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**CO-PARENTING WAR POWERS: CONGRESS'S  
AUTHORITY TO ESCALATE CONFLICTS**

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\* J.D., Harvard Law School, 2017. All errors are my own.

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#### ABSTRACT

This article argues that Congress has the ability to force a President to escalate military intervention when he is otherwise unwilling to do so. The article begins by exploring the constitutional powers at Congress's disposal—the Declare War Clause, the Taxing and Spending Clause, and the Commander-in-Chief Clause—and their historical application. It then establishes that, under Justice Jackson's *Youngstown* framework, the Executive would be acting in Category Three, meaning that the President may “rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.” Citing multiple Article I clauses, this article argues that Executive action in contravention of Congressional efforts to increase military intervention would

unconstitutionally encroach on Congress's prerogative. Finally, it buttresses these conclusions by drawing on historical precedent.

[T]he powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident, that none of them ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it.

— James Madison, *The Federalist* No. 48.

## I. INTRODUCTION

When the Assad regime attacked Syrian civilians with chemical weapons<sup>1</sup> within months of President Trump's inauguration, the Commander-in-Chief activated United States military might: at his command, the "military launched 59 cruise missiles at a Syrian military airfield."<sup>2</sup> The missiles "struck an air base . . . includ[ing] air defenses, aircraft, hangars and fuel."<sup>3</sup>

The strike ran counter to President Trump's isolationist rhetoric and purported policy viewpoint,<sup>4</sup> which had "raised alarm in allied countries that still rely on the [United States] for defense."<sup>5</sup> Yet the next day, U.N. Ambassador Nikki Haley addressed the United Nations: "The United States took a *very*

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<sup>1</sup> See Anne Barnard & Michael R. Gordon, *Worst Chemical Attack in Years in Syria; U.S. Blames Assad*, N.Y. TIMES (Apr. 4, 2017), <https://www.nytimes.com/2017/04/04/world/middleeast/syria-gas-attack.html>.

<sup>2</sup> Dan Lamothe, Missy Ryan & Thomas Gibbons-Neff, *U.S. Strikes Syrian Military Airfield in First Direct Assault on Bashar Al-Assad's Government*, WASH. POST (Apr. 7, 2017), [https://www.washingtonpost.com/world/national-security/trump-weighing-military-options-following-chemical-weapons-attack-in-syria/2017/04/06/0c59603a-1ae8-11e7-9887-1a5314b56a08\\_story.html?utm\\_term=.d0cf7d35d97c](https://www.washingtonpost.com/world/national-security/trump-weighing-military-options-following-chemical-weapons-attack-in-syria/2017/04/06/0c59603a-1ae8-11e7-9887-1a5314b56a08_story.html?utm_term=.d0cf7d35d97c).

<sup>3</sup> *Id.*

<sup>4</sup> See, e.g., Charles Krauthammer, *Trump's Foreign-Policy Revolution*, NAT'L REV. (Jan. 27, 2017, 8:00 PM), <http://www.nationalreview.com/article/444321/trump-foreign-policy-isolationism-america-first-allies-nato-trans-pacific-partnership>.

<sup>5</sup> Peter Graff, *Trump's 'America First' Speech Alarms U.S. Allies*, REUTERS (Apr. 27, 2016, 6:14 A.M.), <http://www.reuters.com/article/us-usa-election-trump-idUSKCN0XO10R>; see Zeke J. Miller & Philip Elliott, *U.S. Launches a Missile Attack at Syria in a Test of President Trump's 'America First' Policy*, TIME (Apr. 6, 2017, 10:21 PM), <http://time.com/4730107/syria-chemical-donald-trump-assad/>.

*measured* step last night. We are prepared to do more, but we hope that will not be necessary.”<sup>6</sup>

What if Congress *did* feel it necessary to “do more”?<sup>7</sup> What *recourse* would legislators have?

Consider a hypothetical: a small-scale terrorist attack occurs on American soil. Three Americans killed, sixteen maimed, and several hundred others injured.<sup>8</sup> The attacker avows loyalty to a new terrorist group. Imagine the President disregards Congress’s calls to strike back.<sup>9</sup> This would not be the first time Congress was more hawkish than the President,<sup>10</sup> though that has not been the dynamic recently.<sup>11</sup> What tools in its arsenal can Congress deploy to *escalate* the situation beyond what a dovish President executes?

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<sup>6</sup> Harriet Alexander, Josie Ensor & Roland Oliphant, *US Strikes on Syria: Xi Jinping Told Donald Trump He Understood the US Response ‘Because of the Death of Children’*, TELEGRAPH (Apr. 7, 2017, 10:01 PM) (emphasis added) (quoting Ambassador Haley), <http://www.telegraph.co.uk/news/2017/04/07/us-strikes-syria-tensions-rise-russia-warns-damage-ties-washington/>.

<sup>7</sup> Notably, in August 2016, most Americans favored airstrikes and special operations campaigns into the Syrian civil war. See Dina Smeltz, Craig Kafura & Kelhan Martin, *Americans Support Limited Military Action in Syria Against ISIS*, CHI. COUNCIL ON GLOBAL AFF. (Aug. 15, 2016), <https://www.thechicagocouncil.org/publication/americans-support-limited-military-action-syria-against-isis>. Unheralded, these actions were already underway. See Adam Taylor, *Poll: Most Americans Support U.S. Military Action in Syria — But Only Want a Limited Amount*, WASH. POST (Aug. 15, 2016), [https://www.washingtonpost.com/news/worldviews/wp/2016/08/15/poll-most-americans-support-u-s-military-action-in-syria-but-only-want-a-limited-amount/?utm\\_term=.b9b7caee1336](https://www.washingtonpost.com/news/worldviews/wp/2016/08/15/poll-most-americans-support-u-s-military-action-in-syria-but-only-want-a-limited-amount/?utm_term=.b9b7caee1336).

<sup>8</sup> These are the exact statistics from the Boston Marathon Bombing. See *Boston Marathon Terror Attack Fast Facts*, CNN (Mar. 25, 2018, 6:42 P.M.), <http://www.cnn.com/2013/06/03/us/boston-marathon-terror-attack-fast-facts/>.

<sup>9</sup> It is a hypothetical, after all.

<sup>10</sup> J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 85–86 (1991).

John Adams resisted calls for a declaration of war against France in 1798 and instead sought authority for the limited and undeclared Quasi-War; James Madison was ambivalent about declaring war on Britain in 1812; Grover Cleveland in 1896 rebuffed the proposal by various members of Congress to declare war on Spain; William McKinley in 1898 reluctantly conceded to the same war fervor; and Woodrow Wilson successfully campaigned for reelection in 1916 on the slogan, “He kept us out of war.”

*Id.* (citations omitted).

<sup>11</sup> See *id.* at 85 (“Today, of course, we are so accustomed to thinking of Presidents as more hawkish than Congress that the hypothetical of a dovish President would strike many as preposterous.”).

Congress could appropriate money for such a strike and force the President's hand.<sup>12</sup> Another potential lever is a declaration of war.<sup>13</sup> If Congress deploys these tools, when do the President's Commander-in-Chief powers<sup>14</sup> and separation-of-powers concerns come into play?

This article explores the uneasy balance between the legislature's authority to tax and spend as well as its ability to declare war, and the President's Commander-in-Chief powers. The article begins by discussing each power in turn, tracing their original understanding and subsequent interpretation. In Section III, the article examines the messy intermingling of these powers. Section IV then analyzes whether Congress's powers could indeed escalate a conflict and concludes that Executive action in contravention of Congressional efforts to increase military intervention would unconstitutionally encroach on Congress's prerogative.

## II. A BRIEF HISTORY OF THE RESPECTIVE POWERS AT PLAY

This section skims three of the most important categories of powers written into our Constitution: the Spending Powers, Declare War Powers, and Commander-in-Chief Powers. Within each, this article looks at both the text and our Founding Fathers' original understanding of it, setting the stage to demonstrate where these powers clash with one another.

### A. *Congress's Spending Power*

This section first presents the text of the Taxing and Spending Clause, which states that Congress has the power to levy taxes for three purposes: to pay debts, defend, and provide for the general welfare of the United States. Next, this section analyzes the evolution of the interpretation of Congress's Spending Power, from the Founding Fathers to a recent Supreme Court interpretation.

#### 1. The Text

The Taxing and Spending Clause reads: "The Congress shall have Power . . . [t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the

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<sup>12</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>13</sup> *Id.* § 8, cl. 11; *see also* Sidak, *supra* note 10, at 84–85 ("[T]he power to initiate hostilities was clearly meant to be reserved to the Congress, with the President participating in that initiative only so far as his signature was necessary to complete an act of Congress.") (quoting Alexander M. Bickel et al., *Indochina: The Constitutional Crisis*, 116 CONG. REC. 15,410 (1970)).

<sup>14</sup> U.S. CONST. art. II, § 2, cl. 1.

Debts and provide for the common Defense and general Welfare of the United States[.]”<sup>15</sup>

As the Clause specifies, taxes can only be levied for three reasons: *first*, to “pay the debts . . . of the United States.”<sup>16</sup> Paired with its sister clause—the Borrowing Clause—this permits Congress to borrow against the nation’s credit.<sup>17</sup> *Second*, “for the common Defense . . . of the United States.” In the words of Justice Joseph Story, “[w]ithout such a power, it would not be possible to provide for the support of the national forces by land or sea . . . . For these purposes at least, there must be a constant and regular supply of revenue.”<sup>18</sup>

*Third*, for the “general Welfare of the United States,” or “the well-being of the nation.”<sup>19</sup> While exceptionally straightforward in theory, it is equally amorphous and pliable in practice. One can only synthesize the outer bounds of this concept by reviewing its understanding and interpretation since the Constitution’s ratification.

## 2. The Taxing and Spending Clause as Understood at the Founding

Given the motto “no taxation without representation,”<sup>20</sup> it is unsurprising that the Framers modeled the spending powers on the British model: Parliament,

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<sup>15</sup> U.S. CONST. art. I, § 8, cl. 1. This is different from the Appropriations Clause. *See* U.S. CONST. art. 1, § 9, cl. 7. Together, the two are commonly referred to as the “power of the purse.” *See Power of the Purse*, HIST., ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES., <http://history.house.gov/Institution/Origins-Development/Power-of-the-Purse/> (last visited Aug. 27, 2018).

<sup>16</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>17</sup> *Id.* § 8, cl. 2; *cf.* GEORGE WASHINGTON, WASHINGTON’S FAREWELL ADDRESS TO THE PEOPLE OF THE UNITED STATES, S. Doc. No. 106-21, at 21 (2d Sess. 2000).

As a very important source of strength and security, cherish public credit. One method of preserving it is to use it as sparingly as possible . . . timely disbursements to prepare for danger frequently prevent much greater disbursements to repel it; avoiding likewise the accumulation of debt, not only by shunning occasions of expense, but by vigorous exertions in time of peace to discharge the debts which unavoidable wars may have occasioned, not ungenerously throwing upon posterity the burden which we ourselves ought to bear.

*Id.*

<sup>18</sup> 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 932 (5th ed. 1891) [hereinafter STORY].

<sup>19</sup> *Helvering v. Davis*, 301 U.S. 619, 641 (1937).

<sup>20</sup> Interestingly, the phrase was born before the American Revolution: the slogan-*cum*-philosophy existed in Ireland for years before the colonists used it as a call to arms. *See* DAVID MCCULLOUGH, JOHN ADAMS 61 (2001). This is highly surprising as the Crown’s subjugation of the Irish began *far* before that of the American colonists. Boston politician James Otis modified the phrase but was no less evocative in telling would-be constituents “taxation without

representing the people, barred the Crown from spending moneys beyond the citizens' wishes.<sup>21</sup> As, per Continental Congress Vice President Elbridge Gerry, the House "was more immediately the representatives of the people,"<sup>22</sup> the Continental Congress resolved to bestow "the power to originate money bills to the House."<sup>23</sup>

At the Founding, there were significant disputes as to the precise limits of Congress's spending powers. In the words of Justice Owen Roberts:

Since the foundation of the Nation, sharp differences of opinion have persisted as to the true interpretation of the phrase. Madison asserted it amounted to no more than a reference to the other powers enumerated in the subsequent clauses of the same section; that, as the United States is a government of limited and enumerated powers, the grant of power to tax and spend for the general national welfare must be confined to the enumerated legislative fields committed to the Congress . . . Hamilton, on the other hand, maintained the clause confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States. Each contention has had the support of those whose views are entitled to weight.<sup>24</sup>

Secondary sources confirm that Hamilton's interpretation won. In his treatise on the Constitution, for example, Justice Story held that a tax levied against and paid out to the general population passes constitutional muster.<sup>25</sup>

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representation is tyranny." DANIEL A. SMITH, *TAX CRUSADERS AND THE POLITICS OF DIRECT DEMOCRACY* 23, 174 n.13 (1998).

