the President used the armed forces abroad without obtaining prior congressional authorization: Leonard C. Meeker, U.S. Dept. of State, *The Legality of United States Participation in the Defense of Viet-Nam*, 54 Dept. St. Bull. 474, 484-85 (1966) reprinted in 75 Yale L.J. 1085, 1101 (1966).

constitutional doctrine has gained currency since that time which gives primacy to the President in the initiation of hostilities.[45] Administrations now regularly invoke the President's Article II powers as Commander-in-Chief and associated foreign affairs powers to justify armed incursions, and put far less emphasis on the Congressional power to 'declare War'.[46]

Pro-Executive scholar, Philip Bobbitt, takes the view that the power to *make* war is not an enumerated power, thus leaving the field clear for prudential arguments favoring Executive precedence. Bobbitt dismisses the notion that to *declare* war means *commence* war as a "*contemporary textual preconception*".[47]

John Yoo is of the view that, "*although the text of the Constitution divides the power to make war between the President and Congress, it does not clearly address the authority to initiate a war*".[48] In Yoo's scheme, the Declare War Clause was intended by the Framers to be read narrowly as (only) conferring on Congress a juridical power that both defines the state of international legal relations, and triggers domestic constitutional authorities during wartime.[49] In that result, Executive has constitutional power to initiate hostilities without Congressional approval.[50]

Yoo's thesis therefore turns on the acceptance of a narrow reading of the word 'declare' in Article I of the Constitution.

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[45] For example; Turner R.F., *Repealing The War Powers Resolution,* 109–110 (1991); Bobbitt P., *War Powers: An Essay on John Hart Ely's "War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath"*, Michigan Law Review 92:1364 (1994), pages 1364-1400; Yoo J.C., *The Continuation of Politics by Other Means: The Original Understanding of War Powers,* 84 Cal. L. Rev. 167, 173–74 (1996); John Yoo, *The Powers of War and Peace*, (the University of Chicago Press, 2006) arguing that the President may start a war; eg at pp 17, 144, 165.

[46] (eg) John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 Calif. L. Rev. 167, 196-217 (1996); Saikrishna Prakash, *Reply: A Two-Front War*, 93 Cornell L. Rev. 197 (2007).

[47] Philip Bobbitt, *War Powers: An Essay on John Hart Ely's "War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath"*, Michigan Law Review 92:1364 (1994) at p. 1381.

[48] John C. Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 U. Colo. L. Rev. 1169 (1999) at page 1175

[49] John Yoo, *War and the Constitutional Text,* 69 U. Chi. L. Rev. page 1639 (2002) relying principally on the views of Blackstone and Montesquieu: at page 7, note 14.

[50] Yoo *supra* pp 17, 144-146, 165.

2. *The Meaning of 'Declare' War during the Revolutionary Period*[51]

The pre-Revolutionary period was marked by strong anti-executive sentiments amongst the colonists.[52] Indeed, the conduct of the American Revolutionary War was governed by the Continental Congress and later, more formally, under the auspices Articles of Confederation which provided for no distinct executive branch of government.[53] As it would transpire, the British experience became 'far more distant from the Constitution's Framers than their own experiences with colonial and State governments, and under the Continental Congress and Articles of Confederation.[54]

Just as the State of Virginia was ratifying the Articles of Confederation in December 1777,[55] General Washington was leading his troops into their winter quarters at Valley Forge in Pennsylvania. The shortcomings of the Confederation and its lack of executive vitality would soon become apparent to Washington and his starving troops[56].

The Articles of Confederation and Perpetual Union were proposed by the Second Continental Congress on 15 November 1777. The "United States" thereafter became 'an alliance, a multilateral treaty of sovereign nation-states.'[57] On questions of war, the Articles providing that "*No State shall engage in any war without the consent of the United States in Congress*" except where "*actually invaded by enemies*", or where they had received notice of an

[51] Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution*, 94-130 (1996) at 8: "*scholars distinguish between "original intent," which refers to the purposes and decisions of the Constitution's authors, and "original understanding," which includes the impressions and interpretations of the Constitution held by its "original readers - the citizens, polemicists, and convention delegates who participated in one way or another in ratification*"."; *cf* the majority's approach in *District of Columbia v. Heller*, 554 U.S. 570 (2008) which is couched in terms of original understanding (which Balkin terms 'original expected application' – at page 7): at 576–78 (Scalia J), at 636–37 (Stevens J dissenting).

[52] Abraham D. Sofaer, *War, Foreign Affairs and Constitutional Power – The Origins* (Ballinger Publishing Company, Cambridge Massachusetts, 1976) at pages 15-16. This anti-executive feeling in the colonies was later translated into State governments that in general were dominated by the legislative branch.

[53] Thomas Paine. *Writings of Thomas Paine — Volume 1 (1774-1779): The American Crisis*, (J Watson, editor, 1835), at page 123: "*There are certain powers which the people of each state have delegated to their legislative and executive bodies, and there are other powers which the people of every state have delegated to Congress, among which is that of conducting the war, and, consequently, of managing the expenses attending it; for how else can that be managed, which concerns every state, but by a delegation from each?*", Common Sense, Philadelphia, 5 March, 1782.

[54] Sofaer *supra* at p 15.

[55] On 16 December 1777. The Articles were formally ratified by the 13 original States on 1 March 1781.

[56] Ron Chernow, *Washington: A Life*, (Penguin Books, 2010), Chapter 27 at p 323.

[57] Akhil Reed Amar, *The Constitution: A Biography* (Random House, 2005) at page 25

invasion "*and the danger is so imminent as not to admit of a delay*".[58] Congress was constituted as having the "*sole and exclusive right and power of determining on peace and war*".[59]

Yoo argues that if the Framers wanted to put the issue of war powers in the 1788 Constitution beyond doubt, they could have employed similar, unambiguous language as that found in the Articles of Confederation.[60] Yoo asserts that the change from the Articles' language of 'determining on war and peace' to the Constitution's 'declare War' is conclusive evidence of the Framers' intent to change Congress's war powers.[61]

There are a number of responses to this charge. The structure of the Articles was concerned with regulating the nascent States, not the separation of powers between branches of the federal government. In those circumstances, it would not be expected that cognate language would readily be transposed unaltered from one document to another with an very different focus.[62]

Yoo also misses a critical aspect of the text in his analysis. The States were prohibited under Article VI of the Articles from granting letters of marque or reprisal.[63] Article VI made an exception to this prohibition in the case where "*a declaration of war by the United States in Congress assembled*" had been made. Yoo does not refer to this aspect of the text in his discussion of the Articles of Confederation[64], but any serious analysis must grapple with the meaning of the word 'declaration' when used within such close proximity to the war powers provisions.[65] It is an issue upon which much turns in this debate, as Yoo asserts that the term 'declare' was understood in Revolutionary America to mean "to publish; to proclaim".[66] It follows on Yoo's argument that Congress's remit was merely to proclaim "*a state of affairs* -

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[58] Article VI. Article VI dealt with various prohibitions on the Stated ("*No State shall*.."), whereas Article IX collocated the grants of power to Congress ("*The United States in Congress assembled shall*..").
[59] Article IX.
[60] Yoo *supra* at page 148. This is a common device employed by Yoo throughout his materials.
[61] Yoo *supra* at pp 148, 332, note 17.
[62] See Prakash, S., *Unleashing the Dogs of War: What the Constitution Means by "Declare War"*, Cornell Law Review, Vol 93:45, 2007, at p 89; Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 Yale LJ. 672 (1972) at 674.
[63] This was the practice whereby Congress would authorize acts of a warlike nature (such as commissioning privateers to raid enemy commerce) that were short of "perfect" war: see Koh, H.H., *Can the President be Torturer in Chief?,* Indiana Law Journal, Vol 81:1145, (2006) at page 1218.
[64] Yoo *supra* Chapter 5.
[65] Akhil Reed Amar, *Intratextualism*,112 Harv. L. Rev. 747 (1999): "*It is hardly to be presumed that the variation in the language could have been accidental. It must have been the result of some determinate reason*".
[66] Relying upon Samuel Johnson's dictionary; Yoo *supra* at page 145, footnote 7 (Chapter 5).

clarifying the legal status of the nation's relationship with another country - rather than [to authorize] the creation of that state of affairs." Contemporary publications, however, suggest that the term 'declare' was also being used synonymously with 'commence'.[67]

Madison, writing as Publius in *The Federalist* No. 41, reviewed the several powers conferred on the proposed government of the Union. The first of these was 'security against foreign danger'.[68] Madison then set out the powers that guaranteed such security as including "*those of declaring war and granting letters of marque; of providing armies and fleets; of regulating and calling forth the militia; of levying and borrowing money*." The question was then posited; "*Is the power of declaring war necessary?*". Madison's reply to his own rhetorical flourish was that "no man" would deny that it was, and that "*[t]he existing Confederation establishes this power in the most ample form.*" The only grant of power in this respect under the Articles was the 'power to determine war and peace'. Thus Madison was using the term 'declaring' in a cognate sense to the plenary head of power under the Articles to initiate hostilities.[69]

In *The Federalist* No. 69, Hamilton as Publius (twice) compared the war powers of the English monarch (and the Governor of New York), to those under of branches of government of the United States. The commander-in-chief power of the President amounted to "*nothing more than the supreme command and direction of the military and naval forces*", while that of the British king extended "to the *declaring* of war and to the *raising* and *regulating* of fleets and armies - all which, by Constitution under consideration, would appertain to the legislature".[70] Hamilton did not expressly define what "declaring war" was.[71] However, if 'declaration' was used by Hamilton in a formal sense to mean no more than to 'announce' a legal state of affairs, then this piece of advocacy would have had no place in *The Federalist*, the clear objective of which was to disabuse the people of the notion that a unitary Executive

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[67] Treanor, W.M., *Fame the Founding and the Power to Declare War*, Cornell Law Review, Vol 82, Iss. 4: 695-772 (1997) at p 708-9.

[68] The Primacy given to national security matters is evident from the Preamble of the Constitution; see also the early *Federalist* essays written by John Jay and Alexander Hamilton as Publius; and see discussion in Akhil Reed Amar, *America's Constitution: A Biography* (Random House, 2005) esp. Chapters 1 and 5.

[69] See also *The Federalist* No. 44 (Hamilton), and in which 'declare' was is used is a broad sense.

[70] Original emphasis; This position was subsequently endorsed by the Supreme Court in *Fleming v Page* 50 US 643, 646-647, 9 How. 603, 615 (1850); In *The Federalist* No. 69, Hamilton also queried here whether the constitutions of New Hampshire and Massachusetts conferred larger powers upon their respective governors than could be claimed by the President (discussed below).

[71] Prakash, S., *Unleashing the Dogs of War: What the Constitution Means by "Declare War"*, Cornell Law Review, Vol 93:45, 2007, at pages 88-89.

was inevitably "*an aristocracy, a monarchy, and a despotism*". The better reading is that Hamilton equated 'declaring' with the power to commence war.

This conclusion is supported by the fact that it is nowhere suggested in *The Federalist* No. 69 that the President had any concurrent power in respect of taking the nation to war. Hamilton referenced Blackstone's commentaries for the purposes of comparing the executive powers to the royal prerogative. [72] Blackstone had attributed to the King two forms of prerogative – that of commanding the nation's military forces in the course of war, and the commencement of war. It was the latter power that Hamilton identified as differentiating the two systems. That is, the he was making it clear that the Executive did not possess such a power in Article II.

Yoo relies heavily upon the works of such early theorists as Blackstone and Grotius to show that war was an executive power, and that declarations of war were understood at the time to be unnecessary in the commencement of hostilities. Both were writers that the Framers were intimately aware of.[73]

Grotius did conceptualize a declaration of war as a legal condition: a formal declaration of war appeared to be a necessary (or reliable) means of transforming "*the brute existence of armed conflict into a condition governed and regulated by rules of law*", but observed that "*most wars are begun without declaration of war*".[74] For example, as Vattel had recognized that a declaration was unnecessary when responding to an armed attack.[75]

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[72] Locke also had theories on the royal prerogative but had relatively little to say about specific institutions or problems of constitution design. In his Second Treatise on Civil Government (1690), John Locke identified three functions of government: legislative, executive and "federative". The last of these powers embraced "*the power of war and peace, leagues and alliances, and all the transactions with all persons and communities without the Commonwealth*": s 146. To Locke, the federative power (what today we call war and foreign policy) was "*always almost united*" with the Executive. Any effort to separate the Executive and federated powers, he counseled, would invite "*disorder and ruin*": ss. 147-148. Locke, however, was rarely cited after 1781 - instead, Blackstone became the primary, although indirect, means for injecting Locke's ideas into the debate on the Constitution. After Montesquieu, the Federalists cited Blackstone most frequently, followed by Locke: Donald S. Lutz, *A Preface to American Political Theory*, (University Press of Kansas, 1992): at p. 123; and the tables of relative influence at pp 135-139.

[73] According to Bernard Bailyn, in "*pamphlet after pamphlet*" the American writers cited the likes of Locke, Grotius, Pufendorf, Burlamaqui, and Vattel on the laws of nature and of nations, and on the principles of civil government: Bernard Bailyn, *The Ideological Origins of the American Revolution*, 27 (Harvard University Press, 1967, 1990 (postscript)) at page 27.

[74] Hugo Grotius, *On the Rights of War and Peace* (1853 ed), page 318; see also Delahunty & Yoo *supra* at page 144: "*Grotius emphasized that although war could be made without formalities…, nonetheless the formalities were needed under the Law of War to attach certain legal "privileges and effects" to war.*"; Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 Yale LJ. 672 (1972) at pp. 690-691 refer to the immunity attaching to participants as one such legal condition.

[75] Emmerich de Vattel, *The Law of Nations* (Joseph Chitty editor, 1861) at page 316.

Grotius first described the idea of an 'imperfect war' in 1625 as "*where a state of perfect war has not yet been reached, but where nevertheless there is need of an enforcement of a right by violent means, that is, by means of an imperfect war*".[76]

For another early writer, Burlamaqui, the dichotomy between perfect and imperfect war was important as imperfect wars were intimately related to the idea of 'reprisals' and did not require a declaration of war.[77]

The dichotomy between perfect and imperfect war is important to understanding the distribution of War Powers between Articles I & II of the Constitution, because it is reflected in the text.[78] Located immediately after the Declare War Clause in Article I are the clauses granting Congress power to issues "Letters of Marque and Reprisal", and make Rules concerning "Captures on Land and Water". These are powers to wage hostilities short of full scale war.[79] Of letters of marque and reprisal, Blackstone wrote; "*the prerogative of granting which is nearly related to, and plainly derived from, that other of making war; this being indeed only an incomplete state of hostilities, and generally ending in a formal denunciation of war.*".[80]

This is an important aspect of the early jurisprudence, as there was an appreciation of the possibility of commencing hostilities short of a formal declaration of war, and that this be accomplished through the expedient of 'reprisals' and 'captures'. On one end of the continuum was the unequivocal declaration of (perfect) war, such as in the case of war or

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[76] "*Hugo Grotius on the Law of War and Peace*" Book 3, page 625 (William S. Heim & Co Inc, 1995).

[77] Jean-Jacques Burlamaqui "*The Principles of Natural and Politic Law*" (2 vols., T. Nugent trans. 1752; 3rd ed. 1784) at Vol. 2, Chap. IV, pp 269-273, s XXV; Burlamaqui was not entirely clear in this part of his work on the necessity for a declaration of war. He stated that a declaration *ought* (at p. 269, s. XV) to be issued out of the respect between sovereigns. He also distinguishes between distinguish between a "declaration" and a "publication" of war (pp 272-273, s. XXV): see also Kathryn L. Einspanier, *Burlamaqui, The Constitution, and the Imperfect War on Terror*, Georgetown Law Journal, Vol 96: 985 (2008); see also Louis Fisher *supra* at pp 2-3; Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 Yale LJ. 672 (1972) at pp. 690-691; *cf* Delahunty, R.J. & Yoo, J.C., *Making War*, *supra* at pp 142-148.

[78] The Framers were also aware that there were various means of commencing hostilities without the necessity of a formal declaration of war. To that end, Publius (Hamilton) in *The Federalist* No. 25 noted that the "*formal denunciation of war has of late fallen into disuse*."

[79] Ingrid Wuerth *The Captures Clause*, University of Chicago Law Review 76:1683 (2009); William Young, *A Check on Faint-Hearted Presidents: Letters of Marque and Reprisal*, 66 Washington & Lee Law Review 895 (2009); see also *Brown v. United States* 12 US (8 Cranch) 110 (1814) at page 129.

[80] William Blackstone, *Commentaries on the Laws of England,* (William C Sprague, editor. Callaghan & Co, 1915, 9th Edition) Chapter VII.

conquest or an invasion. In those examples there was no doubt that a nation had declared war. On the other end of the continuum were ambiguous actions or words, such as ambassadorial dismissals or isolated armed hostility that might be regarded as declarations only under certain circumstances.[81]

For Blackstone, each case along the continuum formed part of the King's prerogative the power to initiate the hostile action. The question then becomes whether the Framers intended to allocated the entire corpus of war-initiating powers to the legislative branch contrary to the understanding of these early writers, or to divide them?

Charles Lofgren assessed the war powers along the continuum allocated to Congress as signifying an intent to take the question of war-making out of the hands of the executive: "*Taken together, then, the grants to Congress of power over the declaration of war and issuance of letters of marque and reprisal likely convinced contemporaries even further that the new Congress would have nearly complete authority over the commencement of war*".[82]

Fisher suggests that, in this respect, "*the American Framers could not have been more explicit in rejecting the British model of an Executive who possesses exclusive control over external affairs*".[83]

This break in 1787/88 from English constitutional theory in which war-making was a Crown prerogative is explicable by the fact that, although broad executive power was eschewed after Independence, the trend reversed over the course of the decade. As will be seen below, the reversal resulted from domestic considerations that had little to do with external issues such as war.[84]

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[81] Aware of the potential ambiguity in ambassadorial dismissals, Senator John Quincy Adams proposed an 1806 Bill that would have made clear that the President could demand the departure of misbehaving foreign ministers: see Prakash S.B., *Exhuming the Seemingly Moribund Declaration of War*, the George Washington Law Review, Vol 77:89 (2008): "*Summing up, it makes sense to regard declarations of war in the founding era as existing along a continuum of certainty*": Page 104.

[82] Charles A. Lofgren, *War–Making under the Constitution: The Original Understanding*, 81 The Yale Law Journal (March 1972) pp. 672-702 – at p. 700.

[83] Louis Fisher, *John Yoo and the Republic*, Presidential Studies Quarterly, March 2011, pages 177-191 at 183; English Whigs add some support to this view - Matthew Hale had written: "*The power of making war or peace . . . in England is lodged singly in the King, tho it ever succeeds best when done by parliamentary advice*.": R. Hofstadter, *The American Political Tradition And The Men Who Made It* (Knopf, 1954) at p. 159.

[84] Gordon S. Wood, *The Creation of the American Republic 1776-1788*, (University of North Carolina Press, 1998) esp. from Chapter 5; see also Charles A. Lofgren, *War–Making under the Constitution: The Original Understanding*, 81 The Yale Law Journal (March 1972) pp. 672-702 – at p. 697.

Yoo's heavy reliance on Blackstone in support of his thesis ultimately appears misplaced. Yoo reads Blackstone to support his conclusion that "*when the British monarch exercised his sole authority on questions of war and peace, he could issue a declaration of war either before or after "the actual commencement of hostilities*"".[85] In other words, he argues that there was no connection between a declaration and the commencement of war. Blackstone, however, did not say this. To the contrary, Blackstone queried "*why according to the Law of Nations a denunciation of war ought always to precede the actual commencement of hostilities*….".[86] Thus Blackstone proceeded on the basis that a declaration "*ought*" to come before the actual commencement of war "*in order to make a war completely effectual*". But it was not in dispute that Blackstone contemplated various forms of hostilities that did not amount to total or "perfect" war.

The panoply of war powers that the Framers allocated to Congress occupy the full spectrum of hostilities in Blackstone's analysis. It is entirely consistent with that analysis that the expression 'declare War' in the Constitution was intended to be synonymous the power of 'determining on war'.[87]

Even accepting that a declaration of war had profound legal consequences, Yoo can only speculate why the Framers deemed it important for this 'juridical' power to be separated out from a more general power to make war. Indeed, there appears to be no discussion in any of the Founding documents that identifies this as a burning issue that required textual recognition.

3. The Relevance of State Practice

After the conclusion of the Revolutionary War, the Continental Congress was again tested in late 1786 when Shays' Rebellion took place in and around Massachusetts. Although the Rebellion's impact on the Constitution remains debatable[88], it highlighted the inability of the

[85] John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 Cal. L. Rev. 167 (1996) at page 205.
[86] Chapter VII.
[87] As it appears in the Articles of Confederation: see Treanor, W.M. *Fame the Founding and the Power to Declare War*, Cornell Law Review, Vol 82, iss. 4 1997, pages 695-772: at 709; *cf* Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 Yale LJ. 672 (1972) at 695.
[88] Akhil Amar does not feature the '*rebellion as a major causal force driving the Constitution of 1787–88*' in his book, *America's Constitution: A Biography* – see Chapter 3, note 39; *cf The Federalist* Nos. 6, 21 & 25, 28, 74 (Alexander Hamilton), and No. 43 (James Madison).

Continental Congress to adequately react to existential threats.[89] Washington was sufficiently concerned to write to Madison concerning the insurrection, "*What stronger evidence can be given of the want of energy in our governments than these disorders?*".[90] The rebellion possibly precipitated a reluctant Washington's attendance at the Philadelphia Convention.[91]

Shays' Rebellion was finally put down in February, 1787 by a privately funded militia. A few months later, in May, the Constitutional Convention convened in Philadelphia. As a result of these experiences there was said to be widespread demand for a stronger Executive.[92] Yoo seizes on this point to support his pro-executive thesis; "*Congress's dismal record and the looming threat of chaos and disorder augured by Shays' Rebellion were at the forefront of the minds of the delegates as they met in Philadelphia*"[93]

It would, however, be erroneous to explain the motivation of the Framers at Philadelphia solely by reference to the weaknesses apparent in the Articles of Confederation.

Bernard Bailyn[94] identified three distinct phases in the ideological history of the American Revolution: (i) the years of struggle with Britain prior to 1776; (ii) from 1776 to the 1780s when the institutional problems of republican government at State level and the principles on which they were based were probed in this constructive phase; and (iii) the writing, debating,

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[89] Sofaer A.D., *War, Foreign Affairs and Constitutional Power – The Origins* (Ballinger Publishing Company, Cambridge Massachusetts, 1976) at pp 25-26;

[90] Letter from George Washington to James Madison (Nov. 5, 1786), in 4 *The Papers of George Washington* 331, 332 (W.W. Abbot & Dorothy Twohig editors, 1995); Washington also wrote to Henry Lee in a similar vein: "*Influence is no Government. Let us have one by which our lives, liberties and properties will be secured; or let us know the worst at once*.": Letter from George Washington to Henry Lee dated 31 October 1786 – *The Writings of George Washington* (John C. Fitzpatrick ed).

[91] See Ron Chernow *Washington, A Life* (Penguin Books, 2010) at chapter 41 (pp 517-519); see also Amanda L. Tyler, *Suspension as an Emergency Power*, 118 Yale L.J. 600 at pp 624-626; Gordon S. Wood, *The Radicalism of the American Revolution*, (First Vintage Books, 1993) at p 209 as to the central importance of Washington to the ultimate adoption of the Constitution.

[92] Sofaer *supra* at pp 24-25, referring to "*the dangers and inefficiencies of unbalanced, legislative government*".

[93] John Yoo, *Crisis and Command: A History of Executive Power from George Washington to the Present*, (Kaplan Publishing, 2011), Chapter 1, p 11. It should be note that Yoo also offers a more general explanation when he asserts that that '*the Constitution represented a reaction by the young leaders of the Revolution against a rampant, unchecked democracy that had swamped the State governments and had permitted interest groups to pass legislation to further their private interests*': Yoo, J.C., *The Continuation of Politics By Other Means: The Original Understanding of War Powers*, California Law Review, Vol 84, issue 2, pages 167-305 (March 1996) at p 302 citing *Federalist* No. 10 (Madison).

[94] Bernard Bailyn "*The Ideological Origins of the American Revolution*", (Harvard University Press 1967) with postscript: "Fulfilment: A Commentary on the Constitution" (1990) at pages 323-325.

ratifying and amending of the National Constitution.[95] Each of these phases had a distinctive focus and emphasis.[96]

Willi Paul Adams argues in *The First American Constitutions* that the presidential system at the Federal level can be ascribed 'much more' to the beliefs of the framers of the first State constitutions that "*free government, stability, and efficiency were most likely to be found with the combination of governor, assembly and courts to which they were accustomed from colonial times*".[97] That is, the architects of the Federal Constitution of 1787 adhered to the outline of the familiar baselines that existed prior to ratification.

Gordon Wood similarly advances the view that the Constitution cannot be understood by reference to the many shortcomings in the Articles of Confederation.[98] Wood was of the view that most Americans in 1776 did 'by no means object to a governour' but at the same time they would "*by no means consent to lodging too much power in the hands of one person, or suffering an interest in government to exist separate from that of the people, or any man to hold an office, for the execution of which he is not in some way or other answerable to that people to whom he owes his political existence*".[99] Thus the mere invocation of the concerns of a weak executive at the time of the Framing does not carry the argument for Yoo.

Thomas Jefferson's 1776 draft for the Virginia Constitution would have enumerated the executive powers that governors were prohibited from wielding. While the State Constitutions did not adopt this format, the chief magistrate in Virginia was prevented from exercising "*any power or prerogative by virtue of any Law, statute or Custom, of England*"[100]. As the war years were to demonstrate, such provisions were apt to enfeeble the State governors.

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[95] Bailyn *supra* at pages 323-325.
[96] Bailyn *supra* page 327: of the third phase, Bailyn wrote that the "*mass of federalist writings reveals the great range and variety of thinking on that side of the struggle, by no means all represented in the Federalist papers. In fact, in the full context of the political writings of 1787-88 the importance of the Federalist papers seems diminished.*" By way of example, Bailyn mentions the speech of James Wilson dated 6 October 1787 which "captured most people's imaginations" more so than the *Federalist* papers (at page 328).
[97] Willie Paul Adams, *The First American Constitutions*, (University of North Carolina Press, 2001) at pages at 288-289; and see the *Federalist* no.39 (Madison) wherein he attempts to demonstrate the structural similarities of the republican State Constitutions and the equally republican Federal Constitutions.
[98] Gordon S. Wood, *The Creation of the American Republic 1776-1788*, (University of North Carolina Press, 1998) (hereinafter "**Wood**") at pages 472–75 citing *Federalist* Nos. 18, 19 and 20 (Madison).
[99] Gordon S. Wood, *supra*, page 136.
[100] From the Maryland and Virginia Constitutions; Wood, *supra* at p 137.

In Pennsylvania, where radical Whiggism 'found its fullest expression', the governor was eliminated and replaced by an executive council of 12 representatives of the people.[101]

The New York Constitution of 1777 with its strong Senate and its independent governor elected directly by the people for a 3 year term stood apart from the other States at the time of its ratification. The governor was the 'General and Commander-in-Chief' of all the State militia, plus had (albeit limited) powers to veto legislation and to dismiss the legislature.[102] New York's experience was 'highly regarded' by those who sought devices to check legislative excesses.[103] Nevertheless, the New York Convention in the spring of 1777 was 'torn in two directions – between the inherited dread of magisterial despotism and a fear of the popular disorder'.[104]

The Massachusetts Constitution of 1780 eventually set the benchmark as the 'perfect constitution'.[105] The Massachusetts governor represented the most powerful magistrate of all the States notwithstanding that he was fettered with a council comprised of senators selected by both Houses.[106] As was the case in New York, the governor was elected directly by the people and (unlike the New York governor) he alone could veto all acts of the legislature, except those re-passed by a two-thirds majority of both houses.[107] America was ultimately 'offered something akin to the Massachusetts Constitution of 1780 - on a continental scale.'[108]

Yoo identifies the second wave of state constitution-making as a supportive of his thesis[109]. He asserts that the Massachusetts constitution expressly empowered the governor to undertake "offensive operations" under his "direct authority." His analysis is said to be further supported by the fact that an earlier, rejected constitution (the Essex Result) would

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[101] The Supreme Executive Council did include a 'president' - see Willi Paul Adams *supra* at p 266; *cf* Wood *supra* at page 137; English Whigs such as Algernon Sidney and John Locke were associated with support of the supremacy of Parliament, and opposition to the Divine Right of Kings.
[102] Sofaer *supra* at page 17; (Anti-Federalist) George Clinton was Governor for the eight years during the federal ratification process.
[103] Sofaer *supra* at p 19; see also Willi Paul Adams *supra* at pp 81, 294; Gordon Wood *supra* at page 433.
[104] Wood *supra* at page 433.
[105] Wood *supra* at page 434.
[106] The Massachusetts Constitution of 1780 provided for numerous examples of the exercise of war powers without reference to the legislature other than in the case of martial law: Chapter II, section 1, Article VII (dealing with Executive power).
[107] Wood *supra* at page 434; Willi Paul Adams *supra* at pp 83-90.
[108] Akhil Reed Amar, *America's Constitution: A Biography*, (Random House, 2005) at pp 41-42.
[109] Yoo, *supra* at p. 69.

have fettered the governor's military power "according to the laws" or "resolves" of the legislature. Yoo argues that such checks on power were rejected by the people and did not appear in the 1780 iteration. The 1780 Constitution, however, did limit the exercise of the governor's war powers in a number of ways: to "*the special defence*" of the State[110]; "*agreeably to the ... laws of the land, and not otherwise*"; and to activities within the State unless the power "*be granted to him by the legislature*" or with the "*consent of the general court*". Thus, while the Essex Result may have shaped the debate over the Massachusetts constitution, external executive powers concerning war and peace appear to have been left to the Confederation Congress.[111]

By the 1780s, there was 'inveterate suspicion and jealousy of political power' which, although once concentrated almost exclusively on the Crown and its agents, was now 'transferred to the various State legislatures'.[112] Where the magistracy had once seemed to be the font of tyranny, 'now the legislatures through the Revolutionary state constitutions had become the institutions to be most feared.'[113] As James Wilson said, where the Executive was weak, "*legislature and tyranny ... were most properly associated*".[114] Madison as Publius wrote that "*the tendency of republican governments is to an aggrandizement of the legislat[ure] at the expense of the other departments*."[115]

Evidence of such deep distrust of legislatures at State level potentially adds an additional layer in support of Yoo's thesis.[116] Whilst this may have some superficial appeal, Yoo's argument does not survive close analysis. All the State constitutions made the governor or the president the commander-in-chief of the military. The governor could only call out the militia with the approval of the executive councils, and in the case of calling out the army, only with the approval of the legislature.[117]

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[110] Part 2, Ch. I, § I, Art. VII (1780).
[111] See Stuart Streichler, *Mad about Yoo, or, Why Worry about the Next Unconstitutional War?*, Journal of Law & Politics Vol. XXIV:93(2008) at p 104.
[112] Gordon S. Wood, *supra*, page 409.
[113] Gordon S. Wood, *supra*, page 409; see generally pp 403ff ("*The Abuses of Legislative Power*").
[114] In Gordon S. Wood, *supra*, page 409.
[115] *Federalist* No. 49.
[116] Yet it is undermines his argument that the Framers were attempting to create an analogue of the English Constitution's separation of war-making powers.
[117] Willi Paul Adams *supra* at page 272: all state constitutions provided the governors with executive councils except New York and New Hampshire.