<sup>21</sup> See *Power of the Purse*, *supra* note 15.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *United States v. Butler*, 297 U.S. 1, 65–66 (1936). Compare, e.g., Alexander Hamilton, *Report on Manufactures* (1791), in *THE FOUNDERS' CONSTITUTION: VOLUME 2 PREAMBLE THROUGH ARTICLE 1, SECTION 8, CLAUSE 1*, 446, 446–47 (Philip B. Kurland & Ralph Lerner eds., 1987), available at [http://press-pubs.uchicago.edu/founders/documents/a1\\_8\\_1s21.html](http://press-pubs.uchicago.edu/founders/documents/a1_8_1s21.html), with, e.g., Letter from President James Madison to the United States House of Representatives (March 3, 1817), available at [http://www.constitution.org/jm/18170303\\_veto.htm](http://www.constitution.org/jm/18170303_veto.htm).

<sup>25</sup> See *STORY*, *supra* note 18, at §§ 902–1049.

### 3. Subsequent Interpretation and Modern Understanding

However, the Clause's interpretation continued to ensnare the Legislative and Executive Branches throughout the 19th century. On President James Madison's last day in office, he vetoed John C. Calhoun's Bonus Bill of 1817, which sought to channel revenue from the Second Bank of the United States to infrastructure improvements.<sup>26</sup> He did so because "[C]ongress had no constitutional power to expend the public revenues for any such purpose."<sup>27</sup> His successor, James Monroe, agreed.<sup>28</sup> Such disputes were not uncommon before the Civil War. Moreover, endorsing these political measures was costly; John Quincy Adams's signing of such bills contributed to Andrew Jackson's subsequently landslide victory, as Jackson vociferously opposed—and ultimately vetoed—them.<sup>29</sup>

The Civil War changed this understanding. In that time, the Court widened Congress's powers via its taxing power: in Chief Justice John Roberts's words, the Court in that era proclaimed "[t]he Federal Government may enact a tax on an activity that it cannot authorize, forbid, or otherwise control."<sup>30</sup>

By the turn of the 20th century, the Court cracked down on pretextual taxes empowering Congress with police powers.<sup>31</sup> For example, in 1936, the Court struck down the Agricultural Adjustment Act, which, in effect, paid farmers to limit their crop production so as to artificially drive price up by reducing crop surpluses during the Great Depression.<sup>32</sup> "[T]he Court held that [the law] could not be justified as an exercise of the taxing power because its

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<sup>26</sup> 2 CYCLOPÆDIA OF POLITICAL SCIENCE, POLITICAL ECONOMY, AND OF THE POLITICAL HISTORY OF THE UNITED STATES § 196.6 (John J. Lalor, ed., N.Y., Maynard, Merrill, & Co. 1899) [hereinafter CYCLOPÆDIA]; see also Stephen Minicucci, *Internal Improvements and the Union, 1790–1860*, 18 STUDIES AM. POL. DEV. 160, 164 (2004).

<sup>27</sup> CYCLOPÆDIA, *supra* note 26, at § 196.6. In writing about the veto—or “negative”—to former Treasury Secretary Albert Gallatin, Thomas Jefferson opined that the interpretation of the Taxing and Spending Clause “is almost the only landmark which now divides the federalists from the republicans.” *Letter from Thomas Jefferson to Albert Gallatin (June 16, 1817)*, in 10 WRITINGS OF THOMAS JEFFERSON 91 (Paul Leicester Ford ed., 1899).

<sup>28</sup> CYCLOPÆDIA, *supra* note 26, at § 196.6.

<sup>29</sup> John C. Eastman, *Spending Clause*, HERITAGE FOUND.: THE HERITAGE GUIDE TO THE CONST., <http://www.heritage.org/constitution/#!/articles/1/essays/34/spending-clause> (last visited Aug. 27, 2018).

<sup>30</sup> Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 537 (2012) (citing License Tax Cases, 72 U.S. 462, 471 (1866)).

<sup>31</sup> See United States v. Constantine, 296 U.S. 287 (1935); Linder v. United States, 268 U.S. 5 (1925); Child Labor Tax Case, 259 U.S. 20 (1922); Hill v. Wallace, 259 U.S. 44 (1922).

<sup>32</sup> See generally United States v. Butler, 297 U.S. 1 (1936).



stated purpose was to regulate agricultural production, rather than raise revenue for the United States.”<sup>33</sup>

In the Court’s words:

[T]he act invades the reserved rights of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government. The tax, the appropriation of the funds raised, and the direction for their disbursement, are but parts of the plan. They are but means to an unconstitutional end.<sup>34</sup>

The Court in this era nevertheless adopted both an expansive and fluid reading of a constitutional tax’s minimal impact requirements. On the Clause’s expansiveness, the Court again looked to Justice Story’s treatise to conclude that constitutional “taxation and appropriation extend only to matters of national, as distinguished from local, welfare,” which were otherwise “the exclusive province of the states.”<sup>35</sup> And on its dynamism, the Court conceded that determining what constitutes “general” and “welfare” is akin to firing at moving targets: “Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the Nation. What is critical or urgent changes with the times.”<sup>36</sup>

Throughout the 20th century, this broad interpretation remained relatively unchallenged.

[C]ourts have essentially treated whatever limitation the clause might impose as essentially a nonjusticiable political question . . . . Instead, the courts have focused . . . on whether various conditions imposed on the receipt of federal funds—conditions designed to achieve ends concededly not within Congress’s enumerated powers—were constitutionally permissible.<sup>37</sup>

Recently, this interpretation was challenged in *National Federation of Independent Business (NFIB) v. Sebelius*.<sup>38</sup> Channeling Shakespeare—“What’s

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<sup>33</sup> Lindsay F. Wiley, *The U.S. Department of Agriculture as a Public Health Agency? A “Health in All Policies” Case Study*, 9 J. FOOD L. & POL’Y 61, 76 n.94 (2013).

<sup>34</sup> *Butler*, 297 U.S. at 68.

<sup>35</sup> *Id.* at 67, 69 (quoting *Gibbons v. Ogden*, 22 U.S. 1, 199 (1824)) (internal quotations omitted).

<sup>36</sup> *Helvering v. Davis*, 301 U.S. 619, 641 (1937).

<sup>37</sup> *Eastman*, *supra* note 29; *see also* *South Dakota v. Dole*, 483 U.S. 203, 207 n.2 (1987) (“The level of deference to the congressional decision is such that the Court has more recently questioned whether ‘general welfare’ is a judicially enforceable restriction at all.”).

<sup>38</sup> 567 U.S. 519 (2012).

in a name?”<sup>39</sup>—Chief Justice Roberts wrote that the Affordable Care Act’s penalization of those without health insurance was identical to a tax and therefore constitutionally permissible.<sup>40</sup> *Sebelius* confirms that the Clause grants the legislative body near-plenary power by which to achieve policy aims.

### B. Congress’s Power to Declare War

“[O]ut of seventeen specific paragraphs of congressional power [in article I, §8], eight of them are devoted in whole or in part to specification of powers connected with warfare.”<sup>41</sup> Among the most powerful is the eleventh clause: “[t]o declare war.”<sup>42</sup> This section first examines the text of the Declare War Clause. Next, it analyzes the historical context of “declaring war.” Finally, the section will examine the Supreme Court’s modern reliance on the historical meaning of declaring war.

#### 1. The Text

Only two words encompass this mighty authority; “the Constitution never defines ‘declare war.’ Hence, it will be impossible to establish, from an examination of text alone, what ‘declare war’ means.”<sup>43</sup> But declaring is simply “the act of making an official statement about something.”<sup>44</sup> The question of how is discussed *infra*.<sup>45</sup>

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<sup>39</sup> WILLIAM SHAKESPEARE, *ROMEO & JULIET* act 2, sc. 2.

<sup>40</sup> *Sebelius*, 567 U.S. at 563–64 (reasoning that it is a tax because it “paid into the Treasury by ‘taxpayer[s]’ when they file their tax returns”; its application and amount are driven by a taxpayer’s federal tax; its “requirement to pay is found in the Internal Revenue Code and enforced by the IRS”; and it sports “the essential feature of any tax: It produces at least some revenue for the Government”).

<sup>41</sup> Proposed Deployment of U.S. Armed Forces into Bosnia, 19 Op. O.L.C. 327, 330 n.3 (1995) (internal quotations omitted) (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 788 (1950)), <https://www.justice.gov/file/20146/download> [hereinafter Proposed Deployment]. These include the powers to: (1) “define and punish . . . offenses against the law of nations”; (2) “declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water”; (3) “raise and support armies”; (4) “provide and maintain a navy”; (5) “make rules for the government and regulation of the land and naval forces”; (6) “provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions”; and (7) “provide for organizing, arming, and disciplining, the militia . . . and the authority of training the militia according to the discipline prescribed by Congress.” U.S. CONST. art. I, § 8.

<sup>42</sup> U.S. CONST. art. I, § 8, cl. 11.

<sup>43</sup> Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by “Declare War”*, 93 CORNELL L. REV. 45, 54 (2007) [hereinafter *Unleashing the Dogs*].

<sup>44</sup> *Declaration*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/declaration> (last visited Aug. 27, 2018).

<sup>45</sup> See *infra* notes 49–50 and accompanying text.

At the Founding, a “war” was the “fighting between two Kings, Princes of parties, in vindication of their ju[s]t rights.”<sup>46</sup> Today’s warfare has changed enough to render this definition obsolete. The traditional notion of “declaring armed hostile conflict between states or nations” or “a state of hostility, conflict, or antagonism”<sup>47</sup> remains, but today’s wars are fought on myriad fronts—from the seas to the skies, from the physical to the digital. Moreover, hostilities may occur that are insufficient to merit the moniker “war.”<sup>48</sup>

There are also questions regarding the declaration itself: What constitutes a declaration? When must one declare war, and to whom? For answers as well as a broader context, history may be instructive.

## 2. The Declare War Clause as Understood at the Founding

The origin of declaring war dates back millennia:

Indeed, from classical times, some nations had declared war via heralds. The heralds would go to the enemy and, presumably with a great deal of ceremony and perhaps with a trumpet, announce the decision to wage war against that nation. Heralds also might announce the war to the declarant’s populace.<sup>49</sup>

Sweden’s declaration of war against Denmark in 1657 marks the last time heralds were declarants themselves.<sup>50</sup>

However, through the Founding, declarations were rarely made formally. Instead, they could be implied from a sovereign’s “actions that . . . signaled unambiguous recourse to war.”<sup>51</sup> “As John Adams noted during the Revolutionary War, neither England nor France needed to issue a formal

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<sup>46</sup> TIMOTHY CUNNINGHAM, 2 A NEW AND COMPLETE LAW-DICTIONARY, OR, GENERAL ABRIDGMENT OF THE LAW (3d. ed., London 1783).

<sup>47</sup> War, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/war> (last visited Aug. 27, 2018).

<sup>48</sup> See generally Curtis A. Bradley, *The ‘Charming Betsy’ Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479 (1998) (examining how international laws may clash with U.S. domestic laws to create conflicts not rising to the level of war).

<sup>49</sup> Saikrishna Bangalore Prakash, *Exhuming the Seemingly Moribund Declaration of War*, 77 GEO. WASH. L. REV. 89, 98 (2008) [hereinafter *Moribund Declaration*] (footnotes omitted); see also STEPHEN C. NEFF, WAR AND THE LAW OF NATIONS 26, 71–73 (2005).