A precedent for the separation of tactical command from the power to make war is found in the South Carolina Constitution. In the 1776 iteration, the Executive was expressly denied the traditional monarchical prerogative power: "*The president and commander-in-chief shall have no power to make war or peace, or enter into any final treaty, without the consent of the general assembly and the legislative council*."[118] Under the 1778 constitution, the governor had "*no power to commence war*" without legislative approval.[119]

The Framers had created national political institutions that were 'profoundly influenced' by and 'firmly based on a pattern already existing at the state level'.[120] The State constitutions therefore formed models of best practice, or (where viewed as failures) natural reference points nevertheless.[121] To that end, Hamilton as *Publius* opened the final salvo in *The Federalist* by an appeal to familiarity via a pointed reference to "*the analogy of the proposed government to your own State constitution*".[122]

Once the institutional precedents and the power of reasoning by reference to structural analogues is acknowledged, the pro-Executive scholars must grapple with the 'high degree of continuity' evident in the adoption of the federal Constitution.[123] It is against this background that the Framers attended Independence Hall in Philadelphia on 25 May 1787.

4. The Philadelphia Convention

The Convention was held in private session in Philadelphia from May to September 1787. What we know of it largely comes from the notes James Madison took and transcribed years later.

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[118] Willi Paul Adams *supra* at p 294.
[119] Yoo, *supra* at p. 149; Yoo relies on this (again) to demonstrate that such language could have been replicated in the 1788 Constitution. As will be seen below, the South Carolinian delegates to the Philadelphia Convention in 1878 had divergent views on the war-making clause, and none of them put up their own constitution as a best practice model.
[120] Willi Paul Adams *supra* at 289-290.
[121] Akhil Reed Amar, *America's Constitution*, *A Biography*, Chapter 4, footnote 31, page 549: "*whether or not the federal Constitution aimed to cure the problems that existed locally, it had to avoid repeating the flaws of imbalance that state constitutions had exemplified*"; *cf* Shlomo Slonim in *"Forum: The Founders and the States,"* Law and Hist. Rev. 16 (1998): 527ff.
[122] *The Federalist* No. 85.
[123] Willi Paul Adams *supra* at pp 290-291.

Two formal plans were submitted to the Convention's Committee on Detail (being those of Edmund Randolph of Virginia and William Patterson of New Jersey). The original 'Virginia Plan' of 29 May allocated to the legislature 'the Legislative Rights vested in Congress by the Confederation' and assigned to the executive 'the Executive rights vested in Congress by the Confederation.'[124] However, the plan left open the question of where the war powers were properly to be located.

On 1 June, while the Convention was debating the state of the American Union[125], James Wilson of Pennsylvania[126] made a statement that the prerogatives of the British monarch were *not* a proper guide in defining executive powers, as some of the prerogatives were of a "*legislative nature. Among others that of war & peace…*".[127]

Madison said of this statement that "*Mr Wilson said the great qualities in the several parts of the Executive are vigour and dispatch. Making peace and war are generally determined by Writers on the Laws of Nation to be legislative powers*."[128] Thus the starting point from at least two of the leading Federalists was that that war powers were legislative.[129]

The New Jersey Plan was proposed on 15 June. Like the Virginia Plan, this plan did not deal with war powers. On 18 June, Alexander Hamilton suggested a third plan of governance involving a far more powerful Executive than the previous plans. In his speech, Hamilton (informally) proposed a plan wherein the Executive was "*to have the direction of war when authorized or begun*" and that the Senate would "*have the sole power of declaring war*".[130] That is, Hamilton equated the term 'declaring' with beginning or authorizing wars. Moreover,

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[124] 1 Farrand at 21, 30ff; William M. Treanor, *Fame, the Founding, and the Power to Declare War*, 82 Cornell L. Rev. 695-772 (1997) at p. 713.
[125] In the Committee of the Whole: 1 Farrand at p 61 (Journal notes).
[126] Wilson was a member of the Committee of Detail, which produced the first draft of the Constitution, and a future Justice of the Supreme Court.
[127] Max Farrand, *The Records of the Federal Convention of 1787*, (3 Volumes, Yale University Press, 1911); see 1 Farrand at pages 65-66.
[128] 1 Farrand at pages 73-74; Hamilton arguably takes a different view years later as *Pacificus* (discussed below).
[129] For the first two months, the Convention mainly discussed general principles, modifying and developing the resolutions Randolph had presented on behalf of the Virginia delegation on 29 May and later by Patterson on 15 June. Late in July, the conclusions that had been reached were turned over to a committee of five, known as the Committee of Detail. On 26 July, the Convention adjourned for ten days to permit this committee to prepare a draft of a constitution. The draft of 6 August was the subject of their discussions for over a month. The proceedings were then referred to a committee of five, known as the Committee of Style and Revision. The Committee of Style made its report on 12 September: see 1 Farrand at p. 15.
[130] 1 Farrand at page 229; draft clauses IV and VI respectively.

although Hamilton later emerged as a strong advocate for enlarging Executive power, even he did not suggest his ideal 'Governour' should have the power to commence wars.

The first draft of the Committee of Detail was presented on 6 August 1787. A power to 'make war' was located amongst the legislative powers, and the 'President' was designated 'commander in chief of the Army and Navy of the United States'.[131]

The Convention debated the proposed war powers clause on 17 August 1787[132]. This aspect of the debate tends to be the principal focus of much of the academic discussion concerning original understanding. On the proposed wording "To make war", Charles Pinckney of South Carolina (whose Constitution separated war-making powers from the Executive) suggested that it be the Senate and not the House who should possess the power of 'making war'.[133] Pinckney had earlier advocated (on 1 June) for a "*vigorous Executive*" but said that he was "*afraid the Executive powers of [the existing] Congress might extend to peace & war*".[134] Similarly, John Rutledge, also of South Carolina, had earlier stated that "*he was not for giving [the Executive] the power of war and peace*".[135]

Only Pierce Butler – another South Carolinian – suggested that the Executive be given the war power. He was "*for vesting the power in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it*."[136] In response to this, Elbridge Gerry said that he "*never expected to hear in a republic a motion to empower the Executive alone to declare war*."[137]

Madison and Gerry then "*moved to insert "declare," striking out "make" war; leaving to the Executive the power to repel sudden attacks*." Madison's notes have the motion having the support of all delegates except those from New Hampshire and Connecticut. James Madison,

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[131] 2 Farrand at pp 144, 146 respectively.
[132] See Stone G. R. *et al Constitutional Law*, Seventh Edition (Aspen Casebooks, 2013) at page 389-390; Sofaer *supra* at pp 25-38.
[133] 2 Farrand at page 249: of the Legislature Pinckney said "*Its proceedings were too slow. It wd. meet but once a year. The Hs. of Reps. would be too numerous for such deliberations. The Senate would be the best depositary, being more acquainted with foreign affairs, and most capable of proper resolutions*."
[134] 1 Farrand at pages 64-65.
[135] 1 Farrand at p. 65.
[136] 2 Farrand at p. 249; Neither delegates referred to the language in their own State constitution.
[137] *Ibid*; Yoo is forced to dispute that Gerry was directing his comment to Butler, however Butler's was the only previous 'motion' that could be characterized as a suggestion by any delegate that the Executive be given such powers: John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 Calif. L. Rev. 167, 196-217 (1996); at p. 262; *cf* Ely *supra* at page 5.

Elbridge Gerry, Roger Sherman, and George Mason all opposed giving the President the power to wage a war: a vote of seven (yes); two (no) and one (abstention).[138]

Yoo suggests that this amendment achieved a significant departure from the original proposal. Ely's reading on this score, however, appears more logical in the circumstances. He takes the view that Congress's intention was to (i) provide the President with tactical control of hostilities properly authorized by Congress, and (ii) to empower Executive to "repel sudden attacks".[139] Similarly, Abraham Sofaer takes the view that "*nothing in the Convention proceedings is inconsistent with the Constitution's apparent grants to Congress of overwhelming authority to control all military decisions other than tactical*".

It is unlikely that such a paradigm shift in structure would occur, as Yoo suggests, without any attendant debate as to the consequences of such a re-alignment. Moreover, the pro-Executive advocates unconvincingly seek to diminish the importance of Gerry's statement "*leaving to the Executive the power to repel sudden attacks*". Yoo resorts to a suggestion that Madison was 'fatigued' given that the amendment was introduced at 5pm, and that it was not adequately explained to the Convention.[140] Yoo does not grapple with the fact that Madison revised his contemporaneous notes, so had ample opportunity to correct any such critical omission.[141]

The records of the debate conclude with the disclosure that "*On the remark by Mr. King that "make" war might be understood to "conduct" it which was an Executive function, Mr. Elseworth gave up his objection and the vote of [Connecticut] was changed to [yes]*." Thus the vote ended up as eight to one in favor of the amendment.[142]

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[138] 2 Farrand at p. 249.
[139] Ely *supra* at p. 5.
[140] John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 Calif. L. Rev. 167, 196-217 (1996);
[141] 1 Farrand at p 12: "*Another extensive set of corrections is to be found in the speeches made in debate. These are generally in the form of additions to Madison's original record*."; see also Gregory E. Maggs, *A Concise Guide to the Records of the Federal Constitutional Convention of 1787 as a Source of the Original Meaning of the U.S. Constitution*, 80 Geo. Wash. L. Rev. 1707 (2012) at pp 34-35.
[142] Nine states cast votes; Massachusetts abstained on the issue; New Jersey and New York were not represented at this point, and Rhode Island did not attend the Convention.

Yoo does not refer to this entry in his seminal paper on the topic.[143] He is instead driven to characterize the records of 17 August 1788 as "*somewhat unclear*", but he still offers to "*venture some tentative conclusions*" which end up underpinning his entire thesis[144]. The other point Yoo makes – that the language of the Articles of Confederation would have achieved the outcome advocated by the pro-Congress school – is undermined by the fact that no reference was made to the language of the Articles during this debate.

Finally, Dr James McHenry, who also took notes on this critical date, recorded the following: "*Debated the difference between a power to declare war, and to make war — amended by substituting declare — adjourned without a question on the clause".*[145] These notes are consistent with the understanding that no major structural reallocation of power occurred because of the amendment. Indeed, nobody other than Pierce Butler (who did not even command the majority view within his own State) argued that the Executive should be able to commence wars. Far from his motion carrying the day, it was ridiculed.

The most rational account of the amendment, as confirmed by all of the notes, is that the change from 'make' to 'declare' was to make it clear that Congress could not exercise the power to prosecute a war already on foot, as this was the province of the Commander in Chief.

Thomas Jefferson, who was stationed in Paris during the Convention debates, understood the import of what had occurred in the allocation of powers. He wrote to fellow Virginian James Madison on 6 September, 1789 stating that "*we have already given in example one effectual check to the Dog of War by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay*".[146]

Yoo's entire argument turns on the putative failure of a 'fatigued' Madison to record a critical exchange in which the entire corpus of war-making powers (other than the narrow 'juridical' power to declare war) was suddenly assigned to the Executive. Having dismissed his notes as unreliable, the lacuna is thereafter filled with speculation.

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[143] John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 Calif. L. Rev. 167, 196-217 (1996).
[144] John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 Calif. L. Rev. 167, 196-217 (1996); at p. 264
[145] 2 Farrand at page 250.
[146] *The Papers of Thomas Jefferson* (Julian P. Boyd ed., 1958 at page 397).

Yoo's argument concerning Framer's intent should be rejected in light of the evidence.[147]

5. The Ratification Debates and the Views of the Anti Federalists

The voluminous war powers literature cited by Yoo generally does not contain any materials from the State ratification debates in 1787/88 that undermines the pro-Congress thesis[148]. There is also a paucity of material in Yoo's analysis concerning the views of the Anti-Federalists during ratification[149]. Although the Federalists were ultimately successful in steering the Constitution through the various State ratification debates without amendment, the views of the opposition nevertheless serve to inform where issue was properly joined.

Anti-Federalists in many States, although generally critical of the scope of the President's powers under the Constitution, also criticized the War Powers Clause for concentrating too much power in Congress, namely both the power of the sword and of the purse.[150] Judge Abraham White said during the Massachusetts Convention "*In giving this power we give up every thing .. and Congress, with the pursestrings in their hands, will use the sword.*":

During the Virginia debates, Patrick Henry made a speech contending that "*Congress can both declare war and carry it on, and levy your money, as long as you have a shilling to pay*" and highlighted the differences with the English practice where such powers were separated as between the parliament and the king.[151]

In New York, the 'Federal Farmer' also demonstrated that he was well aware that Congress held the power to commence war when wrote that "*it has long been thought to be a well*

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[147] The Convention however rejected an effort to enable the Congress to define the content of Executive power. The President was therefore left with a basis for taking issue with future Congressional acts trenching on Article II powers: see Sofaer *supra* at p 38; Delahunty, R.J. & Yoo, J.C., *Making War*, Cornell Law Review, 93:123 (2007), at p 137.

[148] *Cf* Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by "Declare War,"* 93 Cornell L. Rev. 45 (2007); Cameron O. Kistler, *The Anti-Federalists and Presidential War Powers*, 121 Yale L.J. 459 (2011) at page 460.

[149] eg Robert J. Delahunty & John Yoo, *Making War*, 93 Cornell L. Rev. 123, 138 (2007) at page 138 (only Patrick Henry, Anti-Federalist of Virginia, is referred to in any detail).

[150] The Massachusetts Convention (Jan. 21, 1788), in 6 The Documentary History of the Ratification of the Constitution (Kaminski J.P. & Saladino G.J., editors, 1990) page 1286; hereinafter as cited in Treanor W.M., *Fame, the Founding and the Power To Declare War*, 82 Cornell L. Rev. 695 (1997), and Kistler, *supra.*

[151] The Virginia Convention (June 5, 1788) in 9 *The Documentary History of the Ratification of the Constitution* (Kaminski J.P. & Saladino G.J., editors, 1990) at 1069-70 (Patrick Henry); and see Volume 10, page 1494 (John Dawson) for a similar position; Treanor W.M., *Fame, the Founding and the Power To Declare War*, 82 Cornell L. Rev. 695 (1997) at pp 717-718.

founded position, that the purse and sword ought not to be placed in the same hands", as well as noting the divergence from the practice of the 'wise' English.[152]

The Federalists response to these concerns was not to deny that Congress had the power to take the nation to war and to fund such a campaign, but rather to highlight the democratic nature of the legislative branch. In the course of the Connecticut ratification convention on 7 January 1788, Oliver Ellsworth acknowledged the Anti-federalist position and stated "*But does it follow, because it is dangerous to give the power of the sword and the purse to a hereditary prince, who is independent of the people, that therefore it is dangerous to give it to . . . Congress . . . men appointed by yourselves and dependent upon yourselves?*"[153]

Similarly, in the Pennsylvania Convention on 11 December, 1787 James Wilson stated that "*This [new] 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 conclusion that nothing but our national interest can draw us into a war*".[154]

From an originalist perspective, such evidence of the contemporaneous public understanding of the Declare War Clause strongly militates in support of the pro-Congress interpretation.[155] In contrast to such evidence, the pro-executive scholars can produce no statements in which the term "declare War" was to be read as confined to formal announcements.[156] To the contrary, as Prakash has noted, neither Federalists nor Anti-Federalists claimed that the Constitution granted the President the power to unilaterally wage war.[157]

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[152] From Cameron O. Kistler, *The Anti-Federalists and Presidential War Powers*, 121 Yale L.J. 459 (2011) at pp 464-465.
[153] The Connecticut Convention in 3 *The Documentary History of the Ratification of the Constitution* (Kaminski J.P. & Saladino G.J., editors, 1990) at pp 547-552.
[154] 2 *The Debates in the Several State Conventions* (Jonathan Elliot editor, 1907) at pp 107-108.
[155] See Cameron O. Kistler, *The Anti-Federalists and Presidential War Powers*, 121 Yale L.J. 459 (2011) at page 466: "*The presidentialist interpretation of the Declare War Clause is simply implausible in light of the state ratification debates*".
[156] Treanor W.M., *Fame, the Founding and the Power To Declare War*, 82 Cornell L. Rev. 695 (1997) at p. 718.
[157] Saikrishna Prakash, *A Two-Front War*, 93 Cornell L. Rev. 197 (2007) at page 204.

6. Contextual Provisions

6.1 Prohibition on States Engaging in War

Yoo makes some additional contextual arguments that are said to militate in favor of the notion of broad executive war powers. Article I, Section 10 of the Constitution deals with the States, and relevantly provides that "*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*." According to Yoo, this provision creates *exactly* the war powers process, between Congress and the States, that pro-Congress advocates want to create between Congress and the President.[158] It follows that, if the intent of the Framers was to fetter executive control of war powers, they could have easily replicated the arrangement pertaining to the States.[159]

This argument does not withstand close scrutiny. The language chosen by the Framers ('declare' and not 'make' war) was arrived at to leave scope for the Executive to carry out its war powers as Commander-in-Chief.[160] Once this is understood, there was no occasion to use such language to limit the Executive from 'engaging' in war. To the contrary, Article II contemplates that the President will engage in war, once 'declared'.

6.2 Letters of Marque and Reprisal and the Captures Clause

The phrase "Letters of Marque and Reprisal" conferred on Congress power over general reprisals outside the context of declared war.[161] The Founders embraced the idea that there were imperfect wars that were connected to the idea of reprisals and that did not need to be declared. This power was assigned the power of imperfect war to Congress. Yoo denies that the 'phrase referred to all forms of imperfect war'.[162]

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[158] Yoo, J.C., *War and the Constitutional Text*, University of Chicago Law Review, Vol 69, pages 1-41 (2002) at page 26; Yoo also discusses the differences in the adjectives between "declare" on the one hand, and "levy", "engage", "make" or "commence" in respect of the other provisions within the Constitution where war is referred to: at pages 28-29.

[159] Yoo also relies upon the Article III definition of treason which includes "levying War".

[160] Jack M. Balkin, *Living Originalism,* (Belknap Press, 2011) discusses "*the reasons why constitutional designers choose particular types of language*" at page 23;

[161] Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 Yale LJ. 672 (1972) at pp 695-696.

[162] John C. Yoo, The Continuation of Politics by Other Means: The Original Understanding of War Powers, California Law Review, 84 (March): 167-305 at p. 251.

Hamilton was of the view that the President's constitutional authority went no further than the "*authority to repel by force … any thing beyond this must fall under the idea of reprisals and requires the sanction of that Department which is to declare or make war*".[163]

Thomas Jefferson considered that "*the making [of] a reprisal on the nation is a very serious thing … It is considered an act of war, [therefore] the right of reprisal [is] expressly lodged with [Congress] by the Constitution, and not with the Executive*".[164]
The Captures Clause[165] in the Constitution empowers Congress to undertake a form of imperfect war. The clause applied to both public and private forces. Congress controlled the taking of property by public vessels (including takings of property characterized as reprisals), but it did so under the Captures Clause.[166] This can be contrasted with the Letters of Marque and Reprisal, which applied to the licensing of private vessels, and not to the determination about what kinds of property those vessels could take.[167]

For those with a narrow view of the Declare War Clause, the task has been to read down the scope of the Captures and the Marque and Reprisal Clauses. Yoo for example argues that the Captures Clause confers on Congress only control over the procedural aspects of Captures and reaches only takings by private and not public vessels. However, Wuerth argues that the Captures Clause confers on Congress the broad power to determine the property subject to capture both during and before 'war', allowing Congress to initiate or escalate hostilities. [168]

The most harmonious contextual reading was that the powers to issue Letters of Marque and Reprisal and of Capture were to be read together with the War Powers Clause to provide a form of unbroken continuity empowering Congress to initiate all forms of armed hostility.[169]

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[163] Letter from Alexander Hamilton to James McHenry (May 17, 1798) in 21 *The Papers of Alexander Hamilton* 461-462 (Harold C. Syrett editor, 1974), cited in Kathryn L. Einspanier, *Burlamaqui, The Constitution, and the Imperfect War on Terror*, Georgetown Law Journal, Vol 96: 985 (2008) at page 993.
[164] Thomas Jefferson, *Opinion of the Secretary of State* (May 16, 1793), reprinted in 7 John Bassett Moore, *A Digest of International Law*, 123 (1906).
[165] Article I gives Congress the power to "make Rules concerning Captures on Land and Water".
[166] Ingrid Wuerth, *The Captures Clause*, University of Chicago Law Review 76:1683 (2009)
[167] Thus, the Marque and Reprisals Clause conferred only the power to license private vessels to make lawful captures.
[168] Weurth, *supra*, at page 1740.
[169] See Federalist No.44 in which Madison as Publius wrote that, under the Constitution, "*these licences must be obtained as well during war as previous to its declaration, from the government of the United States. This alteration [from the Articles of Confederation] is fully justified by the advantage of uniformity in all points which relate to foreign powers; and of immediate responsibility to the nation in all those, for whose conduct the nation itself is to be responsible.*"Prakash S.B., *Exhuming the Seemingly Moribund Declaration of War*, George Washington Law Review, Vol 77:89 (2008); William Young, *A Check on Faint-Hearted Presidents: Letters of*

7. *Early Custom and Practice*

Those who argue for the primacy of Congress in respect of war-making powers find additional support in the contemporaneous statements of intent by the Framers, the conduct of the political branches and the earlier decisions of the Supreme Court.[170]

7.1 The Views of the Early Presidents

Washington assumed the Presidency with a regular military force of less than 840 men, and with no Congressional approval to utilize them or the State militias. He was therefore driven to seek Congressional support for every military campaign he engaged in.[171]

Yoo suggests that Washington's military actions against the native American Wabash nation was conducted without authority.[172] Congress passed an Act which empower the President to "*protect the inhabitants of the frontiers .. from hostile incursions*".[173] Yoo interprets this as allowing only defensive actions. Washington, however, wrote to the Governor of the Western Territory, Arthur St. Clair, on 6 October, 1789 and authorized him to call on militia "*to act in conjunction with federal troops, in such operations, offensive or defensive" as he should judge necessary*".[174] Washington reported to Congress on 8 December 1790 that an offensive expedition had been authorized and placed his letter of 6 October the year before on the record. No issue was taken in Congress that the expedition was unauthorized. The expedition resulted in the deaths of many federal personnel. Washington reported this outcome to Congress on 14 December 1790. Once again, there was no issue taken as to the legality of the action. Congress thereafter approved a larger regular army and offensive expeditions in 1791.

Marque and Reprisal, 66 Washington & Lee Law Review 895 (2009); Aaron D. Simowitz, *The Original Understanding of the Capture Clause*, Depaul Law Review, Vol 59:121 (2009); J. Gregory Sidak, *The Quasi War Cases – And Their Relevance to Whether "Letters of Marque and Reprisal" constrain presidential war powers*, 465 Harvard Journal of Law & Public Policy Vol 28.

[170] Although even these sources are disputed.

[171] Sofaer *supra* at pp 116-117.

[172] Yoo & Delahunty *supra* at page 160: "*It appears that Washington settled on war with the Indians in the Ohio region that summer. On June 7, 1790, Washington ordered Generals Harmar and St. Clair to organize an offensive, punitive expedition into Indian territory. He neither sought nor received authorization from Congress*" citing Richard H. Kohn, *Eagle And Sword: The Federalists And The Creation of The Military Establishment In America*, 1783-1802 at 92-93 (1975) at p 102 (emphasis added).

[173] Section 5 of Act of Sept. 29, 1789, 1 Stat. 95, 96

[174] Sofaer *supra* at p 120.

Yoo's argument turns on his interpretation of the authorizing legislation – a construction that does not appear to have been shared by Congress.[175]

When Washington discussed a potential military expedition against the Creek nation with South Carolina Governor William Moultrie in the summer of 1793, he indicated that he hoped to launch an "*offensive expedition against the refractory part of the Creek nation, whenever Congress should decide that such measure be appropriate and necessary. The Constitution vests the power of declaring war with Congress; therefore no offensive expedition of importance can be undertaken until after they shall have deliberated upon the subject, and authorized such a measure".* There is a recognition by the President in this exchange that if he was to use more than just defensive measures, Congress would have to authorize them."[176]

This understanding of the Declare War Clause was shared by other key statesmen in the post ratification period. Madison stated in a letter to Jefferson on 2 April 1798: "*The Constitution supposes ... that the ex[ecutive] is the branch of power most interested in war, [and] most prone to it. It has accordingly with studied care, vested the question of war in the legisl[ature]*."[177]

From 1801, President Jefferson engaged the nation in conflicts with the Barbary States. It is argued (including by Yoo) that he did so without Congressional authority.[178] In Jefferson's view, however, US naval vessels had been attacked and thus retaliations on foreign crafts were acts taken in self-defense of American shipping. Orders issued to Commodore Dale on 20 May 1801 were to 'chastise' opposing warships "*in case of their declaring war or*

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[175] See also Ackerman, B. & Hathaway, O., Limited War and the Constitution: Iraq and the Crisis of Presidential Legality, 109 Mich. L. Rev. 447 (2011) at p 480-481: "*To support [Washington's] request, he sent Congress a letter from Governor St. Clair predicting war along the Ohio River if settlers were not restrained from retaliating against attacks by the Indian tribes. Congress responded with a provision authorizing St. Clair to call up the frontier militia to negotiate with the Indians "from strength…. [Later] Congress approved a new expedition of 3;000 men-wrapping it into the general appropriations bill in February 1791.*" Thus Yoo may also be making a very narrow point here (concerning authorizations contained within appropriations), which does not tend to support the claim that the President acted unilaterally.

[176] Prakash, S., *Unleashing the Dogs of War: What the Constitution Means by "Declare War"*, Cornell Law Review, Vol 93:45, 2007, at pages 97-98; This also appears to be the view of Sofaer: "*Washington authorized few military actions during his administration, most clearly approved by legislation.*.": Sofaer *supra* at p 129.

[177] Telman, D.A.J., *The Foreign Affairs Power: Does the Constitution Matter?*, Temple Law Review, Vol 80, pages 245-293 (2007): at page 256 citing letter from Madison to Jefferson dated 2 April 1798 found in *The Writings of James Madison*, 1790-1802 at 311, 312 (Gaillard Hunt ed., 1906). Madison expressed the same views during his Helvidius/Pacificus exchange with Hamilton – see below.

[178] Delahunty & Yoo *supra* from p 162.

committing hostilities".[179] As it turned out, unbeknownst to Jefferson, Tripoli had already declared War on 14 May. Congress thereafter authorized the President to use the newly constructed US Navy to "*subdue, seize and make prize of all vessels … as the state of war will justify, and may, in his opinion, require*".[180]

In June 1812, President Madison declared that "state of war" existed between the United States and Britain. This at first blush seems inconsistent with his earlier writings to Jefferson, however Madison presented Congress with "*a solemn question which the Constitution wisely confides to the legislative department of government*". The Senate at first refused to declare war as it wanted to limit the US response to reprisals, however the declaration of war was approved a few days later. [181]

7.2 The Neutrality Proclamation and the Pacificus-Helvidius Debates

The most important foreign affairs decision of the Washington Presidency 'by far'[182] was the President's Declaration of Neutrality in the war that revolutionary France began with England in 1793. The declaration had wide ramifications as it affected treaties between the US and France, and the reception of a French ambassador. Washington had submitted a list of questions to his cabinet, including whether to involve Congress in the matter by calling the two houses together. Jefferson reported to Washington that this question had "*been decided negatively*".[183]

This matter ultimately led to the *Pacificus-Helvidius* essays between Alexander Hamilton and James Madison (respectively). Hamilton defended the President against the charge that he had committed certain heresies by unilaterally declaring neutrality and suspending treaties. As it turned out, when Congress reconvened on 3 December 1793, Washington explained his actions, and both Houses passed resolutions of approbations, praising his conduct.[184]

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[179] Sofaer *supra* at pp. 209-210.
[180] Sofaer *supra* at pp. 209-216; *Naval Documents related to the United States Wars with the Barbary Powers*, United States Government Printing Office Washington, 1940, Volume II Part 3 of 3 at page 474.
[181] Telman, D.A.J., *The Foreign Affairs Power: Does the Constitution Matter?*, Temple Law Review, Vol 80, pages 245-293 (2007): at page 258. The conduct of Madison is reminiscent of the 'antecedent state of things' that Hamilton (as *Pacificus*) wrote in respect of the Neutrality Proclamation (see below).
[182] Sofaer *supra* at p. 103.
[183] Sofaer *supra* at p. 104: There was apparent concern that the Republican House would favor pro-French policies.
[184] Sofaer *supra* at page 116.

Conceptually, a presidential declaration of neutrality might be seen to impermissibly encroach upon the very subject matter reserved to Congress under the War Powers Clause: that is, whether to go to war, *or not.* Hamilton addressed this issue head on, writing as *Pacificus.* He contended that the implicit congressional power to reject war did not preclude the President from taking executive action to preserve peace leading up to any declaration.[185]

In Hamilton's words "*If the Legislature have a right to make war on the one hand - it is on the other the duty of the Executive to preserve Peace till war is declared; and in fulfilling that duty, it must necessarily possess a right of judging what is the nature of the obligations which the treaties of the Country impose on the Government; and when in pursuance of this right it has concluded that there is nothing in them inconsistent with a state of neutrality, it becomes both its province and its duty to enforce the laws incident to that state of the Nation*."[186]

Hamilton stated that the Executive "*cannot control the exercise of [Congressional] power*" with the consequence that Congress was not legally precluded from declaring war at any time.[187] The proclamation of neutrality in those circumstances merely established "*an antecedent state of things*" which Congress 'ought' to factor into its decision, but would be "*free to perform its own duties according to its own sense of them.*"[188]

The better view of the *Pacificus-Helvidius* debates is that they do not support the notion that Hamilton proposed that the President could take the nation to war. He 'clearly believed that only Congress could declare war' notwithstanding his theory of concurrent powers in respect of neutrality.[189]

As Justice Robert Jackson later recognized in *Youngstown*, how far one can take these examples concerning original intent is debatable. It is debatable in large part because these

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[185] See William R. Casto, *Pacificus and Helvidius Reconsidered*, Northern Kentucky Law Review Vol 28:3 p 612 (2001) at pages 622

[186] *Pacificus No. 1* in *The Pacificus-Helvidius Debates of 1793-1994* (Morton J. Frisch editor, Liberty Fund, 2007) at pp 13-14.

[187] *Pacificus No. 1 ibid* at page 15.

[188] *Pacificus No. 1 ibid* at page 15.

[189] William R. Casto, *Pacificus and Helvidius Reconsidered*, Northern Kentucky Law Review Vol 28:3 p 612 (2001) at pages 622, although it must be acknowledged that the matter is complicated by the effect of the obligation under the 11th article of America's Treaty of Alliance with France of 1778, which was arguably invoked by France's declaration of war on Great Britain.

statements represent the views of a few members of the elite class, and do not attempt in any way to gauge the pervading thought of the broader classes at the time of the Constitutional ratification.[190] It remains the case however that these examples demonstrate a consistent theme amongst the Framers and founding fathers: absent sudden invasions, only Congress could determine when to commit the nation to war.

8. Early Precedents: The Quasi War Cases

During the administration of John Adams, Congress authorized a limited war with France ('the Quasi-War'). President Adams asked Congress to prepare the country for war while he undertook negotiations with towards a peaceful resolution. While no war was officially declared, Congress did enact a number of statutes during this time that included a power to seize French ships travelling to (but not from) French ports.[191]

In *Bas v Tingy*[192] the Supreme Court noted the difference between a "perfect war" where Congress had declared war upon another country, and an "imperfect war" where Congress had merely authorized hostilities. The seriatim opinions treated such 'imperfect' hostilities as 'war'.[193] This is significant as such an understanding undermines the pro-Executive argument that congressional power to authorize hostilities is limited to formal declarations of war.