<sup>50</sup> See NEFF, *supra* note 49, at 104–05.

<sup>51</sup> *Moribund Declaration*, *supra* note 49, at 98.

declaration of war against each other because war was ‘sufficiently declared by actual hostilities in most parts of the world.’”<sup>52</sup>

Knowing historical practices varied, the Framers sought to explicitly demarcate the power to “declare war.” Constitutional Convention delegates debated the clause’s original iteration: “to *make* war.”<sup>53</sup> Charles Cotesworth Pinckney first opposed it for pragmatic reasons: the legislature’s “proceedings were too slow.”<sup>54</sup>

But a more substantive matter was afoot. James Madison and Elbridge Gerry proposed to replace “make” with “declare.”<sup>55</sup> George Mason agreed,<sup>56</sup> as did Oliver Ellsworth, because “there is a material difference between the cases of making *war*, and making *peace*. It [should] be more easy to get out of war, than into it. War also is a simple and overt declaration, peace attended with intricate [and] secret negotiations.”<sup>57</sup> Ultimately, the motion passed.<sup>58</sup>

Despite the topic’s importance, this constitutes the Constitutional Convention’s entire debate over the clause.<sup>59</sup> Scholars have thus looked elsewhere to understand the Clause’s significance, as two streams of thought have emerged: one suggesting its importance, and one minimizing it.

*i. Declaring War as a Sacred Obligation*

There are some indications that a formal war declaration was required for all military action. James Wilson, considered “[s]econd only to Madison—

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<sup>52</sup> *Id.* at 99 (quoting *Letter from John Adams to Samuel Adams* (Feb. 14, 1779), in 3 THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES 47, 48 (Francis Wharton ed., Wash., Gov’t Printing Office 1889)).

<sup>53</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 548 (E.H. Scott, ed., Chicago, Albert, Scott & Co. 1894) [hereinafter RECORDS].

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 549. Notably, “only one delegate to either the Philadelphia Convention or any of the state ratifying conventions, Pierce Butler, is recorded as suggesting that authority to decide on war and peace be vested in the President . . . and Butler subsequently disowned his earlier view.” John Hart Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 COLUM. L. REV. 1379, 1386–87 (1988).

<sup>59</sup> Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 675 (1972) (noting the discussion “occupies little more than one page out of the 1,273 which contain the printed records of the Convention”).

and an honorable second”<sup>60</sup>—“preferred a single magistrate [for an Executive], as giving most energy dispatch and responsibility to the office.”<sup>61</sup> But Wilson

did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of Legislative nature. Among others that of war [and] peace[.] The only powers he conceived strictly Executive were those of executing the laws, and appointing officers, not appertaining to and appointed by the Legislature.<sup>62</sup>

This understanding speaks to the Framers’ intended equipoise, which ascribes substantial weight to the declaration itself. Wilson extolled the balance’s benefit: “This system will not hurry us into war; it is calculated to guard against it.”<sup>63</sup>

Some of the strongest evidence of the clause’s import can be found in the actions and words of our first President. In the early 1790s, the Creek Indians attacked newly minted Americans along the Cumberland River. South Carolina Governor William Moultrie subsequently asked Washington to send troops for a counteroffensive. Washington responded that he could not do so until “whenever Congress should decide that measure to be proper 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.”<sup>64</sup> Washington recognized a distinct limit on military campaigns—even defensive ones at that.<sup>65</sup>

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<sup>60</sup> CLINTON ROSSITER, 1787: THE GRAND CONVENTION 247–48 (1966). Wilson was “one of only six persons to sign both the Declaration of Independence and the Constitution” and one of the debates’ most frequent speakers. Kermit L. Hall, *Introduction* to COLLECTED WORKS OF JAMES WILSON, at xiiv (Kermit L. Hall & Mark David Hall, eds., 2007).

<sup>61</sup> RECORDS, *supra* note 53, at 86.

<sup>62</sup> *Id.*

<sup>63</sup> Ely, *supra* note 58, at 1379 (1988) (citing 2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (J. Elliot ed., 1866)).

<sup>64</sup> 33 THE WRITINGS OF GEORGE WASHINGTON 73 (John C. Fitzpatrick ed., 1940).

<sup>65</sup> This is an especially important distinction because the clause was written to endow the President with the “power to repel sudden attacks without a prior declaration of war.” Sidak, *supra* note 10, at 35. Additionally, this understanding has been refuted; several OLC opinions have claimed Washington felt otherwise. See The President’s Constitutional Auth. to Conduct Military Operations Against Terrorists and Nations Supporting Them, 25 Op. O.L.C. 188, 202 (2001) [hereinafter Constitutional Authority], (citing David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789–1791*, 61 U. CHI. L. REV. 775, 816 (1994), [https://www.justice.gov/sites/default/files/olc/opinions/2001/09/31/op-olc-v025-p0188\\_0.pdf](https://www.justice.gov/sites/default/files/olc/opinions/2001/09/31/op-olc-v025-p0188_0.pdf) (“[B]oth Secretary [of War] Knox and [President] Washington himself seemed to think this [Commander-in-Chief] authority extended to offensive operations undertaken in retaliation for Indian atrocities.”); Proposed Deployment, *supra* note 41, at 331 n.4. However, this quote is taken

The Neutrality Proclamation of 1793 and the Pacificus-Helvidius debates confirm this belief. Once the French declared war on Great Britain, Washington called for an emergency cabinet meeting to consider declaring neutrality; alternatively, Jefferson claimed the new government could “make countries bid for neutrality.”<sup>66</sup> While debates ensued as to whether the President needed congressional approval to declare neutrality, both sides recognized the exclusive right of the legislature to “make” war.<sup>67</sup>

ii. *Declaring War as a Formality*

Two main arguments have been asserted to suggest that even at the Founding, the power to declare war was at best *pro forma*, diminishing its import and Congress’s foreign policy influence generally.

*First*, that replacing “make” to “declare” evinces a nuanced understanding of what war is and how wars are fought, namely that a legislative body is not itself involved in warfighting directly. Having made the distinction between “make” versus “declare,” one could infer the Framers understood the substantial difference between declaring one’s status of being at war and executing it militarily and operationally.<sup>68</sup> Because Congress could only *declare* war, Congress could not dictate its execution. What’s more, as the Office of Legal Counsel phrased it, “[i]f the Framers had wanted to require congressional consent before the initiation of military hostilities, they knew how to write such provisions.”<sup>69</sup> This is supported by Article I, Section 10, Clause 3, which utilizes a similar distinction between a State’s engaging in war and declaring it.<sup>70</sup>

*Second*, historical practice suggests declarations’ diminishing roles. Records show that “undeclared war was the norm in eighteenth-century European practice, a reality brought home to Americans when Britain’s Seven Years’ War with France began on this continent.”<sup>71</sup> Empirical evidence bears this

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out of context and, foregoing reference to the operations that led Currie to write this particular phrase, doing a disservice to Currie’s thesis.

<sup>66</sup> RON CHERNOW, *ALEXANDER HAMILTON* 435 (2004). Lin-Manuel Miranda took some artistic license on this issue.

<sup>67</sup> See generally ALEXANDER HAMILTON & JAMES MADISON, *THE PACIFICUS-HELVIDIUS DEBATES OF 1793–1794* (Morton J. Frisch ed., 2007).

<sup>68</sup> See Constitutional Authority, *supra* note 65, at 191–92.

<sup>69</sup> *Id.* at 192.

<sup>70</sup> U.S. CONST. art. I, § 10, cl. 3 (“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.”).

<sup>71</sup> W. TAYLOR REVELEY, III, *WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND OLIVE BRANCH?* 55 (1981); see also *THE FEDERALIST* NO. 25 (Alexander Hamilton) (“the ceremony of a formal denunciation of war has of late fallen into disuse”).

out, too: “Of the eight major wars fought by Great Britain prior to the ratification of the Constitution, war was declared only once before the start of hostilities.”<sup>72</sup>

Resultantly, many believe the Founders viewed formal declarations of war as “obsolete.”<sup>73</sup>

### 3. Subsequent Interpretation and Modern Understanding

Given the short shrift the Founders paid the clause,

[i]t should be no surprise, therefore, that two centuries later the debate over the original meaning of the War Clause provokes disagreement among the most highly regarded of contemporary interpreters of the Constitution, and that these scholars have squeezed the last imaginable drop of interpretative significance from the story of how . . . the Framers changed Congress’s power to “wage War” to the power to “declare War[.]”<sup>74</sup>

Though important, these interpretations are not decisive in delineating the power to declare war’s implications. “In ruling on constitutional questions involving foreign relations, the Supreme Court has often shown itself willing to rely on the evolved practice and custom of the political branches.”<sup>75</sup> This includes how declarations have been interpreted. Though rare—our last war declaration was 1941<sup>76</sup>—an important lesson can still be learned from declarations and the Supreme Court’s interpretations thereof: whether offensive or defensive, the nature of the attack matters.

Joseph Story, in his constitutional treatise, put forward the most prominent view of the importance of declaring war only in *offensive* measures. Because “formal declarations of war are in modern times often neglected, and are never necessary,”<sup>77</sup> declarations were only required when preempting attacks.

The Supreme Court thereafter adopted this understanding. Leading up to the Civil War, President Lincoln chose not to ask Congress to declare war on the

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<sup>72</sup> See Constitutional Authority, *supra* note 65, at 192 (citing John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 214–15 (1996)).

<sup>73</sup> *Id.*

<sup>74</sup> Sidak, *supra* note 10, at 35.

<sup>75</sup> Proposed Deployment, *supra* note 41, at 331 (citing *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981); *Haig v. Agee*, 453 U.S. 280, 292–93 (1981)).

<sup>76</sup> See JENNIFER K. ELSEA & MATTHEW C. WEED, CONG. RESEARCH SERV., RL 31133, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS 2 (2014), <https://fas.org/sgp/crs/natsec/RL31133.pdf>.

<sup>77</sup> John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 Cal. L. Rev. 167, 248 (1996) (citing STORY, *supra* note 18, at § 1185).

South because he felt that doing so necessarily recognized the South as a separate sovereign.<sup>78</sup> Once the “Confederates bombarded Union soldiers at Fort Sumter, South Carolina on April 12, 1861,” the war began.<sup>79</sup> Thereafter, Lincoln ordered a naval blockade of Southern ports.<sup>80</sup> When ships were taken in the blockade, the Supreme Court adjudicated whether the blockade was constitutional because Congress had not declared war on the Confederacy. In *The Prize Cases*,<sup>81</sup> the Court stated:

By the Constitution, Congress alone has the power to declare a national or foreign war . . . . [The President] is bound to take care that the laws be faithfully executed[.] He has no power to initiate or declare a war either against a foreign nation or a domestic State. [But if] a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force.<sup>82</sup>

Over a century later, the Court confirmed this view when ruling for taxpayers who filed for an injunction against Department of Defense officials from “participating in any way in military activities in or over Cambodia or releasing any bombs which may fall in Cambodia.”<sup>83</sup> In sum, the need for a declaration can be determined by whether the United States’ military posture is offensive or defensive.

The power to declare war also endows Congress with power to authorize military force more broadly, even in limited military engagements that do not rise to warfare.<sup>84</sup> Congress has availed itself of this authority in two ways: the War Powers Resolution and the Authorizations for the Use of Military Force

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<sup>78</sup> See President Abraham Lincoln, Presidential Inauguration Speech, THE AMERICAN PRESIDENCY PROJECT (Mar. 4, 1861), <http://www.presidency.ucsb.edu/ws/index.php?pid=25818> (stating he would not ask Congress to declare war against the South).

<sup>79</sup> *Civil War Facts*, AM. BATTLEFIELD TR., <http://www.civilwar.org/education/history/faq/> (last viewed Aug. 27, 2018).

<sup>80</sup> *Id.*

<sup>81</sup> *The Prize Cases*, 67 U.S. (2 Black) 635 (1862).

<sup>82</sup> *Id.* at 668.

<sup>83</sup> *Holtzman v. Schlesinger*, 414 U.S. 1316, 1316–20 (1973) (vacating the stay of district court decision holding that bombing of Cambodia was unconstitutional after Justice Marshall denied the application to stay).