In *Talbot v. Seeman* (1801), a case involving the salvage rights, newly appointed Chief Justice John Marshall stated: "*The whole powers of war being, by the Constitution of the United States, vested in congress, the acts of that body alone be resorted to as our guides in the enquiry*." Marshall CJ thought that such Congressional powers included the authorization to engage in limited hostilities, which he also regarded as 'war'.[194]

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[190] Donald S. Lutz, *A Preface to American Political Theory*, (University Press of Kansas, 1992): at page 90, 99-100, 107.
[191] Louis Fisher, *Presidential War Power*, (University Press of Kansas, 2013, 3rd Ed.) at pp. 23-26.
[192] 4 US 37 (1800)
[193] "*Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects, and in time. If a general war is declared, its extent and operations are only restricted and regulated by the jus belli, forming a branch of the law of nations; but if a partial [war] is waged, its extent and operation depend on our municipal laws [as passed by Congress]*.": 4 US 37 at 43 per Chase J.
124. *Talbot v. Seeman,* 5 U.S. (1 Cranch) 1, 28, 32 (1801).
[194] Marshall CJ referred to the conflict with France as a "war"; see also Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 Yale LJ. 672 (1972) at p. 701.

In *Little v Barreme*[195] the Supreme Court found that the captain of a US frigate was liable to pay damages to the owner of a neutral Danish vessel captured during the Quasi War with France. Marshall CJ, delivering the opinion of the Court, gave a strict reading to the Act of Congress authorizing capture of vessels travelling to French ports. As the Danish vessel was travelling from a French port, the Executive action was unauthorized by Congress and, accordingly, the seizure was unlawful. This case is significant as the Court found that damages were payable notwithstanding that the captain of the US ship was acting on orders from the President. That is, the Act of Congress trumped the presidential command in respect of defining the scope of the conflict.

9. Structural Considerations and The President's Role in Foreign Affairs

Yoo's principal structural argument concerning war powers is that Congress retains the power of the purse, thus establishing the ultimate check on executive power.[196] This argument, however, assumes that hostilities are already on foot. It makes equal (or more) structural sense that Congress would possess the ability to withdraw funds from a war that may not go as planned, or as a check on the power of the commander-in-chief.[197]

In matters of national security, the nature and extent of the President's foreign affairs power must be reconciled with the war power by those who would advocate for the primacy of Congress. There is admittedly some potential for dovetailing between the two powers from a functional perspective. For example, in his address 1823 address to Congress, President Monroe espoused his doctrine declaring the United States' intention to oppose European attempts at colonizing the Western hemisphere. Just as Washington's Neutrality Proclamation was said to risk French relations, Monroe's implied threat risked provoking European aggression.[198]

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[195] 6 US 170 (1804).
[196] John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, California Law Review, 84 (March): 167-305 at page 174.
[197] Prakash, S., *Unleashing the Dogs of War: What the Constitution Means by "Declare War"*, Cornell Law Review, Vol 93:45 (2007) at p.56.
[198] Waxman, M.C., *The Power to Threaten War*, The Yale Law Journal, 123:1626, 2014, pages 1626-1691 at p 1644.

The seminal pro-Executive decision in this field is the heavily criticized[199], *US v Curtiss-Wright Export Corp*.[200] The President had, by proclamation, prohibited the sale of arms to parties engaged it the Chaco conflict in Bolivia. The proclamation was made pursuant to a joint resolution of Congress. Justice Sutherland recognized *the President as the* "*sole* organ" of the Federal government in the field of international relations, and foreign affairs as "*a power which does not require a basis for its exercise an act of Congress.*"[201]

Harold Koh said of this decision, "*I prefer the "shared power" view of the Constitution in foreign affairs, symbolized by Justice Jackson's canonical concurrence in Youngstown Sheet & Tube Co. v. Sawyer, versus a view of "exclusive executive prerogative" in the War on Terror, bottomed on Justice Sutherland's sweeping dicta in United States v. Curtiss- Wright Export Corp*". [202] Michael Ramsay suggests that *Curtiss-Wright's* theory of extra-constitutional power[203] in foreign affairs is "*demonstrably wrong*".[204]

If one needs to reconcile Sutherland J's views with the Constitution, then rather than the President being the "sole organ" of foreign affairs power (to the exclusion of any congressional involvement) *Curtiss-Wright* may be best understood as designating the President as the single mouthpiece or agent through which foreign policy is to be conducted in order to establish a clear and consistent message.[205] But this take on the case would amount to no more that a normative assessment of structural issue. It would not provide

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[199] Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 Wm. & Mary L. Rev. 379 (2000) from p. 42: "*Curtiss-Wright is a striking departure from the usual view of constitutional law.*.".

[200] 299 US 304 (1936).

[201] 299 US 304 (1936) at p 319-320; although this *dicta* is relied upon to support a unitary view of presidential power over foreign affairs, it is noteworthy that this decision did not hold that Congress impermissibly intruded into Article II Executive authority. Indeed, the Court referred to the "*unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed*…": at p 321-322

[202] Koh, H.H., *Can the President be Torturer in Chief?*, Indiana Law Journal, Vol 81:1145 (2006) at p. 1155.

[203] "*the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution*": 299 US 304 (1936) at 318 (Sutherland J.)

[204] Ramsay *supra* at p. 381.

[205] This take on the nature of the role gains some support from the decision of Circuit Judge Nelson in *Durand v Hollins* 8 F. Cas. 111 (1860). In 1854, Captain Hollins aboard the USS Cyane bombarded Greytown, Nicaragua in response to an "irresponsible and marauding community" which destroyed American property in the town. Durand, a US citizen living in Greytown, sued Captain Hollins for the destruction of his property as a result of the bombardment. At issue was a defense of justification, which relied upon Executive authority to carry out the attack. Upholding the defense, Judge Nelson held that "*as the executive head of the nation, the president is made the only legitimate organ of the general government, to open and carry on correspondence or negotiations with foreign nations, in matters concerning interests of the country or of its citizens*". Although nuanced, this decision better recognizes the pragmatism underlying the position of the President as the appropriate rubric through which foreign affairs are to be conducted (as opposed to a sole repository of constitutional power).

strong grounds to undermine earlier decisions concerning the role of Congress in respect of war powers based on the text of the Constitution, or established practice in foreign affairs following the *Pacificus-Helvidius* debates.

Conclusion to Part I

Two broad schools of thought have emerged to compete for ascendency based on analyses of text, history and original understanding of the Declare War Clause. The pro-Executive model argues that the Constitution must be read against the backdrop of Europeans theorists who heavily influenced the legal thought of the Framers.[206] John Yoo's contribution to this debate has been to introduce textual arguments which, on his thesis, suggest that the Framers intended to effect an allocation of war powers consistent with these political thoughts.

The second model argues that the constitutional separation of the war powers was written to purposely reject the ideas of the European theorists by vesting the power to initiate hostilities in Congress. Taken together, the grants to Congress of power over the declaration of war and issuance of letters of marque and reprisal were intended by the Framers to give the new Congress complete authority over the commencement of war.[207]

The formalist arguments mounted by pro-Executive scholars such as John Yoo do not survive close scrutiny. Their analysis does not adequately accommodate the political thought at the time of the Framing, in which European constitutional philosophy was rejected in favor of a republican ideology designed to accommodate the nascent autochthonal ethos that is American exceptionalism. The evidence amongst both the elite and broader political classes in this time is replete with examples that support the pro-Congressional distribution of war powers under the Constitution. In contrast, there is a paucity of evidence to contradict this model, including from the Anti-Federalists who were motivated to defeat the compact. The history of the Framing, ratification and early practice all militate towards a conclusion that the Framers and ratifiers of the Constitution understood the Declare War Clause to require that the President gain Congressional approval before committing the nation to war.

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[206] (eg) Vattel and Blackstone who assigned war powers to the Executive.
[207] Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 Yale LJ. 672 (1972) at p. 700.

Part II – The Functionalist Approach to Interpretation of War Powers Under the Constitution

Introduction

Justice Jackson once warned that there is danger that if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitution into a 'suicide pact'.[208] Those words are particularly apt in a debate about war powers where existential threats to the nation may demand that the constitutional boundaries between the powers of the branches be determined according to the inherent necessities of governmental co-ordination.'[209]

The originalist defense of Executive war powers has also has taken a more nuanced form designed to capitalize on the rise of modern military industrial complex. In this iteration of the argument, the Framers are said to have been wise enough to have created a flexible system of war powers that eschews fixed rules on how wartime decisions are made. Such a framework is highly pragmatic and easily adaptable to the circumstances that now confront the nation. This explication of the pragmatic roots of our constitutional system of war powers can 'then slip imperceptibly into a defense of executive prerogative, chiefly to initiate the use of force without prior congressional approval, but also, it seems, to disregard statutory restrictions on military judgments as events might require.'[210]

The following section traces the lineage from the Founding roots examined in Part I to the modern era in order to scrutinize the case for a functionalist interpretation of War powers based principally on prudential consideration.

10. The Mexican War

The years of the Mexican War (1846-48) and the decade immediately following were a time of substantial change in the balance of the war powers between Congress and the Executive.

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[208] *Terminiello v. City of Chicago*, 69 S. Ct. 894, 912, 937 (1949) (Jackson, J., dissenting)
[209] *J.W. Hampton, Jr., & Co. v. United States,* 276 U.S. 394, 406 (1928).
[210] Barron, D.J. & Lederman, M.S., *The Commander in Chief at the Lowest Ebb – Framing the Problem, Doctrine, an Original Understanding*, Harvard Law Review, Vol 121 January 2008, no.3, pages 689-804 at page 801.

James K. Polk's election to office in 1845 saw the first president arrive in the White House 'who lacked high military or diplomatic experience'[211]. He also remains the only president who served as Speaker of the House.

Texas had won its independence from Mexico in 1836. It was annexed to the USA in 1845 in the first year of Polk's presidency, creating tensions with Mexico.[212] Polk dispatched federal troops to occupy disputed territory just north of the Rio Grande on the Texas-Mexico border without congressional authorization.[213] Polk claimed that the citizens of Texas had rights to security and protection that justified his gathering of forces in Texas and in sending emissaries to Mexico in advance of conflict.[214]

On 11 May 1846, Polk announced that the defensive position he had adopted to avoid an invasion of Texas had been breached by the Mexican army. The President then asked Congress for a declaration that would recognize the existence of war and called for authority to raise a large body of volunteers.[215] Congress quickly affirmed that a state of war existed by act of Mexico, called for a speedy prosecution of the war, and authorized funds and forces to that end.[216]

Notwithstanding that Polk described the conflict as a "just war", at the conclusion of hostilities two years later the House of Representatives issued a resolution that censured the President Polk for precipitating the war 'unnecessarily and unconstitutionally'.[217] The measure passed by a vote of 85 to 81.[218] Among those voting for the amendment was Congressman Abraham Lincoln.[219]

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[211] Akhil Reed Amar, America's Constitution: A Biography, (Random House, 2005) at pp 143-144.
[212] Louis Fisher, *Presidential War Power*, (University Press of Kansas, 2013, 3rd ed) at page 39.
[213] This action ultimately provoked hostilities and led to Congress declaring the Mexican-American War: Louis Fisher, *Presidential War Power*, (University Press of Kansas, 2013, 3rd ed) at page 38-44.
[214] Authority for Polk's military readiness might be traced back to President Madison's message to Congress of December 1810, in which he explained that he had unilaterally ordered a military takeover in West Florida because the subversion of Spanish authority in West Florida exposed the United States to "*ulterior events which might essentially affect the rights and welfare of the Union*": see Henry Bartholomew Cox, *War, Foreign Affairs and Constitutional Power 1829-1901*, (Ballinger Publishing Co, 1984) at pages 142-144.
[215] Henry Bartholomew Cox *ibid* at page 144.
[216] Henry Bartholomew Cox *ibid* at page 145; by a vote of 174 to 14.
[217] Mark T. Uyeda, *Presidential Prerogative under the Constitution to Deploy U. S. Military Forces in Low-Intensity Conflict*, Duke Law Journal Vol. 44, No. 4, 777-828 (Feb., 1995) at pp 796-797.
[218] Louis Fisher, *Presidential War Power* (University Press of Kansas, 2013, 3rd ed) at page 43.
[219] Lincoln made a speech in support of the censure accusing Polk of harboring a desire for "*military glory - that attractive rainbow, that rises in showers of blood - that serpent's eye, that charms to destroy*": Abraham Lincoln, Speech in United States House of Representatives (Jan. 12, 1848).

11. The Civil War Cases

At the outbreak of the Civil War, following the attack on Fort Sumter on 12 April 1861, President Lincoln imposed a blockade on southern ports. In his message to a special session of Congress on 4 July 1861, Lincoln defended his actions by reference to the existential threat that was presented: "*it was with the deepest regret that the Executive found the duty of employing the war power, in defense of the Government, forced upon him he could but perform this duty or surrender the existence of the Government…*".[220]

Congress later passed a statute ratifying Lincoln's military action. The question of whether the President had a right to institute a blockade of the ports came before the Supreme Court in *The Prize Cases*.[221] The Supreme Court inquired whether, at the time this blockade was instituted, a state of war existed which would justify resort to such means of subduing the hostile force. The Court held that "*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*."[222]

This was an important constitutional moment for the country. A bare majority of five justices held that, as of late April 1861 a state of "Civil War" existed as a matter of fact. It followed, under international law, that if foreign ships ran the blockades, they were subject to arrest and seizure.[223] Although recognizing a duty on the part of the President to meet any existential threat with force, the Court did not decide that the Executive possessed a broad independent war-making power. Rather, the facts of the case fell within the exception contemplated by the Framers involving the repulsion of 'sudden attacks', and not the initiation of war.[224]

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[220] Lincoln's July 4th 1861 Message to Congress.
[221] 67 U.S. 2 Black 635 (1862) (1863)
[222] 67 U.S. 2 Black 635 (1862) at p 661 (Grier J).
[223] George P. Fletcher, *Our Secret Constitution – How Lincoln Redefined American Democracy* (Oxford University Press, 2001) at pages 80-81: "*The Court was able to craft this conclusion without conceding that the Confederacy represented an independent belligerent power waging full-scale war."*
[224] It is noteworthy that Nelson J dissented in *The Prize Cases* on the basis that "*no Civil War existed between this Government and the States in insurrection till recognized by the Act of Congress 13th of July, 1861; that the President does not possess the power under the Constitution to declare war or recognize its existence within the meaning of the laws of nations, which carries with it belligerent rights, and thus change the country and all its citizens from a state of peace to a state of war…*": 67 U.S. 2 Black 635 635 (1862) at p. 698.

Once again, however, historical examples can serve both sides of the debate. John Yoo considers this episode to be supportive of a plenary presidential war-making power: Lincoln "*invoked his authority as Commander-in-Chief and Chief Executive to conduct war, initially without congressional permission, when many were unsure whether secession meant war. Only Lincoln's broad interpretation of his Commander-in-Chief authority made that step of freeing the slaves possible*".[225]

Lincoln's subsequent conduct is consistent with view that the President is compelled to act in the face of existential threats, *a fortiori* when Congress is not in session. Lincoln explained his actions to Congress when it returned for a Special Session in July 1861: "*Whether strictly legal or not [the blockades and raising of militias] were ventured upon under what appeared to be a popular demand and a public necessity, trusting then, as now, that Congress would ratify them*".[226] Congress passed legislation ratifying Lincoln's actions.[227]

Lincoln also felt the hard fetters of the Constitution as enforced by the Courts. After Virginia seceded from the Union on 17 April, 1861, Maryland's strategic importance became acute given its proximity to Washington. On 27 April Lincoln unilaterally authorized General Winfield Scott to suspend the writ of *habeas corpus*, at or near any military line between Philadelphia and Washington. On 25 May, federal troops arrested John Merryman in Maryland, for recruiting and training sympathizers to the Confederate cause. Chief Justice Roger Brooke Taney, sitting in the federal District Court, issued a writ of *habeas corpus* to secure Merryman's release and delivery before the Court by 28 May.[228] In Taney CJ's opinion, Lincoln had acted unconstitutionally as only Congress had the power to issue the writ (given the power was located in Article I of the Constitution).[229]

In response, Lincoln disregarded Taney CJ's order. Lincoln posited the question to Congress on 4 July 1861 that an insurrection "*in nearly one-third of the States had subverted the whole*

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[225] Yoo contends that Lincoln's approach contrasted with that of James Buchanan, his predecessor, who believed that secession was illegal but that he lacked the constitutional authority to stop it: Yoo, J., *Crisis And Command*. (Kaplan Publishing, 2011) at p 206.
[226] Lincoln's July 4th, 1861 Message to Congress.
[227] Thomas Jefferson also made references to higher obligations that might arise in times of emergency that obviate the need for strict observance of the written laws. For instance, he opined, *"[t]o lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.*": Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810).
[228] *Ex parte Merryman*, 17 F. Cas. 144 (C.C. Md. 1861) (Case No. 9487)
[229] Akhil Reed Amar, *America's Constitution*, (Random House, 2005) Chapter 3 at page 122.

of the laws . . . Are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?". He answered his own question in the negative: the President would violate his oath "*if the government should be overthrown, when it was believed that disregarding the single [instance of constitutional] law, would tend to preserve it..*".[230]

Later, in 1866, after a civilian named Lambdin P. Milligan had been charged with war crimes and convicted by military commission, the Court again held that the President's actions were unconstitutional.[231] The Court's decision in *Ex parte Milligan* had large ramifications for Reconstruction politics after the Civil War. However, for present purposes, the case is especially noteworthy as it contains one of the only opinions in all US jurisprudence that expressly contends that Congress cannot infringe upon the President's Commander-in-Chief power.[232]

12. Franklin Roosevelt, Robert Jackson and the Separation of Powers

Within a week of becoming the Prime Minister in May of 1940, Winston Churchill cabled President Franklin D. Roosevelt and described the urgency of the situation facing the Allied powers in Europe.[233] Churchill stated that the "*immediate needs are: first of all, the loan of forty or fifty of your older destroyers to bridge the gap between what we have now and a large new construction we put in hand at the beginning of the war*".[234] Roosevelt initially rejected the demand.[235] Roosevelt told Churchill that a destroyer deal would require specific congressional authorization. This was seemingly unlikely because Senator David Walsh,

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[230] Lincoln's July 4th, 1861 Message to Congress; see also Akhil Reed Amar, *America's Constitution, A Biography*, (Random House, 2005), Chapter 3, page 122

[231] *Ex parte Milligan* 71 U.S. 2 (1866).

[232] Chief Justice Chase (joined by three other members of the Court) at pp 139-140: "*Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns…Congress cannot direct the conduct of campaigns...*"; see also Skibell R., *Separation-of-Powers and the Commander in Chief: Congress's Authority to Override Presidential Decisions in Crisis Situations*, Geo. Mason L. Rev., Vol 13:1, 2004 at p. 197.

[233] See Delahunty, R.J. *Robert Jackson's Opinion on the Destroyer Deal and the Question of Presidential Prerogative*, Vermont Law Review 38:65 (2013).

[234] Delahunty *supra* at page 71.

[235] One basis for the rejection was that Roosevelt wanted a public undertaking from Churchill that the ships would not be conveyed to the victorious Germans in the event that Britain surrendered. Churchill refused this demand, fearing that it would demoralize the public: Delahunty *supra* at page 73.

Chair of the Senate Naval Affairs Committee (and an isolationist)[236] had discovered that the Navy had already been secretly providing torpedo boats to Britain through private defense contractors. The Senator sponsored legislation that prohibited the disposal of any US military equipment unless certified by the Chief of Staff of the relevant armed forces division that such materiel was "*not essential to the defense of the United States*".[237]

Another legislative obstacle was the *Espionage Act of 1917* which provided that, during a war in which the United States was a neutral nation, "*it shall be unlawful to send out of the jurisdiction … any vessel built, armed, or equipped as a vessel of war…*".[238] However, faced with clear prohibitions in the Walsh Amendment, FDR"s Attorney General Robert Jackson advised that the sale of the destroyers would not affect 'the total defensive position' of the United States – thus supporting the case for certification of the transaction.[239] The Destroyer Deal was eventually signed on 2 September 1940.

The advice Jackson rendered in this period later exposed him to a charge that he had recognized and supported a capacious view of Presidential prerogative powers.[240] After serving as Attorney General under Franklin D. Roosevelt in WWII, Jackson served as a prosecutor at the Nuremburg Tribunal and as a Justice of the Supreme Court. The indelible mark he left on the question of allocation of war-powers however is found in his concurring opinion in the most canonical judgment in the field – *Youngstown.*

13. Youngstown – the Steel Seizures Case

When a President acts in a field in which Congress has legislated, or has expressed an intention not to legislate, the 'acknowledged touchstone for constitutional analysis is

[236] Delahunty *supra* at pages 73-74.
[237] The "Walsh Amendment".
[238] Jackson overcame this particular obstacle by relying on an 1883 Act in which Congress authorized the sale of surplus navy vessels. He also parsed the language of the Walsh Amendment and the *Espionage Act* so as to leave untrammeled the Executive Authority to dispose of the naval vessels; Louis Fisher, *Presidential War* Powers, (University Press of Kansas, 2013) at pp 74-75.
[239] *Acquisition of Naval and Air Bases in Exchange for Overage Destroyers* 39 Op. Att'y Gen. 484 (1940) noting that Jackson relied in part on Sutherland J's judgment in *Curtiss-Wright* (39 Op. Att'y Gen. at pp 486-487); see also Louis Fisher, *Presidential War* Powers, (University Press of Kansas, 2013) at pp 74-76; see also Delahunty *supra* at p. 88.
[240] After being reminded in the course of the *Youngstown* argument of his opinion as Attorney General in the Destroyer Deal, he wrote "*While it is not surprising that counsel should grasp support from such unadjudicated claims of power, a judge cannot accept self-serving press statements of the attorney for one of the interested parties as authority in answering a constitutional question, even if the advocate was himself. But prudence has counseled that actual reliance on such nebulous claims stop short of provoking a judicial test*": 343 U. S. at 647.

Youngstown'.[241] President Truman had attempted to take over of the steel mills during the Korean War, ostensibly for the reason that a labor strike would have impacted on the war effort. Congress had, however, passed the Taft-Hartley dealing with labor strikes, and had considered but rejected the inclusion of a provision granting the President authority to seize businesses.[242]

Justice Jackson based his opinion on the notion that "*Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.*"[243] He then created a tripartite taxonomy 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. 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.'[244]

Applying this analysis, Jackson J concurred in the (6:3) majority opinion which found that the President had acted unconstitutionally, his powers falling within zone three of the matrix and thus at their lowest ebb. What is immediately noteworthy about Justice Jackson's approach is that, while it recognized a zone where powers may be concurrent, it plainly proceeds on the basis that, where Congress acts decisively, its position takes primacy.[245]

Jackson J's opinion echoed the concerns of the Framers who had sought to restrain the exercise of executive power: "*With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations*".[246]

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[241] Harold H. Koh, *Can the President be Torturer in Chief?*, Indiana Law Journal, Vol 81:1145 (2006) at 1160.
[242] Labor Management Relations Act of 1947 29 U.S.C. § 401-531 (The Taft–Hartley Act) of 23 June, 1947.
[243] 343 U. S. at p. 635.
[244] 343 U. S. at pp 635-638.
[245] "*His command power is not such an absolute as might be implied from that office in a militaristic system but is subject to limitations consistent with a constitutional Republic whose law and policy-making branch a representative Congress*": 343 U. S. at pp 645-646.
[246] 343 U. S. at p 655.

In order to reconcile his approach with his earlier position as FDR's Attorney General, Jackson stated that the opinion was based on a question of statutory construction (only)[247], and that in order to effect the Destroyer Deal without congressional authority would have required the President to resort to "*a power at once so conclusive and preclusive*" it must be cautiously scrutinized "*for what is at stake is the equilibrium established by our constitutional system*".[248]

Justice Robert Jackson's decision in *Youngstown* remains the seminal constitutional authority concerning war-powers. It quite plainly approaches the issue from a position of Congressional supremacy over executive power. However, notwithstanding *Youngstown's* canonical status, it was 'rewritten'[249] in 1981 in *Dames & Moore v Regan*[250] – a case involving a claim arising out of the Iran Hostage Crisis. *Dames & Moore* took an exceptionally deferential to executive power by relying on inferences from statutes that did not expressly deal with certain subjects (in order to elevate the analysis into Category 1), and similarly by drawing inferences from Congressional acquiescence to executive conduct. In this way, the case marked a dramatic *de facto* expansion of Categories 1 and 2 of *Youngstown*, with a concomitant narrowing of Category 3 – the only category where the President might be overruled by valid legislation.[251]

14. The Evolving Definition of 'War'

As was seen from early post ratification cases such as *Bas v Tingy*,[252] the Framers recognized the existence of a continuum of hostilities that they designated as either forms of 'perfect' war or 'imperfect' war. This nomenclature, however, fell out of use by the 20th Century. The United Nations Charter, which now regulates the international laws of war known as *jus ad bellum*, employs the language of "armed attack" and "use of force".[253] A similar shift away from "war" has occurred in the law of armed conflict (*jus in bello*). The Geneva Conventions

[247] 343 U. S. at p. 645, note 14.
[248] 343 U. S. at p. 638.
[249] Harold H. Koh, *Can the President be Torturer in Chief?*, Indiana Law Journal, Vol 81:1145, 2006, at pp 1160-1161.
[250] 453 U.S. 654 (1981).
[251] Koh *supra* at pp 1160-1161
[252] 4 U.S. 37 (1800).
[253] Franck, T.M., *Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States*, 64 Am. J. Int'l L. 809 (1970) at page 812; see also Waxman M.C., *Cyber-attacks and the Use of Force: Back to the Future of Article 2(4)*, Yale Journal of International Law, Vol 36:421, 2011 at page 441.

of 1949 changed the old regime by making clear that the *jus in bello* rules applied not only to cases of 'declared war', but also to "any other armed conflict" between States. Today, the relevant jurisdictional concept for *jus in bello* is 'armed conflict'. As a result, formal declarations of war now have less significance under international law than they did at the time of the Founding.[254]

15. Korea: The Executive Ascendant

On 3 July 1950, the Department of State prepared a Memorandum that dealt with the authority of the President to repel an attack on the Korean peninsula. That opinion provided "*that the President's power to send the Armed Forces outside the country is not dependent on congressional authority has been repeatedly emphasized by numerous writers*". The opinion then enumerated 85 instances of the use of American armed forces without a declaration of war.[255] Examples included the Boxer Rebellion in 1900-1901 where the President sent 5,000 troops to Peking.[256]

Part of the argument set out in the Memo rested upon the change that was effected upon the ratification of the United Nations Charter. It was said that "*the President was entitled to use armed forces in protection of the foreign policy represented by the Charter*". In the case of Korea, the "*continued defiance of the United Nations by the North Korean authorities would have meant that the United Nations would have ceased to exist as a serious instrumentality for the maintenance of international peace.*" It followed, as the argument went, that the interests of the United States were interests that the President as Commander-in-Chief could protect by the employment of the Armed Forces without a declaration of war.

This was Lockean prerogative 'with a vengeance'[257]. The reason why the Truman administration took the view it did and commenced an inexorable shift in the balance of

[254] Bradley, C.A. & Goldsmith J.L., *Congressional Authorization and the War on Terrorism*, Harvard Law Review, Vol 118, May 2005, no.7, 2047-2131 at p 2061.
[255] These having been incorporated in the *Congressional Record* for 10 July 1941; Ely (*supra*) refers to the Secretary of State Dean Acheson's testimony before Congress in 1951 in which he espoused the notion that Congress lacked authority to stop the President committing US forces to an overseas deployment (at page 8).
[256] And to which can be added and the excursions into Mexico by General Pershing in pursuit of Pancho Villa (as ordered by President Woodrow Wilson in 1916).
[257] Schlesinger *supra* at p 143; similarly John Hart Ely *supra* at pp 10-11.

power between the political branches is unclear. Gary Wills[258] suggests that 'the Bomb' "*redefined the presidency, as in all respects America's "Commander in Chief" (a term that took on a new and unconstitutional meaning in this period)*". Whilst there had been temporary emergency measures taken in the past[259], the Executive war-making power had started to become entrenched.[260]

What of the role of the Courts? It will be recalled that following the Founding, the Supreme Court weighed into disputes involving fundamental questions of whether wars had been commenced.[261] However, part of the thesis explaining how the Executive has arrogated power to itself since the Korean War involves recognizing an abdication by the Court of its role in the process of judicial review. Although this abdication has not been without exception, there have been many fundamental questions left unanswered in recent times through the invocation of the political question and standing doctrines.

The Court's willingness to involve itself in war-powers issues began to wane after WWII. In *Ludecke v Watkins*,[262] a German national who had been sent to a German concentration camp (and later escaped) was the subject of an internment order by the US Attorney-General in 1942. He was thereafter the subject of a presidential order directing his removal from the United States by January 1946. The Executive orders were made pursuant to the *Alien Enemy Act of 1798* which was enlivened "*whenever there is a declared war between the United States and any foreign nation or government*…". The petitioner sought a writ of *habeas corpus* on the basis that the President's powers under that Act did not survive the

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[258] Gary Wills, *Bomb Power: The Modern Presidency and the National Security State* (Penguin Press, New York, 2010); For a contrary view which holds that the advent of nuclear capabilities should mean that the question of deployment be Congress's, see Raven-Hansen, P., *Special Issue: The United States Constitution in its Third Century: Foreign Affairs: Distribution of Constitutional Authority: Nuclear War Powers*, 83 AJIL 786: "*The decision to "go nuclear" in a conventional war "is a political decision of the highest order", as President Lyndon Johnson said, not a tactical choice of weapon. As such, it is not an inherent component of the Commander in Chief's command authority or a technical byproduct of military expertise, but precisely the ultimate national life-or-death decision that the Framers intended Congress to make when time permits. … That time will not permit, however, is another argument for the current distribution of nuclear war power.*"

[259] Wills references the fact that "*Loyalists were rounded up in the Revolution. Suspected aliens were imprisoned in the Quasi-War of the 1790s. Lincoln cancelled habeas corpus in the Civil War. Roosevelt interned Japanese American citizens in World War II*"; *supra*, Chapter 1.

[260] Chapter 1: Wills attributes this to the fact that "*for the first time in our history, the President was given sole and unconstrained authority over all possible uses of the Bomb. All the preparations, protections, and auxiliary requirements for the Bomb's use, including secrecy about the whole matter and a worldwide deployment of various means of delivery, launching by land, sea, air or space … all these were concentrated in the Executive Branch, immune from interference by the legislative or judicial branches. Every executive encroachment or abuse was liable to justification from this one supreme power*"

[261] See for example *Little v Barreme*; and the *Prize Cases* (*supra*).