<sup>84</sup> See STORY, *supra* note 18, at § 1169.

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

*Id.*



(AUMF). Both are important safeguards on the Executive, but they have been rendered toothless in many ways: the Supreme Court and lower courts have foregone adjudicating potential violations of these provisions by the Executive due to standing or political concerns<sup>85</sup> that would likely have entailed more detailed explanations of the limits of the Declare War Clause.<sup>86</sup>

### C. *The Executive's Commander-in-Chief Powers*

Any argument for Congress's ability to escalate foreign policy responses will necessarily butt up against the Commander-in-Chief Clause. Understanding the Clause is therefore vital. This section will first examine the text of the Commander-in-Chief Clause. Next, this section looks at interpretations of the Commander-in-Chief Powers over time, from the time of the founding to its modern-day incarnation.

#### 1. The Text

The Clause reads: “[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[.]”<sup>87</sup>

On its face, the Clause “gives away remarkably little”; it is “a sphinx, and specifying its powers and the theory generating them is its riddle.”<sup>88</sup> “These cryptic words,” Justice Jackson famously said, “have given rise to some of the most persistent controversies in our constitutional history[.] [W]hat authority goes with the name has plagued Presidential advisers who would not waive or narrow it by nonassertion yet cannot say where it begins or ends.”<sup>89</sup>

But some important ideas can be gleaned from a plaintext reading. A “Commander”—especially one “In-Chief”—denotes one’s place in a hierarchy.<sup>90</sup>

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<sup>85</sup> See *infra* Part IV.

<sup>86</sup> See, e.g., *Massachusetts v. Laird*, 400 U.S. 886, 886 (1970) (denying motion for leave to file a bill of complaint by Massachusetts to declare the United States’ participation in the Indochina War “unconstitutional in that it was not initially authorized or subsequently ratified by Congressional declaration”); *Holmes v. United States*, 391 U.S. 936 (1968) (denying petition for certiorari); *Hart v. United States*, 391 U.S. 956 (1968) (denying petition for certiorari); *Mora v. McNamara*, 389 U.S. 934 (1967) (denying petition for certiorari).

<sup>87</sup> US CONST. art. II, § 2, cl. 1.

<sup>88</sup> David Luban, *On the Commander-In-Chief Power*, 81 S. CAL. L. REV. 477, 483 (2008).

<sup>89</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring).

<sup>90</sup> See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 768–69 (2008) (discussing the use of hierarchical terms in the Clause akin to other constitutional clauses).

The Clause also assumes the militia's existence and subordination to the President.<sup>91</sup> Interestingly, though, the President is not alone in calling up the militia: so, too, can Congress, as necessary.<sup>92</sup>

What substantive powers the Clause confers is more opaque. Professor David Barron (now Judge) and Professor Martin Lederman explain why:

[O]ne might conclude that the use of the root "command," when combined with the word "chief," suggests that the President's substantive powers are necessarily preclusive of statutory limitation[.] But this reading of the text of Article II would beg a host of difficult questions. As an initial matter, such an interpretation offers no convincing account of what it means to "command." If . . . bound to act in conformity with statutory requirements concerning [the President's] use of troops in the field, it is not clear whether such statutes would infringe his power to command, or instead simply define that power[.] If the words of the Commander in Chief Clause were construed to give the President an illimitable power to establish the modes and means of waging war, they would render trivial these extensive Article I powers or, at most, read them merely to give the legislature the power to adopt advisory regulations that the President would be free to disregard at his discretion.<sup>93</sup>

Additionally, the notion that the President commands all military forces is not genuinely disputed. Historical practice alone shows this. So too does the text: though the Marine Corps featured prominently in the Revolutionary War, it was briefly disbanded shortly after the War's conclusion, explaining its absence from the Clause. Similarly, flight would not arrive for another century, explaining the Army Air Corps or Air Force's absence. ALLAN REED MILLETT, *SEMPER FIDELIS: THE HISTORY OF THE UNITED STATES MARINE CORPS* 1–28 (1991).

<sup>91</sup> Who comprises the militia is an important question beyond the scope of this article. *See* *United States v. Miller*, 307 U.S. 174, 179 (1939) ("[T]he Militia comprised all males physically capable of acting in concert for the common defense."); *id.* at 178–79 ("[T]he States were expected to maintain and train [despite the] sentiment of the time [that] strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia—civilians primarily, soldiers on occasion.").

<sup>92</sup> U.S. CONST. art. I, § 6.

Congress shall have the Power . . . To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

*Id.* This includes both the organized and unorganized militia. *See* Act of Jan. 21, 1903, Pub. L. No. 57-33, 32 Stat. 775 (also known as The Militia Act of 1903).

<sup>93</sup> Barron & Lederman, *supra* note 90, at 770–71 (footnote omitted).

Given the uncertainty of the scope based solely on the text, our historical understanding of the Clause aids in shaping these substantive powers.

## 2. The Commander-in-Chief Clause as Understood at the Founding

Many have sought to analyze the breadth of power the Commander-in-Chief Clause conferred on the Executive at the Founding. Unsurprisingly, there is no consensus: some believe it to be limited, others broad. In this subsection, each side is explained.

### i. *Commander-in-Chief as a Limited Power*

“The term ‘Commander in Chief’ apparently derives from the reign of King Charles I in the seventeenth century, when it denoted a purely military post under the command of political superiors.”<sup>94</sup> Barron and Lederman dutifully trace the Founders’ intent by synthesizing the time’s recent history, including the appointment and powers of the British and Scottish Commanders-in-Chief.<sup>95</sup> Arguably as important, they note the “substantive restrictions” Parliament imposed so as to curtail the King’s military operations.<sup>96</sup>

Such restrictions are comparable to the laws Congress passed curtailing then-General Washington’s actions, and more broadly the interaction between Washington and his legislative equals. As leader of the Continental Army, George Washington “was constantly writing to the Continental Congress seeking permission for all manner of wartime decisions and eagerly awaiting Congress’s approval before implementing his proposals.”<sup>97</sup> But approval was far from guaranteed; indeed he was often rejected, setting an important precedent for the Commander-in-Chief’s power.<sup>98</sup> Moreover, Congress even “instruct[ed] the Commander in Chief and his subordinates[,] deal[ing] with matters from the deployment of troops to the interception of ships, and much else.”<sup>99</sup> Admittedly, this did not continue throughout the war, as it became impracticable; therefore,

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<sup>94</sup> *Id.* at 772 (citing 1 CHARLES M. CLODE, *THE MILITARY FORCES OF THE CROWN: THEIR ADMINISTRATION AND GOVERNMENT* 425–29 (London, John Murray 1869) (reproducing the 1638 appointment order of Thomas Earl of Arundel and Surrey as Commander-in-Chief)).

<sup>95</sup> *Id.* at 772–74.

<sup>96</sup> *Id.* at 773 (citing WILLIAM BANKS & PETER RAVEN-HANSEN, *NATIONAL SECURITY LAW AND THE POWER OF THE PURSE* 11–17 (1994)).

<sup>97</sup> *Id.* at 775.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 774 (citing ABRAHAM D. SOFAER, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS* 20–21, 388 n.76 (1976); FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, *TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW* 108–09 (2d ed. 1989)).

the Congress delegated *its* power to Washington to conduct operations as he saw fit.<sup>100</sup>

State constitutions also serve as important historical evidence. “Ten of the new state constitutions designated the state’s highest executive officer . . . as the ‘commander in chief’ of the state militia, while two others placed the top state executive official in control of the military but did not affix that specific title[.]”<sup>101</sup> Upon comparing these constitutions,

there was . . . no indication, let alone consensus, that the executive official named the “Commander in Chief” (or the one vested with ultimate control over the militia without such a title) could, by virtue of that office, act in derogation of statutory restrictions as to military matters. Indeed, not a single one of the new state constitutions expressly conferred such preclusive authority, nor did any of them suggest that the legislative branch would be prevented from interfering with the Commander in Chief’s conduct of military operations. Moreover, five of them—including the Massachusetts Constitution, which likely was the primary model for the federal Commander in Chief Clause in 1787—stated expressly that the governor would have to exercise his military powers in conformity with state law.<sup>102</sup>

Massachusetts and New Hampshire passed their constitutions closest in time to the Federal Constitution.<sup>103</sup>

After listing this broad set of substantive powers, however, the Massachusetts [and New Hampshire] Constitution[s] provided that each of the discrete powers listed, as well as any unenumerated ones the commander in chief might possess,

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<sup>100</sup> *Id.* at 778 (quoting 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 101 (Worthington Chauncey Ford et al. eds., 1904–1937)).

And whereas all particulars cannot be foreseen, nor positive instructions for such emergencies so before hand given but that many things must be left to your prudent and discreet management, as occurrences may arise upon the place, or from time to time fall out, you are therefore upon all such accidents or any occasions that may happen, to use your best circumspection and (advising with your council of war) to order and dispose of the said Army under your command as may be most advantageous for the obtaining the end for which these forces have been raised, making it your special care in discharge of the great trust committed unto you, that the liberties of America receive no detriment.

*Id.*

<sup>101</sup> *Id.* at 781. For a more substantive examination of state constitutions, see *id.* at 780–85.

<sup>102</sup> *Id.* at 782.

<sup>103</sup> *Id.* at 783.

would have ‘to be exercised agreeably to the rules and regulations of the [C]onstitution, and the laws of the land, and not otherwise.’<sup>104</sup>

Taken together, state constitutions support the claim that the Federal Constitution’s Commander-in-Chief Clause does not confer substantive superiority over the legislature in military efforts.

Another important source of understanding to buttress this is the Constitutional Convention. “The term ‘Commander in Chief’ first appeared at the Convention in the plan proposed by Charles Pinckney of South Carolina on May 29, 1787. It did not appear in the other three early proposed models—the Virginia and New Jersey plans, and Hamilton’s proposal.”<sup>105</sup> Three earlier constitutional designs would have granted the Executive plenary authority and would “have the direction of war when authorized or begun,”<sup>106</sup> but they were shot down in part because of this expansive Executive power.<sup>107</sup> Ultimately, the Clause’s more muted iteration—with a more limited understanding—“was passed unchanged and without recorded debate on August 27, 1787. This expeditious, unremarked assent again suggests a narrow, non-controversial conception of the clause.”<sup>108</sup>

Finally, the state ratification processes are illuminating. State ratification debates rarely addressed the Clause but, when it was brought up, concerns about the Clause conferring too much power to the Executive were insufficiently supported to gain traction and were largely mollified.<sup>109</sup> Arguably the stronger evidence during the ratification period, however, stems from *The Federalist Papers*. Alexander Hamilton sought to quell the public’s fear of a tyrannical dictator leading their nation into war—what they had fought against in the Revolutionary War—in *Federalist No. 69*: the Clause “would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy,” he wrote.<sup>110</sup> Indeed, Hamilton went further in a subsequent *Federalist* essay: “little need be said to explain or enforce” the Clause.<sup>111</sup>

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<sup>104</sup> *Id.* (citing MASS. CONST. of 1780, pt. 2, ch. 2, § 1, art. VII).

<sup>105</sup> *Id.* at 786–87 (footnotes omitted).

<sup>106</sup> *Id.* at 788 (citing 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 292 (Max Farrand ed., 1911) (Alexander Hamilton’s proposal)).

<sup>107</sup> *Id.* at 788–89 (discussing the plans put forward and ultimately knocked down).

<sup>108</sup> Lofgren, *supra* note 59, at 679.

<sup>109</sup> Barron & Lederman, *supra* note 90, at 794–95 (noting specifically the exchange between Roger Miller and Richard Spaight in North Carolina on July 28, 1788).

<sup>110</sup> THE FEDERALIST NO. 69 (Alexander Hamilton).

<sup>111</sup> THE FEDERALIST NO. 74 (Alexander Hamilton).

ii. *Commander-in-Chief as a Broad Power*

Others have concluded that the Founding generation viewed the clause “as investing the President with the fullest range of power understood at the time of the ratification of the Constitution as belonging to the military commander.”<sup>112</sup>

In first addressing the above contrary arguments, those espousing this position would distinguish the conclusions drawn from Washington’s conduct in the Revolution. This position has merit, as those requests were made under the Articles of Confederation, which did not even contemplate an Executive Branch with inherent—and ever-expanding—powers.<sup>113</sup> There, that evidence and any derivative conclusions are irrelevant.

But the Articles can also be used to support a wide breadth of executive powers. In the words of Chief Justice John Marshall, “[t]he confederation was, essentially, a league; and [C]ongress was a corps of ambassadors, to be recalled at the will of their masters.”<sup>114</sup> In other words:

The Articles of Confederation were nothing more than a tight treaty among thirteen otherwise independent states—a self-described “firm *league* of friendship” in which each state expressly “retains its sovereignty.” Like the later Congress of Vienna, its “Congress” was merely an international assembly of ambassadors, sent, recallable, and paid by state governments with each state casting a single vote as a state.<sup>115</sup>

Given this structure, the Articles can be interpreted to support a wide executive power. If the Congress was itself the Articles’ Executive, Congress’s broad executive powers were effectively gifted to the Executive’s next reincarnation—the Presidency.<sup>116</sup> These include superiority in international relations and the state’s security.

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<sup>112</sup> Memorandum from Jay S. Bybee, Assistant Att’y Gen., to Alberto Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002).

<sup>113</sup> See ARTICLES OF CONFEDERATION of 1781; Noah Feldman, *Trump’s War Powers Build on Obama’s, and Bush’s, and . . .*, BLOOMBERG: BLOOMBERG OPINION (Apr. 11, 2017, 10:22 AM), <https://www.bloomberg.com/view/articles/2017-04-11/trump-s-war-powers-build-on-obama-s-and-bush-s-and> (“Whether we like it or not, every president in the modern era has added on to the presidential power seized by his predecessors.”). See generally William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505 (2008) (arguing that the power of the Presidency has been expanding since the Founding).

<sup>114</sup> Letter from John Marshall to the Editor of the Alexandria Gazette (July 9, 1819), in JOHN MARSHALL’S DEFENSE OF MCCULLOCH V. MARYLAND 196, 199 (Gerald Gunther ed., 1969).

<sup>115</sup> Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 465 (1994).

<sup>116</sup> See Yoo, *supra* note 77, at 235–41.

Beyond the Articles, the Constitutional Convention can also be cited as evidence of wide executive powers under the Clause. The Convention aimed to imbue the Executive with increasing power in part because Washington was the presumed inaugural President.<sup>117</sup> For example, one delegate wrote:

[The President's Powers are] greater than I was disposed to make them. Nor . . . do I believe they would have been so great had not many of the members cast their eyes towards General Washington as President; and shaped their Ideas of the Powers to be given to a President, by their opinions of his Virtue.<sup>118</sup>

If the Convention generally sought to endow the Executive with outsized authority, this would extend to the President's war-making authority under the Commander-in-Chief Clause.

The text of the Constitution can also be reasonably interpreted to support a strong executive. As then-Professor Yoo wrote:

If the Framers intended to require congressional consent before war, they again were perfectly capable of making their wishes known, as evidenced by the second and third paragraphs of Section 10, which begin, "No state shall, without the Consent of Congress." Had the Framers intended to prohibit the President from initiating wars, or to require him to receive congressional approval beforehand, they easily could have incorporated a Section 10 analogue into Article II. ("The President shall not, without the Consent of Congress[.]") But the Framers chose not to, and instead left the allocation of war powers intact.<sup>119</sup>

Therefore, one can reasonably argue that the Executive's power in international relations and national security under Commander-in-Chief powers are vast.

### 3. Subsequent Interpretations and Modern Understanding

Some aspects of the Executive's Commander-in-Chief powers have been largely undisputed. The best example is the Executive's authority to declare an

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<sup>117</sup> See CLINTON ROSSITER, 1787: THE GRAND CONVENTION 222 (1966) (This describes Washington's history as implicitly nudging delegates "toward unity, strength, and independence in the executive[.]") Therefore, "[w]e cannot measure even crudely the influence of the commanding presence of the most famous and trusted of Americans[.]").

<sup>118</sup> Yoo, *supra* note 77, at 252 (citing Letter from Pierce Butler to Weedon Butler (May 5, 1788), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 301–02 (Max Farrand ed., 1911)).

<sup>119</sup> *Id.* at 255 (footnotes omitted).

emergency and “repel” it.<sup>120</sup> During the War of 1812, James Madison called up the militia pursuant to the 1795 Militia Act. The “Supreme Judicial Court of Massachusetts issued an advisory opinion declaring that the governors or commanders in chief of the several states had the exclusive right to determine whether exigent circumstances existed for the militia to be called out.”<sup>121</sup> The opinion meant each governor could veto the President’s calling up his or her state’s militia.

The Supreme Court unanimously disagreed: “We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons.”<sup>122</sup> Twenty-two years later, the Supreme Court even held that such a decision was beyond judicial review.<sup>123</sup>

This fervent debate over the Framers’ original intent for the Clause’s scope has been eclipsed by subsequent debates on the topic. What is more, historical interpretations may be of even greater importance in understanding this power:

[T]here are few areas of the law where originalism makes less sense than civilian-military relations. The differences between a few thousand musketeers and a military of over a million, garrisoned around the globe and backed by a thermonuclear force capable of depopulating continents in a matter of days, are simply too great.<sup>124</sup>

In analyzing historical interpretations, the same two factions emerge.

i. *Commander-in-Chief as a Broad, Substantive Power Historically*

Those who argue the Clause “vests the President with the plenary authority . . . to use military force abroad”<sup>125</sup> cabin their argument in the primacy of security: “It is ‘obvious and unarguable’ that no governmental interest is more

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<sup>120</sup> See *infra* note 174 and accompanying text.

<sup>121</sup> John C. Yoo & James C. Ho, *Commander of Militia*, HERITAGE FOUND.: THE HERITAGE GUIDE TO THE CONSTITUTION, <https://www.heritage.org/constitution/#!/articles/2/essays/87/commander-of-militia> (last visited Aug. 24, 2018 at 5:32 PM).

<sup>122</sup> *Martin v. Mott*, 25 U.S. 19, 30 (1827).

<sup>123</sup> *Luther v. Borden*, 48 U.S. 1, 43–45 (1849).

<sup>124</sup> Luban, *supra* note 88, at 508.

<sup>125</sup> Constitutional Authority, *supra* note 65, at 188.



compelling than the security of the Nation.”<sup>126</sup> For example, in a Memorandum to the President denoting executive authority to deploy forces abroad, John Yoo began his analysis with a famous *Federalist* passage by saying as much:

[B]ecause “the circumstances which may affect the public safety are [not] reducible within certain determinate limits, . . . it must be admitted, as a necessary consequence that there can be no limitation of that authority which is to provide for the defense and protection of the community in any matter essential to its efficiency.”<sup>127</sup>

Yoo notes other such passages and Supreme Court language echoing these sentiments.<sup>128</sup>

Next, this line of reasoning argues that the Commander-in-Chief Clause operates not as an island, but in the context of the Constitution’s greater text and structure. Specifically, it reads the Commander-in-Chief Clause in the context of the Vesting Clause, which provides: “The *executive Power* shall be vested in a President of the United States of America.”<sup>129</sup> The Vesting Clause demands “[t]he President [be] the sole organ of the nation in its external relations, and its sole representative with foreign nations.”<sup>130</sup> And if the “President [is the] sole organ of the federal government in the field of international relations - a power which does not require as a basis for its exercise an act of Congress,”<sup>131</sup> such policy decisions encompass military action as an arm of American foreign policy. Thus, when considered in conjunction, this line of argument goes, “[t]hese powers give the President broad constitutional authority to use military force in response to threats to the national security and foreign policy of the United States.”<sup>132</sup>

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<sup>126</sup> *Haig v. Agee*, 453 U.S. 280, 307 (1981) (citing *Aptheker v. Sec’y of State*, 378 U.S. 500, 509 (1964)).

<sup>127</sup> Constitutional Authority, *supra* note 65, at 189 (citing THE FEDERALIST NO. 23 (Alexander Hamilton)).

<sup>128</sup> See *id.* at 189 n.2 (citing THE FEDERALIST NO. 34 (Alexander Hamilton)); *id.* (citing THE FEDERALIST NO. 41 (James Madison)); *Dames & Moore v. Regan*, 453 U.S. 654, 662 (1981); *Miller v. United States*, 78 U.S. 268, 305 (1871); *Stewart v. Kahn*, 78 U.S. 493, 506 (1870)).

<sup>129</sup> U.S. CONST. art. II, § 1, cl. 1 (emphasis added).

<sup>130</sup> *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (citing 10 ANNALS OF CONGRESS 613 (1800) (statement of John Marshall)).

<sup>131</sup> *Id.* at 320; see also *Dep’t of the Navy v. Egan*, 484 U.S. 518, 529 (1988) (quoting *Haig*, 453 U.S. at 293–94); *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948) (“The Founders in their wisdom made [the President] not only the Commander-in-Chief but also the guiding organ in the conduct of our foreign affairs [with] vast powers in relation to the outside world.”).

<sup>132</sup> Constitutional Authority, *supra* note 65, at 190.

Arguably the strongest evidence that the Commander-in-Chief Clause endows the Executive with near-plenary military powers is past practice. If the President as Commander-in-Chief “has ‘the power to dispose of troops and equipment in such manner and on such duties as best to promote the safety of the country,’” he has certainly exercised that power.<sup>133</sup> As of 1966, “[i]n at least 125 instances, the President acted without express authorization from Congress.”<sup>134</sup> By 1990, that number surpassed 200.<sup>135</sup> Moreover, this authority has historically been stretched significantly. For example, the Korean War “lasted for three years and caused over 142,000 American casualties” without congressional approval.<sup>136</sup> These actions only serve to expand what Justice Frankfurter famously referred to as a historical “gloss on ‘executive Power’ vested in the President by § 1 of Art. II,”<sup>137</sup> brought on by “‘long-continued acquiescence’ from the legislative branch.”<sup>138</sup> In recent years, however, the War Powers Resolution and AUMFs are emblematic of Congress’s attempts to counteract the inertia of acquiescence and recalibrate the separation of war-making powers.

ii. *Clause as Strictly Hierarchical*

The latter faction is not without its justifications, too. Having examined military practices in the nation’s first years, Barron and Lederman concluded:

The first seven decades of constitutional practice were not marked by a surfeit of legislative action specifically restricting the President’s manner of engaging the enemy during battle. This was not the product of a consensus that the Commander in Chief must be unfettered in dealing with the enemy. It is better attributed to two other factors. First, Congress often made the unsurprising policy judgment that the President should be afforded broad discretion in deciding how to fight wars. In addition, and of more direct relevance for present purposes, the political branches, as well as courts and scholars throughout the period, shared the belief that the President was appropriately bound in his conduct of military operations by a body of widely

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<sup>133</sup> Proposed Deployment, *supra* note 41, at 330 (citing Training of British Flying Students in the U.S., 40 Op. Att’y Gen. 58, 62 (1941)).

<sup>134</sup> *Id.* at 331 (citing Leonard C. Meeker, Legal Adviser, Dep’t of State, *The Legality of United States Participation in the Defense of Vietnam*, 54 DEP’T ST. BULL. 474, 484–85 (1966)).

<sup>135</sup> See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990).

<sup>136</sup> Proposed Deployment, *supra* note 41, at 331 n.5.

<sup>137</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 611 (1952) (Frankfurter, J., concurring).

<sup>138</sup> Alison L. LaCroix, *Historical Gloss: A Primer*, 126 HARV. L. REV. F. 75, 76 (2012) (citing *Youngstown*, 343 U.S. at 613).

accepted international legal norms—namely, the “laws and usages” of war[, which] were customary, but they were still understood to constitute a critical component of the legal structure within which the President exercised his war powers.<sup>139</sup>

Supreme Court precedent can also be read to suggest that the Clause’s power is limited to hierarchical control of the armed forces, not substantive authority to decide whether to conduct military operations. When adjudicating the constitutionality of a blockade in the Spanish-American War, the Supreme Court relied on the fact that:

“[the President’s] duty and his power are purely military. As commander-in-chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy.”<sup>140</sup>

Explaining the President’s power as limited to military tactics in theater suggests a narrow reading of the Clause overall.