[262] 335 US 160 (1948)

cessation of hostilities in Europe (which were said to have ceased upon the signing of the German Instrument of Surrender at Rheims, France on 7 May 1945). In a 5:4 decision, the Court held that the question of whether "a state of war still exists" was for the political branches to determine. Justice Black in dissent stated: "*I think the idea that we are still at war with Germany in the sense contemplated by the statute controlling here is a pure fiction*."[263]

It must be accepted, however, that the question of whether a state of war exists may present an inherently difficult factual question to decide in some cases.[264] One needs only to recall the stark imagery of President George W. Bush standing on the deck of the aircraft carrier USS Abraham Lincoln on 1 May 2003 with the buntings emblazoned "Mission Accomplished" for all the world to see, only to realize shortly thereafter that a declared end to 'major combat operations' by the Commander-in-Chief may in fact be, in Churchill's words, only 'perhaps, the end of the beginning'.[265]

With the Supreme Court now deferring the political branches on factual questions that it once grappled with, the stage was set for the ascendancy of the Executive. The office of the President was armed with nuclear capability, the Cold War had crystallized the fear of the spread of Communism, and the UN Charter had given the President a reason to become involved in the collective security of nations further afield.[266]

16. Vietnam: The Executive 'Rampant'[267]

In one sense the Vietnam War commenced in 1945 at the conclusion of the Second World War. The August Revolution by the Viet Minh commenced in the same month that Japan capitulated in 1945. Within a year, the re-occupation of Indochina by the French led to the commencement of the First Indochina War, in which the Viet Minh received support from

[263] Justices Douglas, Murphy and Rutledge joined in dissenting.
[264] See discussion in W. T. Reveley, *War Powers of the President and Congress: Who Holds the Arrows and Olive Branch?*, (University Press of Virginia, 1981) at p. 206-218.
[265] Speech at the Lord Mayor's day luncheon at the Mansion House, London, 9 November 1942.
[266] The presidencies of Eisenhower and Kennedy plainly have their own interesting features to contribute to the narrative. Louis Fisher *supra* by and large describes the Eisenhower era as one of compliance and co-operation with Congress, including in respect of the Formosa dispute: pp 116-124. Arthur Schlesinger *supra* takes a similar view in respect of Eisenhower's early years, but attributes an aggrandizement of power evidence by the expansion of US foreign policy and its increasing centralization in the office of the Presidency: at p. 159-168.
[267] As described by Schlesinger *supra* at Chapter 7.

communist Chinese from 1950. In the era of McCarthyism, the US Government decided it in their foreign policy interests to provide military aid to the French.[268] In July of 1954, the French signed the Geneva Accords, agreeing to a ceasefire and withdrawal to the south of the 17th Parallel. The US was not a signatory; however it pledged that it would not interfere with the Accords.[269]

The US, during the Eisenhower administration, continued to conduct paramilitary operations in Indochina. By the time of the Kennedy administration in 1961, there were 400 Special Forces troops and approximately 100 other military advisers dispatched (contrary to the understandings under the Geneva Accords). By the end of 1962, there were 11,000 US troops in South Vietnam.[270]

Following the 'Gulf of Tonkin Incident' in which the USS Maddox was apparently fired upon by torpedoes, President Johnson addressed the nation and called for a "limited and fitting" response without seeking a "wider war".[271] Within days, Congress passed the Tonkin Gulf Resolution authorizing the use of military force, with no dissenting votes in the House, and only two in the Senate.[272] Notwithstanding the limited form of assistance the President had asked for, the terms of the Resolution were very broad. It authorized the President to "*take all necessary steps, including the use of armed force*" to assist (relevantly) the US interests in Vietnam.[273] By the end of 1965, there were 184,000 US troops in South Vietnam. Another 207,000 were added in the course of 1966. By 1968 there were 510,000 troops in total.[274]

Questions by the Senate Committee on Foreign Relations concerning the legality of the war and its escalation beyond stated objectives were addressed in a State Department memo prepared by Leonard C. Meeker[275]. It was asserted by Administration that "*an attack on a*

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[268] $10 million in 1950 to $1.1 billion in 1954.
[269] Louis Fisher *supra* Chapter 6, pp 127ff.
[270] See (eg) Committee on Foreign Affairs, *The War Powers Resolution – A Special Study of the Committee on Foreign Affairs* – Committee Print from pages 1-3; John Hart Ely *supra* from page 11; Schlesinger *supra* at Chapter 7; Fisher *supra* Chapter 6, pp 127ff.
[271] Louis Fisher *supra* Chapter 6, p 128-131; 88th Cong. 2d Sess. 25 (1964).
[272] John Hart Ely *supra* page 19.
[273] Although John Hart Ely also suggests that the broad language of the Tonkin Gulf Resolution authorized the ground war in Cambodia, "*though barely*": Ely, *supra* at pp. 31-32.
[274] Committee on Foreign Affairs *supra* at pages 7-8.
[275] Meeker, L. C., *The Legality of United States Participation in the Defense of Viet-Nam*, Department of State Bulletin, (4 March 1966); Reprinted in 75 Yale LJ 1085 (1966).

country far from our shores can impinge directly on the nation's security".[276] Meeker relied primarily on the President's powers under Article II of the Constitution as Commander in Chief, the SEATO Collective Defense Treaty[277], and the Tonkin Gulf Resolution of August 1964.

As was the case in the Truman Administration's defense of its expansive interpretation of Executive war powers, Meeker sought to show that the President had committed troops into conflicts without Congressional authority on at least 125 occasions.[278] The principal example given was when '*President Truman ordered 250,000 troops to Korea during the Korean war of the early 1950s*'[279]. That is, the Johnson Administration was using the most controversial example of troop commitment by a President in the history of the nation as precedence to justify the escalation of the Vietnam War.

The U.S. involvement in South-East Asia was challenged in the courts, typically by servicemen-petitioners ordered to be deployed into the conflict. The litigation strategy was to contend that the Executive officers issuing orders for deployment were acting unconstitutionally because Congress did not properly authorize the War.[280] The Courts developed a position that recognized the appropriateness collaborative conduct between the political Branches on questions of military operations. The subject matter of such collaborations was held to be a non-justiciable political question where it was shown that there had been "sufficient mutual participation" between Congress and the President.[281]

The War became increasingly unpopular following the Tet Offensive in 1968. On 30 April 1970, President Nixon announced to the nation that 20,000 US troops were involved in an attack on the Viet Cong inside Cambodia.[282] Mass protests around the country followed,

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[276] Department of State Bulletin (1966) at page 484.
[277] This treaty provided that an armed attack against Vietnam would damage the peace and security of the USA.
[278] Department of State Bulletin (1966) at page 484: "*Since the Constitution was adopted there have been at least 125 instances in which the President has ordered the armed forces to take action or maintain positions abroad without obtaining prior congressional authorization, starting with the "undeclared war" with France (1798-1800)*."
[279] Department of State Bulletin (1966) at pp 484-485
[280] (eg) *Orlando v. Laird*, 443 F.2d 1039 (1971).
[281] Also discussed in *Massachusetts v. Laird*, 451 F.2d 26 (1971). It was apparent to the Court that there had been sufficient mutual participation because Congress had approved large expenditures for the conduct of the war.
[282] Ratner, M. & Cole D., *The Force of Law: Judicial Enforcement of the War Powers Resolution*, Loyola of Los Angeles Law Review, Vol 17: 715-766 (1984) at pp 728-730.

including at Kent State University, with tragic consequences. Only a few members of Congress had known about the US Operations in Cambodia and Laos at this time.

By the end of 1970, Congress repealed the Tonkin Gulf Resolution. The War was now being fought without express congressional support. This then brought into question whether the element of "mutual participation" required by the Court in *Orlando v Laird* continued to exist. The question raised in *DaCosta v Laird* by a petitioner who had received orders to be deployed into the conflict.[283] The Court once again sided with the Executive holding that: "*It was not the intent of Congress in passing the repeal amendment to bring all military operations in Vietnam to an abrupt halt*".[284] The means by which the political branches mutually participate in disengaging from armed conflict was therefore also treated as a non-justiciable political question.

In *Mitchell v Laird*,[285] the Court refused to characterize appropriations legislation as "*approval or ratification of a war already being waged at the direction of the President alone*". The Court recognized that 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 placed and continued them in that dangerous posture*." The case was again dismissed on political question grounds.

The publication of the *Pentagon Papers* in June of 1971 revealed years of duplicity on the part of the Executive administration. Congress thereafter passed an appropriations measure with 'the Mansfield Amendment' attached to it.[286] The Amendment provided that "*it is hereby declared to be the policy of the United States to terminate at the earliest possible date all military operations of the United States in Indo China*..". President Nixon did not veto the amendment, but issued a signing statement in which he stated that the measure was "*without*

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[283] 448 F.2d 1368 (2nd Circ, 1971)
[284] *Ibid* at [4] per Kaufman, Anderson and Feinberg, Circuit Judges; at [5] the Court held that "*If the mutual action by the Legislative and Executive branches and the particular means of collaboration they adopted to escalate a police action into large scale military operations are not a violation of the Constitution, as we held in Orlando, it can hardly be said that the combined efforts of the same two branches to achieve an orderly deceleration and termination of the conflict are.*".
[285] *Mitchell v. Laird*, 448 F.2d 611 (D.C. 1973).
[286] PUB.L.MO.92-156 (1971).

binding force or effect, and it does not reflect my judgment about the way in which the war should be brought to a conclusion".[287]

Nixon thereafter commenced renewed bombing and mining of the ports in Northern Vietnam in 1972, while peace talks were on foot. A formal peace agreement was executed in Paris in January of 1973, and US troops were withdrawn from South Vietnam by March of 1973. Bombing in Cambodia during this period of time, however, intensified.

17. Congress Fights Back: The War Powers Resolution

In May of 1973, Congress passed a Bill sponsored by Senator Thomas Eagleton which provided that "*none of the funds herein appropriated ... may be expended to support directly or indirectly combat activities in, over or from off the shores of Cambodia …*".[288] Nixon vetoed the Bill. The political branches later reached a compromise by June of 1973, which Nixon signed into law.[289]

From this account we see that from 1969 Congress began to disapprove of the War, largely to no avail. Between 1969 and 1973, Congress passed legislation on 10 occasions designed to fetter presidential authority to conduct the Vietnam War, however President Nixon continued to take unilateral action to escalate the conflict. The repeal of the Gulf of Tonkin Resolution in 1970 (being the authorization to commence the War), and the use of appropriations power proved futile.[290]

Against this background, and with the Presidency severely weakened by domestic issues, Congress passed the War Powers Resolution of 1973 over Nixon's veto. The Resolution required the President in every possible instance to consult with Congress before introducing US forces into hostilities, and to submit a written report within 48 hours of utilizing US forces absent a declaration of war.[291] Furthermore, Congress could, at any time, direct the

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[287] Committee on Foreign Affairs *supra* at pp 38-39; a federal District Court Judge took issue with Nixon's language in the signing statement: *DaCosta v. Nixon*, 55 F.R.D. 145 (E.D. N.Y. 1972) at p 146.
[288] John Hart Ely *supra* pp 32-35.
[289] Discussed in *Holtzman v. Schlesinger*, 484 F.2d 1307 (1973) per Mulligan J.
[290] Ratner, M. & Cole D, *The Force of Law: Judicial Enforcement of the War Powers Resolution*, Loyola of Los Angeles Law Review, Vol 17, 1984, pages 715-766 at pp 729-730.
[291] 50 U.S.C. §§1542, 1543 (1976).

President by concurrent resolution to remove US forces from hostilities.[292] More controversially, however, Congress granted the President latitude to use military force for 60 days; if the President thereafter failed to gain Congress's authorization during that time, the Resolution required him to withdraw forces within the next 30 days.[293]

The result was that Congress handed the President a 90 day period in which the Executive could engage in unilateral armed conflict. That was in effect a minimum period - the 'war powers clock' only commences the countdown if the President files a hostilities report within the first 24 hours. Senator Eagleton asked how Congress, after a decade of watching the Vietnam War divide the country and consume American lives, could give "unbridled, unlimited total authority to the President to commit us to war."[294]

The Senate and the House of Representatives had each developed their own versions of War Powers Resolutions. The House would have allowed 120 days in which the President could act unilaterally before a requirement for authorization arose (after which time the President would be required to terminate US engagement in hostilities). The Senate's draft proscribed the instances in which the President might at unilaterally (namely repelling armed attacks, and rescuing endangered American nationals). The Senate would have required cessation of hostilities unless authorization was approved within 30 days.[295]

The two Houses then met in conference and developed a consolidated Bill that included a mix of House and Senate provisions. Some Democrats in the House recognized that the conference report 'tilted power dangerously towards the President'[296]. Instead of the employing enumerated exceptions method specified in the Senate draft, the conference version gave the President "carte blanche" authority to use military force for up to 90 days. Senator Eagleton denounced the Bill that emerged from conference as a "*total, complete distortion of the war powers concept*".[297] Eagleton took the view that, after being nobly conceived, it had "*been horribly bastardized to the point of being a menace*"."[298]

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[292] §1544(b)-(c).
[293] Thus allowing for a 90 day period in which the President can engage in unilateral armed conflict.
[294] 119 Cong. Rec. 36177 (1973); Louis Fisher, *Thomas F. Eagleton: A Model of Integrity*, 52 St. Louis U. L. J. 97 (2007) at p. 105.
[295] Fisher L., *Presidential War Power* (University Press of Kansas, 2013, Third Edition) from pages 145-147
[296] *Ibid* at pp. 146-147.
[297] *Ibid* at p. 147.
[298] *Ibid* at p. 147: 'The vote on the War Powers Resolution was clouded by the Watergate scandal. The "Saturday Night Massacre", which sent Special Prosecutor Archibald Cox, Attorney-General Elliot Richardson,

Nixon's veto of the Bill on 24 October 1973 included the statement that the Resolution: "*would attempt to take away, by a mere legislative act, authorities which the President has properly exercised under the Constitution for almost 200 years. One of its provisions would automatically cut off certain authorities after 60 days unless the Congress extended them. Another would allow the Congress to eliminate certain authorities merely by the passage of a concurrent resolution – an action which does not normally have the force of law, since it denies the President its constitutional role in approving legislation … I believe that both of these provisions are unconstitutional*."[299]

Congress overrode the President's veto on the same day.[300]

18. The War Powers Resolution in Practice

According to Section 2(a), the War Powers Resolution was intended to 'fulfill the intent of the framers' and to "*insure that the collective judgment of both the Congress and the President*" would apply to the introduction of US forces to foreign hostilities. The Resolution has had no such effect: it arguably expresses an intent contrary to that held by the Framers, and does not serve to ensure a collective judgment between the political Branches.

Presidents from Ronald Reagan to Barak Obama made repeated use of military force without either seeking or obtaining authority of Congress."[301]

As John Hart Ely noted, Presidents committing United States troops to combat have treated the War Powers Resolution as unconstitutional. They have repeatedly failed to notify Congress, or have filed a report which was intentionally non-compliant (and which according

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and Deputy Attorney-General William Ruckelshaus out of government, occurred just four days before Nixon's veto of the War Powers Resolution. Ten days before the Saturday Night Massacre, Spiro Agnew had resigned as Vice President in the face of criminal charges': Fisher *supra* at p. 147.

[299] In respect of the latter concern, President Nixon foreshadowed the Supreme Court decision in *Immigration and Naturalization Service v. Chadha* 103 S. Ct. 2764 (1983) which found a legislative veto of delegated executive action unconstitutional. This clause of the Resolution, which enables Congress to terminate a presidential military deployment, bears similarities to the clause successfully challenged in *Chadha*. Although Congress has yet to invoke the concurrent resolution provision, it's constitutionality remains in issue. John Hart Ely recognizes the point but opines, "*My personal opinion is that section 5(c) is not unconstitutional*", once viewed in context - Ely *supra* at p. 119.

[300] The presidential veto was overridden by votes of 284:135 (House) and 78:18 (Senate).

[301] Fisher *supra* 144-145.

to executive branch officials, did not therefore start the Resolution's 60 day clock running).[302] However, despite the lack of formal compliance with the strict terms of the WPR, to September 2012, Presidents have submitted some 132 reports to Congress stated to be 'consistent with' the WPR.[303]

Some significant examples of where Presidents have not filed formal hostilities reports include the sending of U.S. troops to Lebanon in 1982-1983, Kosovo in 1999, and Libya in 2011.