### III. THE DELIBERATE SEPARATION OF POWERS

“Even before the birth of this country, separation of powers was known to be a defense against tyranny.”<sup>141</sup> As Madison said, “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed[sic], or elective, may justly be pronounced the very definition of tyranny.”<sup>142</sup> The Framers therefore divvied up “powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial.”<sup>143</sup>

The “danger of one branch’s *aggrandizing its power* at the expense of another branch” cannot be overstated.<sup>144</sup> In Justice Kennedy’s words, “[l]iberty is always at stake when one or more of the branches seek to transgress the separation of powers.”<sup>145</sup>

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<sup>139</sup> Barron & Lederman, *supra* note 90, at 952.

<sup>140</sup> Fleming v. Page, 50 U.S. 603, 615 (1950).

<sup>141</sup> Loving v. United States, 517 U.S. 748, 756 (1996).

<sup>142</sup> THE FEDERALIST NO. 47 (James Madison).

<sup>143</sup> Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 483 (2010) (citing I.N.S. v. Chadha, 462 U.S. 919, 951 (1983)).

<sup>144</sup> *Id.* at 535 (citing Freytag v. Comm’r, 501 U.S. 868, 878 (1991)).

<sup>145</sup> Hamdan v. Rumsfeld, 548 U.S. 557, 638 (2006) (Kennedy, J., concurring in part) (“Concentration of power puts personal liberty in peril of arbitrary action by officials, an incursion

The potential perils of separation of powers questions are at their apex in foreign and military affairs. And the intricacies and nuances may be similarly thorny. Professor Kate Stith notes that:

in the area of foreign affairs, Congress itself would violate the Constitution if it refused to appropriate funds for the President to receive foreign ambassadors or to make treaties. Although Congress holds the purse-strings, it may not exercise this power in a manner inconsistent with the direct commands of the Constitution.<sup>146</sup>

In another example, Congress cannot use appropriations to bypass other constitutional commands such as passing bills of attainder.<sup>147</sup>

However, the commands to which Stith refers (including the pardon power) are all unitary, affixed to one only in the Executive branch. The “war powers,” as stated earlier, are not—they are divided amongst the Legislature *and* the Executive. So, does Congress’s foothold on *some* war powers confer the legislature authority to escalate a conflict? This subsection reviews the historical relationship between the two congressional powers above—spending money and declaring war—and the Executive’s Commander-in-Chief powers.

#### A. *The Separation of Spending and Commander Powers*

The power to carry out a war and the power to fund it were deliberately separated by the Founders—with good reasoning. They divide safeguards against an unchecked tyrant. Conversely, as Stith explained, spending powers had reciprocal limits on restricting other branches’ endowed powers. First, this section delves into the Framers’ motivations for checking the Executive’s war-making with the power of the purse. Then the section discusses how Congress has increased its role in the national security regime through its appropriations decisions.

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the Constitution’s three-part system is designed to avoid.”); *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring).

<sup>146</sup> Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343, 1351 (1988).

<sup>147</sup> *Id.* at 1351 n.33 (citing *United States v. Lovett*, 328 U.S. 303, 313–14 (1946) (“Congress cannot enact bills of attainder through appropriations legislation.”)). Stith also makes an astute point: direct interference is not the same as refusal to appropriate funds needed for the Executive to carry out his unitary obligations. *Id.* at 1351 n.32 (comparing *United States v. Klein*, 80 U.S. 128, 147–48 (1871) (“Congress may not interfere with pardon power”), with *Hart v. United States*, 118 U.S. 62 (1886) (“pardon authority does not alter power of Congress subsequently to refuse appropriations to pay debts to persons pardoned”).

### 1. At the Founding

All students of the past, the Founders were keenly aware of their former ruler's history.<sup>148</sup> Nowhere was that more evident than with the separation of powers. Chief among these separations was the need to divide the power to execute a military effort and to pay for it. "In the eyes of the Constitutional Convention, the problem was that the national government needed more power to raise funds and have a national military. For this, it was essential that the public be reassured that control of the purse strings would vest in the accountable Congress."<sup>149</sup> And commentary from the Framers confirmed this. At the Constitutional Convention, George Mason cautioned that the "purse [and] the sword ought never to get into the same hands [whether Legislative or Executive.]"<sup>150</sup> So the Framers devised a "deliberately divided government[,] making the President the commander in chief and reserving to Congress the power to finance military expeditions."<sup>151</sup> Jefferson praised this mechanism to Madison: "we have already given . . . 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."<sup>152</sup>

Separating the execution and funding of wars was not the only way in which the Founders exercised their historical knowledge to keep the Executive's war-making powers in check with the power of the purse. To fund some of the monarchy's unending and perilous wars, "[s]ome of the payments came from foreign governments. Because of these transgressions, England lurched into a civil war and Charles I lost both his office and his head."<sup>153</sup> Thus, the Framers also restricted how the Executive could fund his war efforts by requiring that all expenditures be taken from the Treasury.<sup>154</sup>

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<sup>148</sup> In his seminal work, David Luban artfully connects the Founding Fathers' understanding of "Julius Caesar, who crossed the Rubicon with his army and precipitated the civil wars that ended the Roman republic and made him the first emperor," as well as the English Civil War and Oliver Cromwell, by examining the writings of the Founding Generation and their references to each of these historical epochs. Luban, *supra* note 88, at 508–13.

<sup>149</sup> Charles Tiefer, *Can Congress Make a President Step Up a War?*, 71 LA. L. REV. 391, 406 n.89 (2011).

<sup>150</sup> Louis Fisher, *How Tightly Can Congress Draw the Purse Strings?*, 83 AM. J. INT'L. L. 758, 762 (1989) (citing 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 139–40 (M. Farrand ed., 1937)).

<sup>151</sup> *Id.* at 762.

<sup>152</sup> Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 392, 397 (Julian P. Boyd ed., 1958); see Fisher, *supra* note 150, at 762.

<sup>153</sup> Fisher, *supra* note 150, at 761.

<sup>154</sup> An Act of June 30, 1920, Pub. L. No. 66-7, 41 Stat. 104, 105 (1919).

## 2. Historical Developments in the Separation of Spending and War Powers

Noticeably, however, the lion's share of examples of congressional spending, both generally and within the defense realm, dealt only with Congress's decision to *spend* money. But what about the negative use of appropriations? That is where recent history comes prominently into play.

Throughout history, Congress has restricted federal funding. In fact, limiting funding provisos first began in defense appropriations.<sup>155</sup> Indeed, the issue of negative restrictions on defense appropriations was featured a myriad of times in the waning years of the 20th century.<sup>156</sup>

In the Vietnam Conflict's waning years, thrice Congress "attach[ed] amendments to legislation to restrict military actions by the United States in the Indochina region, as part of a larger effort to compel the withdrawal of U.S. military forces from the area."<sup>157</sup> One appropriations bill barred financial assistance to the Cambodian military or deploying troops in Cambodia,<sup>158</sup> and two barred funding "to support directly or indirectly combat activities in or over Cambodia, Laos, North Vietnam, and South Vietnam."<sup>159</sup> Other legislation passed at that time used appropriations to restrict troop deployments.<sup>160</sup>

Arguably the most famous use of Congress's budgetary curtailing was the Boland Amendment and caps on Nicaraguan intervention. The Amendment reads:

None of the funds provided in this Act may be used by the Central Intelligence Agency or the Department of Defense to furnish military equipment, military training or advice, or other

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<sup>155</sup> The phrase "None of the funds appropriated" was first written to cap civilian defense employees' salaries. *See id.* An extended version of that phrase—"None of the funds appropriated in this Act . . ."—first appears in a 1922 provision barring reckless spending in moving war material. An Act of June 30, 1923, ch. 253, Pub. L. No. 67-259, 42 Stat. 716, 717 (1922).

<sup>156</sup> *See* RICHARD F. GRIMMETT, CONG. RESEARCH SERVICE, RS20775, CONGRESSIONAL USE OF FUNDING CUTOFFS SINCE 1970 INVOLVING U.S. MILITARY FORCES AND OVERSEAS DEPLOYMENTS 5-6 (2001), [https://digital.library.unt.edu/ark:/67531/metacrs1442/m1/1/high\\_res\\_d/RS20775\\_2001Jan10.pdf](https://digital.library.unt.edu/ark:/67531/metacrs1442/m1/1/high_res_d/RS20775_2001Jan10.pdf).

<sup>157</sup> *Id.* at 2.

<sup>158</sup> Special Foreign Assistance Act of 1971, Pub. L. No. 91-652, § 5, 84 Stat. 1942, 1943 (1971).

<sup>159</sup> An Act of June 30, 1973, Pub. L. No. 93-50, § 307, 87 Stat. 99, 129 (1973); *see also* Continuing Appropriations, 1974, Pub. L. No. 93-52, § 108, 87 Stat. 130, 134 (1973) ("Notwithstanding any other provision of law, on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia.").

<sup>160</sup> Foreign Assistance Act of 1974, Pub. L. No. 93-559, §§ 21-27, 88 Stat. 1795, 1801-03 (1974).

support for military activities, to any group or individual, not part of a country's armed forces, for the purpose of overthrowing the Government of Nicaragua or provoking a military exchange between Nicaragua and Honduras.<sup>161</sup>

The following year, Congress capped funding for military and paramilitary operations in Nicaragua.<sup>162</sup> In 1984 and 1985, Congress returned to an out-and-out prohibition on such funds.<sup>163</sup> (The Iran-Contra scandal foiled the need for further bars, as it was politically untenable to maintain a presence there.<sup>164</sup>)

This tactic was again used in the 1990s. U.N. Security Council Resolution 794 unanimously approved a peacekeeping operation led by the United States.<sup>165</sup> In November 1993, Congress set funding for the country's intervention in the Somali Civil War to expire the following March.<sup>166</sup> Two years later, Congress placed a sunset on Operation Support Hope, the U.S. operation in the Rwandan Genocide.<sup>167</sup>

Congress has also used appropriations to cap troop deployments. The Foreign Assistance Act of 1974 "established a personnel ceiling of 4000 Americans in Vietnam within six months of enactment and 3000 Americans

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<sup>161</sup> Continuing Appropriations for Fiscal Year 1983, Pub. L. No. 97-377, § 793, 96 Stat. 1830, 1865 (1982).

<sup>162</sup> Department of Defense Appropriation Act, 1984, Pub. L. No. 98-212, § 775, 97 Stat. 1421, 1452 (1983); Intelligence Authorization Act for Fiscal Year 1984, Pub. L. No. 98-215, §§ 108–109, 97 Stat. 1473, 1475 (1983).

<sup>163</sup> Continuing Appropriations for Fiscal Year 1985, Pub. L. No. 98-473, § 8066, 98 Stat. 1837, 1935 (1984); Intelligence Authorization Act for Fiscal Year 1985, Pub. L. No. 98-618, §801, 98 Stat. 3298, 3304 (1984); International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83, § 722, 99 Stat. 190, 249–58 (1985).

<sup>164</sup> Notably, the Iran-Contra was a result of the Boland Amendment. The Administration's National Security Council concluded that the Amendment left legal wiggle room for communication with the Contras. See Memorandum from J. R. Scharfen to Robert W. Pearson (Aug. 23, 1985), [https://www.brown.edu/Research/Understanding\\_the\\_Iran\\_Contra\\_Affair/documents/d-nic-21.pdf](https://www.brown.edu/Research/Understanding_the_Iran_Contra_Affair/documents/d-nic-21.pdf). Moreover, the Administration openly flouted appropriations law in foreign affairs. For example, Colonel Oliver North and Admiral John Poindexter argued that President Reagan "could authorize and conduct covert operations with nonappropriated funds" and that he need not disclose such operations because they "were private, third-country funds," respectively. Fisher, *supra* note 150, at 764–65, 764 n.42, 765 n.44.

<sup>165</sup> See S.C. Res. 794 (Dec. 3, 1992).

<sup>166</sup> See Department of Defense Appropriations Act, 1994, Pub. L. No. 103-139, § 8150, 107 Stat. 1418, 1476 (1993).

<sup>167</sup> See Department of Defense Appropriations Act, 1995, Pub. L. No. 103-335, tit. IX, 108 Stat. 2599, 2659–60 (1994).

within one year.”<sup>168</sup> The Lebanon Emergency Assistance Act required the Executive to seek specific authorization to deploy substantially more troops than were already abroad at the time in Lebanon.<sup>169</sup> And in 2000, Congress capped the number of military personnel in Colombia.<sup>170</sup>

These examples demonstrate how Congress has maintained a forceful role in the national security regime via appropriations decisions. And appropriations law is not the only area in which Congress maintains a foothold in the military and war fighting apparatus: only Congress has the right to declare war.

*B. Congress's Power to Declare War Versus the President's Commander-in-Chief Power*

Having only been officially issued five times in our nation's history,<sup>171</sup> a declaration of war is among the most important types of legislation that can be passed. But certainly, declarations of war are themselves different than executions of war.<sup>172</sup> Therefore, it is important to examine the distinction between declaring war and executing it, dating back to our nation's birth.

1. At the Founding

During the Constitutional Convention, James Madison noted that:

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<sup>168</sup> *Congressional Limitations and Requirements for Military Deployments and Funding*, CTR. AM. PROGRESS (Jan. 9, 2007, 9:00 AM), <https://www.americanprogress.org/issues/security/news/2007/01/09/2449/congressional-limitations-and-requirements-for-military-deployments-and-funding/>.

<sup>169</sup> Lebanon Emergency Assistance Act of 1983, Pub. L. No. 98-43, § 4, 97 Stat. 214, 215 (1983).

<sup>170</sup> Military Construction Appropriations Act, 2001, Pub. L. No. 106-246, § 3204, 114 Stat. 511, 575-76 (2000).

<sup>171</sup> See ELSEA & WEED, *supra* note 76, at 1-5 (The War of 1812, Mexican-American War, Spanish-American War, and World Wars I and II).

<sup>172</sup> One need only look to the 11 declarations of war made in our nation's history (two were made in World War I and six in World War II). *Id.* at 1, 4. Of the five Presidents to have signed those declarations, only three served in uniform prior to being named Commander-in-Chief. See *id.* at 4; Barri Segal, *Donald Trump Isn't the First President Who Didn't Serve in the Military*, CHEATSHEET (Feb. 24, 2018), <https://www.cheatsheet.com/culture/donald-trump-isnt-the-first-president-who-didnt-serve-in-the-military.html/>. Moreover, 15 Presidents never held a political office before assuming ultimate military command. Barri Segal, *Donald Trump Isn't the First President Who Didn't Serve in the Military*, CHEATSHEET (Feb. 24, 2018), <https://www.cheatsheet.com/culture/donald-trump-isnt-the-first-president-who-didnt-serve-in-the-military.html/>.



Mr. Mason was [against] giving the power of war to the Executive, because [he was] not safely to be trusted with it; or to the Senate, because [it was] not so constructed as to be entitled to it. He was for clogging rather than facilitating war; but for facilitating peace.<sup>173</sup>

Resultantly, it can be surmised that the Framers endowed the President with the right to “repel and not to commence war,” but to endow the legislature the right to “declare” it.<sup>174</sup> Moreover, the South Carolina Legislature’s Ratification Debate confirms this theory.<sup>175</sup>

## 2. Interpretations and Actions Taken Post-Founding

According to Harold Koh, historical precedent served as “quasi-constitutional custom” in foreign affairs.<sup>176</sup> It is therefore important to look to how this thorny separation of powers question has been answered in practice historically.

Certainly some historical points can be marshalled to demonstrate Congressional dominance. Consider a 1790 report filed by then-Secretary of State Thomas Jefferson. After pirates captured several American vessels and took over 100 prisoners,

Jefferson acknowledged that the legislature controlled not only the general question of whether to offer a military response at all, but also the nature of any such response: “If war, they will consider how far our own resources shall be called forth, and

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<sup>173</sup> RECORDS, *supra* note 53, at 548.

<sup>174</sup> *Id.*

<sup>175</sup> 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 250 (Max Farrand, ed., 1911).

It was at first proposed to vest the sole power of making peace or war in the Senate; but this was objected to as inimical to the genius of a republic, by destroying the necessary balance they were anxious to preserve. Some gentlemen were inclined to give this power to the President; but it was objected to, as throwing into his hands the influence of a monarch, having an opportunity of involving his country in a war whenever he wished to promote her destruction.

*Id.*

<sup>176</sup> HAROLD H. KOH, THE NATIONAL SECURITY CONSTITUTION 70 (1990); *see also* Proposed Deployment, *supra* note 41, at 331 (“[T]he relationship of Congress’s power to declare war and the President’s authority as Commander in Chief and Chief Executive has been clarified by 200 years of practice.”).

how far they will enable the Executive to engage, in the forms of the constitution, the co-operation of other Powers.”<sup>177</sup>

The Supreme Court upheld this view in *Miller v. United States*.<sup>178</sup> There, the Court ruled on the legality of a court order declaring the forfeiture of personal property during the Civil War. The Court dove deeper into the Declare War clause:

The Constitution confers upon Congress expressly power to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted.<sup>179</sup>

The Court later reaffirmed this principle in *United States v. Macintosh*.<sup>180</sup> There, the Court decided whether a Canadian immigrant should have his naturalization petition denied because he “was not attached to the principles of the Constitution,” and he “would not promise in advance to bear arms in defense of the United States unless he believed the war to be morally justified.”<sup>181</sup> Again, the Court addressed Congress’s authority to declare war: “In express terms Congress is empowered ‘to declare war,’ which necessarily connotes the plenary power to wage war with all the force necessary to make it effective.”<sup>182</sup>

But as much as some precedent militates towards strict Congressional assent to military actions, some legal arguments and historical practice militate against it.

One legal argument was put forward by then-Assistant Attorney General William Rehnquist. Internally assessing the President’s authority to deploy troops to Vietnam, Rehnquist looked again at the interplay of the Vesting and Commander-in-Chief Clauses. The Vesting Clause, Rehnquist wrote, demands

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<sup>177</sup> Barron & Lederman, *supra* note 90, at 956 (citing Thomas Jefferson, *Report of the Secretary of State Relative to the Mediterranean Trade* (1790), reprinted in 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 104, 105 (Walter Lowrie & Walter S. Franklin eds., Washington, Gales & Seaton 1833)).

<sup>178</sup> 78 U.S. 268, 305 (1870) (This is not the name-fellow case regarding the regulation of shotguns famously discussed in 2nd Amendment cases.).

<sup>179</sup> *Id.* at 305.

<sup>180</sup> 283 U.S. 605 (1931), *overruled by* *Girouard v. United States*, 328 U.S. 61 (1946) (holding that an alien who is willing to serve as a non-combatant in the U.S. army but is unwilling to bear arms due to religious reasons may be admitted citizenship under the Nationality Act of 1940, as amended by the Act of March 27, 1942).

<sup>181</sup> *Id.* at 613.

<sup>182</sup> *Id.* at 622.

“any ambiguities in the allocation of a power that is executive in nature—such as the power to conduct military hostilities— . . . be resolved in favor of the Executive Branch.”<sup>183</sup> In other words, Rehnquist argued that the Framers intended to fill any space between branches in favor of the Executive. Past government action may offer the Executive the stronger argument.

Historical practice supplies numerous cases in which Presidents, acting on the claim of inherent power, have introduced armed forces into situations in which they encountered, or risked encountering, hostilities, but which were not “wars” in either the common meaning or the constitutional sense. As the Supreme Court observed in 1990, “[t]he United States frequently employs Armed Forces outside this country—over 200 times in our history—for the protection of American citizens or national security.” In at least 125 instances, the President acted without express authorization from Congress.<sup>184</sup>

The War Powers Resolution (“WPR”) has tried to curtail this practice by mandating Congressional approval for even the deployment of troops into hostilities that fall short of “war.”<sup>185</sup> The WPR’s critical reception and success have been lukewarm at best.<sup>186</sup>

This was proven true in President Clinton’s decision-making process to send military personnel to Haiti. In 1991, Haitian General Raoul Cédras orchestrated a coup d’état to overthrow President Jean-Bertrand Aristide.<sup>187</sup> After prolonged (and unavailing) diplomatic efforts,<sup>188</sup> Clinton lobbied the U.N. Security Council (“UNSC”) for support. On July 31, 1994, the UNSC passed Resolution 940 authorizing military intervention in Haiti.<sup>189</sup> It was “the first resolution authorizing the use of force to restore democracy for a member

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<sup>183</sup> Constitutional Authority, *supra* note 65, at 194.

<sup>184</sup> Proposed Deployment, *supra* note 41, at 331 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990)).

<sup>185</sup> War Powers Resolution of 1973, 50 U.S.C. §§ 1541–1548 (2012).

<sup>186</sup> See, e.g., Louis Fisher & David Gray Adler, *The War Powers Resolution: Time to Say Goodbye*, 113 POL. SCI. Q. 1, 1 (1998) (The Resolution “was ill conceived and badly compromised from the start, replete with tortured ambiguity and self-contradiction.”); Jack Goldsmith, *The Constitutionality of the Syria Strike Through the Eyes of OLC (and the Obama Administration)*, LAWFARE BLOG (Apr. 7, 2017, 7:31 AM), <https://www.lawfareblog.com/constitutionality-syria-strike-through-eyes-olc-and-obama-administration> (referring to it as “Swiss cheese”).

<sup>187</sup> *Intervention in Haiti, 1994–1995*, OFF. HISTORIAN, DEP’T OF STATE, <https://history.state.gov/milestones/1993-2000/haiti> (last visited Aug. 24, 2018, 8:22 PM).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

nation.”<sup>190</sup> Four Senators wrote to Assistant Attorney General Walter Dellinger “request[ing] a copy or summary of any legal opinion that may have been rendered, orally or in writing, by this Office concerning the lawfulness of the President’s planned deployment of United States military forces into Haiti.”<sup>191</sup> Dellinger issued a Memorandum with three conclusions: that appropriations signaled sufficient congressional consent; that the planned deployment would not violate the War Powers Resolution; and that the operation “was not a ‘war’ in the constitutional sense. Specifically, the planned deployment was to take place with the full consent of the legitimate government, and did not involve the risk of major or prolonged hostilities or serious casualties to either the United States or Haiti.”<sup>192</sup>

The final conclusion offers an insight into the question we face here: given potentially low-level military action, whether the Commander-in-Chief needs Congressional approval may simply depend on “the anticipated nature, scope, and duration of the planned deployment, and in particular the limited antecedent risk that United States forces would encounter significant armed resistance or suffer or inflict substantial casualties as a result of the deployment.”<sup>193</sup> The more substantial these factors are, the more likely the Executive needs approval.

But a larger principle may be gleaned about discretion in relation to the importance of the potential conflict. Relatively low-level conflicts endow the President discretion: pedestrian, Congressional approval is not sought, let alone required. The contrapositive means that if Congress’s blessing is needed, the matter is quite serious. Yet it also means that the President has less discretion to make military and foreign policy decisions against the wishes of Congress.

#### IV. CAN CONGRESS DO ANYTHING TO RAMP UP A WAR EFFORT?

Having explored these powers in isolation and in conflict, as well as their historical deployments, the article turns to the question at hand: can Congress increase the aggressiveness of a military effort? First, this section reviews the only other scholarship that endeavored to answer this question and why it did so in the negative. Then, this section argues the affirmative, while noting practical considerations that are necessarily implicated.

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<sup>190</sup> *Id.*

<sup>191</sup> Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C. 173, 173 (1994).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 179.

A. *Existing Literature*

Only one article has addressed the question of congressional catalyzing more aggressive military efforts; it argues Congress has no such authority. One other article tangentially discusses the topic.