18.1 Lebanon 1983

On 6 July 1982, President Reagan announced he would send a small deployment of troops to participate in a multinational force for temporary peacekeeping in Lebanon. Forces arrived on August 25 and Reagan reported this action to Congress, but did not cite section 4(a)(1) of the War Powers Resolution on the grounds that the agreement with Lebanon ruled out any chance of hostilities. The first Multinational Force left Lebanon on 10 September, 1982. A second deployment of Marines returned to Lebanon as part of a new multinational force on 20 September, 1982 following the assassination of President-elect Bashir Gemayel.[304]

On 29 September, 1982 Reagan reported to Congress that 1,200 Marines had been dispatched to Beirut, but once again did not cite section 4(a)(1) on the basis that the American forces would not engage in combat. Congress thereafter passed the *Lebanon Emergency Assistance Act of 1983* requiring statutory authorization for any substantial expansion in the number or role of U.S. Armed Forces in Lebanon.[305]

On 30 August 1983, two marines were killed during hostilities. President Reagan reported on the situation, again without citing section 4(a)(1). Casualties continued as hostilities

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[302] Ely J.H., *War and Responsibility – Constitutional Lessons of Vietnam and its Aftermath*, (Princeton University Press, 1995) (Ely) at page 49.
[303] President Ford submitted 4, President Carter 1, President Reagan 14, President George H. W. Bush 7, President Clinton 60, President George W. Bush 39, and President Barack Obama 11; see Grimmett, R.F., *War Powers Resolution: Presidential Compliance*, Congressional Research Service (September 25, 2012) at page 14.
[304] Elsea, J.K. & Weed M.C., *Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications,* Congressional Research Service (April 18, 2014) at page 10ff.
[305] This Act included a provision that stated: '*Nothing in this section is intended to modify, limit, or suspend any of the standards and procedures prescribed by the War Powers Resolution of 1973*': see *ibid* at p 96ff.

escalated.[306] Various members of Congress began to threaten to withdraw funding for the mission unless the President complied with the War Powers Resolution by submitting a section 4(a)(1) report.

The standoff was ultimately resolved in September 1983 when legislation was passed authorizing the forces to remain for 18 months. In signing the resolution, President Reagan stated that "*I do not and cannot cede any of the authority vested in me under the Constitution as President and as Commander in Chief of United States Armed Forces. Nor should my signing be viewed as any acknowledgment that the President's constitutional authority can be impermissibly infringed by statute.*."[307]

US forces were thus deployed for over a year into a conflict zone without compliance with the War Powers Resolution. A form of resolution was ultimately achieved which resulted in the first and only occasion when the war powers clock was triggered.

18.2 Kosovo 1999

President Clinton ordered U.S. military forces to participate in a NATO-led military operation in Kosovo in March 1999. This deployment was highly controversial as it occurred without either congressional or U.N. Security Council authorization, and without a plausible claim of self-defense.[308] These circumstances ultimately led to a suit being filed in (DC) District Court by some Members of Congress contending that the President violated the War Powers Resolution.[309]

On 26 March, 1999, Clinton had notified the Congress "consistent with" the War Powers Resolution that on 24 March the military (in coalition with NATO allies) had commenced air strikes against Yugoslavian forces in order to support the ethnic Albanian population of Kosovo.

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[306] Elsea, J.K. & Weed M.C. *supra* at page 11.
[307] Elsea, J.K. & Weed M.C. *supra* at page 12.
[308] Curtis A. Bradley & Jack L. Goldsmith *Congressional Authorization and the War on Terrorism* 118 Harvard Law Review 2047-2133 (2005) at p 2090.
[309] *Campbell v. Clinton*, 52 F. Supp. 2d 34 (D.D.C. 1999); see also Grimmett, R.F., *War Powers Resolution: Presidential Compliance*, Congressional Research Service (September 25, 2012) at pages 4-6.

On 28 April, 1999 the House voted on four resolutions related to the Yugoslav conflict. The outcomes are internally inconsistent: Congress voted down a declaration of war 427:2; it voted against an "authorization" of the air strikes 213:213; (yet) it voted against requiring the President to immediately end US participation in the operation 1319:290; and (notwithstanding the earlier resolutions) it voted to fund the involvement.[310]

On 30 April, 1999, Representative Tom Campbell and other Members of the House filed a suit in federal District Court seeking a ruling requiring the President to obtain authorization from Congress before continuing the air war. The petitioners contended that the President was in violation of the War Powers Resolution requiring a withdrawal of U.S. forces after 60 days in the absence of congressional authorization. The President maintained that the War Powers Resolution was unconstitutional. In dismissing the suit, District Court Judge Friedman noted that, as Congress had not acted as a whole to order the withdrawal, there was no 'constitutional impasse' or 'actual confrontation'.[311] This result was affirmed on appeal.[312] The Supreme Court refused *certiorari*.[313]

The NATO-led peacekeeping Kosovo Force began entered Kosovo on 12 June 1999. Thus the 60 day (intended) time limit had well expired without formal notification or attempted withdrawal of US forces.

18.3 Libya 2011

On 21 March, 2011, President Obama submitted to Congress, "consistent with the War Powers Resolution," a report stating that on 19 March he had directed U.S. military forces to

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[310] Louis Fisher, *Presidential War Power*, (University Press of Kansas, 2013) at p. 199.

[311] *Campbell v. Clinton*, 52 F. Supp. 2d 34 (D.D.C. 1999): "*To have standing, legislative plaintiffs must allege that their votes have been "completely nullified," Raines v. Byrd, 521 U.S. at 823, 117 S.Ct. 2312, or "virtually held for naught." Coleman v. Miller, 307 U.S. at 438, 59 S.Ct. 972. Such a showing requires them to demonstrate that there is a true "constitutional impasse" or "actual confrontation" between the legislative and executive branches; otherwise courts would "encourage small groups or even individual Members of Congress to seek judicial resolution of issues before the normal political process has the opportunity to resolve the conflict." Goldwater v. Carter, 444 U.S. at 997-98, 100 S.Ct. 533 (Powell, J., concurring). In the Court's view, there is no such constitutional impasse here.*"; 52 F. Supp. 2d 34 (D.D.C. 1999) at page 43.

[312] *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000) in which the political question doctrine was also relied upon: "*in my view, no one is able to bring this challenge because the two claims are not justiciable. We lack "judicially discoverable and manageable standards" for addressing them, and the War Powers Clause claim implicates the political question doctrine. See Baker v. Carr, 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).*" (Judge Siberman, concurring)

[313] 531 U.S. 815 (2000).

commence "*operations to assist an international effort authorized by the United Nations (U.N.) Security Council … to prevent a humanitarian catastrophe … in Libya*."[314]

The President's position was that the intervention was undertaken "*pursuant to my constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive*" and was justified in the "*national security and foreign policy interests*" of the United States.

On 1 April, 2011, the Office of Legal Counsel (OLC) of the U.S. Justice Department issued a memorandum opinion entitled "Authority to use Military Force in Libya". The President's legal authority to direct military force in Libya was said to turn on two matters: (i) whether the operations would serve sufficiently important national interests; and (ii) whether the operations would be sufficiently extensive in "nature, scope, and duration" to constitute a "war" requiring prior specific congressional approval under the Constitution.[315] In respect of each issue, the opinion of the OLC was that the intervention was justified.[316]

It is notable that the War Powers Resolution was only mentioned twice in the Opinion. Rather than discussing the need for authorization or the impending time limit for withdrawal of forces, it was said that the WPR's structure "*recognizes and presupposes the existence of unilateral presidential authority to deploy armed forces*" into hostilities or circumstances presenting an imminent risk of hostilities.[317] That is, rather than being seen as a fetter on Presidential power, the War Powers Resolution was identified as empowering the President to act unilaterally.

On 3 June, 2011, the House passed (by a vote of 268 to 145) a resolution expressed in terms that "*the President shall not deploy, establish or maintain the presence of units and members of the United States Armed Forces on the ground in Libya*," except to rescue members of the Armed Forces[318]. The Resolution also made findings that: (1) that the President "*has not sought, and Congress has not provided, authorization for the introduction or continued involvement of the United States Armed Forces in Libya*," and (2) that "*Congress has the*

[314] Grimmett, R.F., *War Powers Resolution: Presidential Compliance, Congressional Research Service* (September 25, 2012) at page 11-12.
[315] Page 10 of the Memorandum.
[316] Page 13 of the Memorandum.
[317] Page 8 of the Memorandum.
[318] H.Res. 292

constitutional prerogative to withhold funding for any unauthorized use of the United States Armed Forces, including for unauthorized activities regarding Libya."

On June 15, 2011 (well past the 60 day limit in the War Powers Resolution), the Administration submitted report describing the U.S. actions in Libya, together with a statement that the President was of the view that "*the current U.S. military operations in Libya are consistent with the War Powers Resolution and do not under that law require further congressional authorization, because U.S. military operations are distinct from the kind of "hostilities" contemplated by the Resolution's 60 day termination provision*".[319]

That is, the President interpreted the term "hostilities" - which was intended to be broad enough to trigger the war powers clock in all forms of conflict – such that the War Powers Resolution is left without any real operative force, and is exposed to the most transparent stratagems of circumvention.[320]

Conclusions

Bruce Ackerman warned that, 'almost 40 years ago, Arthur Schlesinger Jr. sounded the alarm in *The Imperial Presidency* (1973). Yet the presidency has become far more dangerous today.'[321] The passage of the War Powers Resolution was intended to 'rein in a presidency run amok', and to reassert congressional prerogatives over foreign policy-making.[322] However, it has largely proved ineffective.[323] Every president since Richard Nixon, Democrat and Republican, has refused to recognize its constitutionality.

John Hart Ely attributes the failure to rein the Executive in to "*a combination of presidential defiance, congressional irresolution, and judicial abstention*". He charges that '*The War*

[319] Grimmett, R.F., *War Powers Resolution: Presidential Compliance*, Congressional Research Service (September 25, 2012) at page 13.
[320] If there is a positive to be found in this experience, it is that there is a at least a form of dialogue being undertaken between the political branches which might in part be attributed to the terms of the Resolution.
[321] Ackerman, B., *The Decline and Fall of the American Republic*, (The Belknap Press, 2013): at page 188.
[322] Howell, W.G. & Pevehouse, J.C., *While Dangers Gather – Congressional Checks on Presidential War Powers*, (Princeton University Press, 2007) at pp 4-6.
[323] Each of Ely, Fisher, and Ackerman & Hathaway (*supra*) reach this conclusion.

Powers Resolution has not worked repeatedly."[324] It has only been a single occasion, during the 1983 incursion into Lebanon under Reagan, that the 60-day war powers clock was even started.[325]

Yoo would attribute to the Framers an intent that Presidential war powers are to be conditioned (only) by Congress's powers of appropriations and spending, together with the power of impeachment. Yet these powers have not proved to be effective checks. For example, Ackerman & Hathaway attribute the aggrandizement of Executive power in part to Congress gradually giving up the detailed budgetary oversight that it had once held in a less complex world.[326]

It remains the case that the present system has seen the Executive assume the ascendency on the question of war-making powers.[327] Congress's attempts to arrest the gravitational pull toward executive hegemony in American war-making, including by enacting the War Powers Resolution of 1973, have not had their intended effect.[328]

Such a result, however, may not be unintended. Publius' (Alexander Hamilton) in *The Federalist* No.23, said of national self-defense that "*the power ought to be co-extensive with all the possible combinations of such circumstances*" because 'it is impossible to foresee or define the extent and variety of national exigencies and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed'.[329] That the Constitution was intended to be an 'invitation to struggle' for the privilege of directing

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[324] Ely J.H., *Suppose Congress wanted a War Powers Act that Worked*, Columbia Law Review, Vol 88, Nov 1988 No.7, pages 1379-1431 at page 1381: "the President either has not reported under section 4(a) or has failed to specify what he is filing is a section 4(a)(i) "hostilities" report, thus avoiding the 60-day clock".

[325] Howell *supra* at pages 5-6 - Yet even on that occasion Congress granted an 18 month grace period.

[326] Ackerman, B. & Hathaway, O., *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 Mich. L. Rev. 447 (2011): "*Congress has lost the oversight capacity that made the power of the purse such a potent means of military control at the time of the Founding. Nevertheless, it has not given up trying to use its budgetary powers to keep limited wars from escalating. Despite the obstacles created by a transformed appropriation system, these efforts have been occasionally successful. But these successes have been so erratic and unpredictable that they will have little deterrent effect on future assertions of presidential unilateralism.*" at page 485.

[327] Bruce Ackerman warned that, '*almost 40 years ago, Arthur Schlesinger Jr. sounded the alarm in The Imperial Presidency (1973). Yet the presidency has become far more dangerous today*': Ackerman, B., *The Decline and Fall of the American Republic*, (The Belknap Press, 2013 ed) at page 188.

[328] W. T. Reveley, *War Powers of the President and Congress: Who Holds the Arrows and Olive Branch?*, (University Press of Virginia, 1981) at p. 261.

[329] See also Arthur M. Schlesinger (Jr), *The Imperial Presidency: What the Founding Fathers Intended* (Houghton Mifflin Co., 2004) at page 5; note that in *The Federalist* Nos. 28 (Hamilton) and 46 (Madison), Publius discusses the resort to State militias to dispatch national military tyrants run amok; see also Akhil Reed Amar, *America's Constitution, A Biography*, (Random House, 2005) at pp 117-118.

American foreign policy may be axiomatic when viewed through the lens of a system expressly designed to counter ambition with ambition.[330]

But this realization of itself provides no answers as to how war powers are to be distributed. It merely does away with binary debates in which the protagonists are advocating variations on two themes. In reality, the subject matter of war powers should not be seen as a discrete head of power within the Constitution, divorced from its surroundings. Von Clausewitz's famous aphorism in this sense becomes particularly apposite.[331] The power to engage in armed conflicts forms but a part of the far broader spectrum of stratagems that comprise modern statecraft. In modern terms, power is understood in terms of influence: threats of war, diplomatic recognition, intelligence operations, foreign aid, international agreement making, and dialogue are the true determinants of war and peace.[332] If that proposition is accepted, then it may disclose 'a much more complex interaction of law and strategy than often assumed in war powers debates' and open up the interpretive debate to the introduction of functional considerations.[333]

The constitutional text should, however, always serve as a focal point to solve such problems of inter-Branch co-ordination.[334] This Paper demonstrates that, when assessed by reference to text, history, and structure, the Framers and "We the People" who ratified the Constitution well understood the purpose of the Declare War Clause: absent sudden invasions, only Congress can determine when to commit the nation to war.

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[330] Edward S. Corwin, *The President, Officer and Powers 1787-1957* (NYU Press, 1957) at page 171; *The Federalist* No. 51 (Madison): "*Ambition must be made to counteract ambition*."

[331] General Carl von Clausewitz *On War* (translated by Colonel J.J. Graham, 1909 reprint): "*We see, therefore, that War is not merely a political act, but also a real political instrument, a continuation of political commerce, a carrying out of the same by other means*." at Chapter 1, Section 24.

[332] See Travers McLeod, *Rule of Law in War* (Oxford University Press, 2015) at page 18: "Not only have the "sources of strength for war" changed, so too have the sources for power. These days "power" is very much a chameleon term; it might refer to weapons, it might refer to words, and it might refer to status. Quite often, we can differentiate between material and non-material sources of power. Above all, however, power refers to *influence*."

[333] Matthew C. Waxman, *The Power to Threaten War*, The Yale Law Journal, 123:1626, 2014, at page 1682 who suggests the possibility of new avenues for analysis and possible reform; see also *J.W. Hampton, Jr., & Co. v. United States,* 276 U.S. 394 (1928) at p. 406: "*the constitutional boundaries between the powers of the branches must be determined "according to common sense and the inherent necessities of the governmental co-ordination*"; *Terminiello v. City of Chicago*, 69 S. Ct. 894, 912, 937 (1949) (Jackson, J., dissenting) "*There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the [Constitution] into a suicide pact*."

[334] Jack M. Balkin, *Living Originalism*, (The Balknap Press, 2011) at pp 50-51; see also Akhil Reed Amar, *America's Unwritten Constitution*, (Basic Books, 2013) at Chapter 3, p. 108ff - Interpretive analyses must have at their heart legal coherence and fidelity to the text and the Founding principles.

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