In 2010, Charles Tiefer examined this question. Tiefer begins by citing historical precedent, specifically John Adams being compelled by a more belligerent Congress to enter the Quasi-War with France in 1798 when Congress “increased the authorized activity beyond what it had enacted earlier.”<sup>194</sup> Similarly,

Congress pushed President Madison into the War of 1812, and a similar Congress pushed President McKinley into the Spanish-American War. Although Congress had not convened when President Lincoln dealt with the onset of the Civil War, once it did convene, it showed great vigor in wanting to fight the war, including, sometimes, more of a taste for “hawkish” measures than Lincoln.<sup>195</sup>

These examples are not solely of a bygone era. For example, by relieving General Douglas MacArthur for his efforts to expand the Korean War,<sup>196</sup> President Truman was viewed as more dovish than Congress.<sup>197</sup>

Tiefer then analyze whether appropriations can press a President into “stepping up” a war effort.<sup>198</sup> Tiefer offers multiple, varied examples of appropriations that conflict with the Commander-in-Chief’s authority, namely “command, disposition of forces, and military campaigns.”<sup>199</sup> Tiefer suggests that such scenarios “shak[e] up habitual ways of thinking” about the

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<sup>194</sup> Tiefer, *supra* note 149, at 410.

<sup>195</sup> *Id.*; see also Sidak, *supra* note 10, at 85–86.

Yet, history provides a number of commonly ignored examples: John Adams resisted calls for a declaration of war against France in 1798 and instead sought authority for the limited and undeclared Quasi-War; James Madison was ambivalent about declaring war on Britain in 1812; Grover Cleveland in 1896 rebuffed the proposal by various members of Congress to declare war on Spain; William McKinley in 1898 reluctantly conceded to the same war fervor; and Woodrow Wilson successfully campaigned for reelection in 1916 on the slogan, “He kept us out of war.”

*Id.* (footnotes omitted).

<sup>196</sup> See *FAQ: Why Did President Truman Dismiss General MacArthur*, HARRY S. TRUMAN PRESIDENTIAL LIBR., <https://www.trumanlibrary.org/trivia/macarth.htm> (last visited Aug. 24, 2018).

<sup>197</sup> See Tiefer, *supra* note 149, at 433–34.

<sup>198</sup> See *id.* at 417.

<sup>199</sup> Tiefer, *supra* note 149, at 400 (footnotes omitted).

Executive.<sup>200</sup> Resultantly, he concludes that “[t]he constitutional text and original intent accord[ed] enormous power to Congress through the ‘No Appropriations’ clause, but only as used to limit or to constrain military activity. The clause does not empower Congress to push for more military activity.”<sup>201</sup>

Years ago, Gregory Sidak performed an exhaustive examination on what it means to declare war, albeit in the context of discussing Congress’s authority to regulate and oversee the “prosecution of war,” or troops’ actions.<sup>202</sup> Particularly, Sidak assessed the viability of “us[ing] the appropriations process” and “the equitable powers of the judiciary to enjoin the President.”<sup>203</sup> Despite focusing on ramping down war, he touched on the alternative, noting the possibility of stepping up military aggressiveness using a declaration of war so long as Congress “muster[s] a supermajority in both houses to declare war over the President’s dissent.”<sup>204</sup>

### B. *Why Congress Is Authorized to Step up Military Efforts*

“[I]n the competition for power in foreign relations, Congress has ‘an impressive array of powers expressly enumerated in the Constitution.’”<sup>205</sup> With that in mind, this section puts forward a legal argument as to why Congress can compel a pacifistic President to increase the intensity of military action.

#### 1. *Youngstown’s Ebbs*

In “the most celebrated opinion in the most famous presidential power decision in Supreme Court history,”<sup>206</sup> Justice Jackson’s concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*<sup>207</sup> reads: “Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.”<sup>208</sup> “He then went on to fashion a sliding scale for the exercise of

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<sup>200</sup> *Id.* at 402.

<sup>201</sup> *Id.* at 417.

<sup>202</sup> *See* Sidak, *supra* note 10.

<sup>203</sup> *Id.* at 34 (citations omitted).

<sup>204</sup> *Id.* at 85.

<sup>205</sup> *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 199 (2012) (citations omitted).

<sup>206</sup> Goldsmith, *supra* note 186.

<sup>207</sup> 343 U.S. 579 (1952).

<sup>208</sup> *Id.* at 635 (Jackson, J., concurring).

executive power vis-à-vis congressional power,”<sup>209</sup> constructing three “somewhat over-simplified grouping[s] of practical situations.”<sup>210</sup>

First, “[w]hen 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.” Second, “[w]hen 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.” In such a circumstance, Presidential authority can derive support from “congressional inertia, indifference or quiescence.” Finally, “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb,” and the Court can sustain his actions “only by disabling the Congress from acting upon the subject.”<sup>211</sup>

This “familiar tripartite scheme provides the accepted framework for evaluating executive action” in separation of powers questions; categorization lurks ever-present, permeating all such debates, particularly so in national security and foreign relations questions.<sup>212</sup> And while the framework was devised to adjudicate a President taking action, it similarly applies to the President’s responses—or lack thereof<sup>213</sup>—to congressional action. Admittedly, offering a perspective here is difficult in abstraction,<sup>214</sup> but a few core concepts can be fleshed out.

If Congress moves to increase our aggressiveness in foreign policy in response to what it perceives as insufficient executive action and with an explicit

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<sup>209</sup> Alex Kozinski, *Executive Power in Foreign Affairs*, 30 HARV. J.L. & PUB. POL’Y 137, 137 (2006).

<sup>210</sup> *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

<sup>211</sup> *Medellin v. Texas*, 552 U.S. 491, 524–25 (2008) (citations omitted) (quoting *Youngstown*, 343 U.S. at 635, 637–38).

<sup>212</sup> *Id.* at 524; *see, e.g.*, *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083 (2015); *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507, 552 (2004) (Souter, J., concurring in part and dissenting in part); *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981).

<sup>213</sup> *Cf. Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 612 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (citing *Archie v. Racine*, 847 F.2d 1211, 1213 (7th Cir. 1988) (en banc)) (“As Judge Easterbrook noted, ‘it is possible to restate most actions as corresponding inactions with the same effect.’”).

<sup>214</sup> As I state later in my conclusion, further analysis of this question is needed with specific potential legislative solutions in mind for more pointed legal analysis.

intent to remedy the inadequacy, the President would almost certainly not be “act[ing] pursuant to an express or implied authorization of Congress,”<sup>215</sup> foreclosing Category One. The same argument also runs counter to the requisite “absence of either a congressional grant or denial of authority”<sup>216</sup> of Category Two. That leaves only Category Three.

That the President operates in Category Three is not determinative, but it is constitutionally treacherous. When in this category, the President may “rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”<sup>217</sup> Thus, if Congress’s actions to ramp up war fall under its powers, the measure will be found valid and the President’s contrary response will be unconstitutional; if the measure is not clearly a congressional prerogative, the President will have the better argument.

Now, if Congress passed a law that dives deep into military strategy and operational tactics—for example, where the Seventh Fleet should be—the President’s actions are likely upheld: “As commander-in-chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy.”<sup>218</sup>

Short of detailed tactical commands, the answer is far hazier. *Brown v. United States*<sup>219</sup> is exemplary:

*Brown* arose from the War of 1812, in which Congress both declared war and authorized the President in general terms to use force. The issue was whether Congress had thereby authorized the President to confiscate enemy property located within the United States—an action permitted by the laws of war. The declaration did not authorize the confiscation, concluded the Court, because it had “only the effect” of creating a state of war. The Court further held that the authorization to use force did not support the confiscation, reasoning that the

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<sup>215</sup> *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

<sup>216</sup> *Id.* at 637.

<sup>217</sup> *Id.*

<sup>218</sup> *Fleming v. Page*, 50 U.S. 603, 615 (1850); *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 531 (2004) (“Without doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them.”); *Dep’t of Navy v. Egan*, 484 U.S. 518, 530 (1988) (noting the reluctance of the courts “to intrude upon the authority of the Executive in military and national security affairs”); *Youngstown*, 343 U.S. at 587 (acknowledging “broad powers in military commanders engaged in day-to-day fighting in a theater of war”).

<sup>219</sup> 12 U.S. 110 (1814).



President could not seize enemy property in the United States without specific authorization from Congress.<sup>220</sup>

Other constitutional provisions, court precedents, and past practices permit onlookers to hone in on whether provisions to ratchet up military efforts fall under the President's or Congress's constitutional powers.

## 2. Enumerated Powers Section as Precedent for Congressional Aggressiveness in International Relations

One argument to support Congress's authority to enact a law stepping up war efforts stems from its other enumerated powers that, when effectuated, could *cause* war. And this is not simply theoretical: Congress *has* taken action "to increase its powers" in foreign affairs using this reasoning.<sup>221</sup> This subsection reviews such actions in theory and practice.

### i. Enumerated Powers Short of Declaring War

The Constitution grants Congress the authority "[t]o regulate commerce with foreign nations."<sup>222</sup> Congress exercises that power in multiple ways, including by passing the Trading with the Enemy Act,<sup>223</sup> the International Emergency Economic Powers Act,<sup>224</sup> and the Foreign Assistance Act,<sup>225</sup> which permit the President to enact an embargo at his discretion on a nation if certain conditions are met.<sup>226</sup>

Congress has also enacted prohibitions against specific nations: the Cuban Democracy Act;<sup>227</sup> Cuban Liberty and Democratic Solidarity (Libertad)

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<sup>220</sup> Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2093 (2005) (footnotes omitted) (citing *Brown*, 12 U.S. at 122–23, 125–27).

<sup>221</sup> Memorandum to Fred F. Fielding, Counsel to the President, from Theodore B. Olson, Assistant Att'y Gen., Office of Legal Counsel (Mar. 23, 1984), <https://www.justice.gov/olc/page/file/936126/download>.

<sup>222</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>223</sup> Trading with the Enemy Act, Pub. L. No. 65-91, ch. 106, 40 Stat. 411 (codified at 50 U.S.C. §§ 4301–4341 (2018)).

<sup>224</sup> International Emergency Economic Powers Act, Pub. L. No. 95-223, tit. II, 91 Stat. 1626 (codified at 50 U.S.C. §§ 1701–1708 (2018)).

<sup>225</sup> Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424 (codified at 22 U.S.C. § 2151 *et seq.* (2018)).

<sup>226</sup> Including a declaration of war, discussed *infra* Section IV.B.2.iii.

<sup>227</sup> Cuban Democracy Act of 1992, Pub. L. No. 102-484, 106 Stat. 2575 (codified at 22 U.S.C. § 6001 *et seq.* (2018)).

Act;<sup>228</sup> Iran and Libya Sanctions Act;<sup>229</sup> Trade Sanctions Reform and Export Enhancement Act;<sup>230</sup> Iran Freedom Support Act;<sup>231</sup> and the Comprehensive Iran Sanctions, Accountability, and Divestment Act.<sup>232</sup> While embargoes and exports are typically framed as economic and international relations actions, they are at their root examples of Congress's authority to take aggressive action to escalate tensions with foreign nations. The upshot of such actions is that Congress can dictate the conditions under which tensions are escalated, which necessarily assumes its role in such escalations more broadly.

Powers more directly associated with militaristic action are even clearer demonstratives. As stated earlier, Justice Jackson once wrote, "out of seventeen specific paragraphs of congressional power, eight of them are devoted in whole or in part to specification of powers connected with warfare."<sup>233</sup> For example, Congress can dictate rules regarding enemy capture<sup>234</sup> and "define and punish piracies and felonies committed on the high seas, and offenses against the law of nations."<sup>235</sup>

In one compelling example, Congress can "grant letters of marque and reprisal,"<sup>236</sup> which authorize privateers to attack and capture enemy vessels.<sup>237</sup> These grants are incredibly important to the Framers' grant of power to Congress in international relations:

Letters of marque and reprisal were one way of referring to what were known as imperfect wars, special wars, limited wars—all of which constituted something less than full-scale warfare . . . . Blackstone noted that the "prerogative of granting [letters of

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<sup>228</sup> Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (codified at 22 U.S.C. §§ 6021–6091 (2018)).

<sup>229</sup> Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541 (codified at 50 U.S.C. §§ 1701 *et seq.* (2018)).

<sup>230</sup> Trade Sanctions Reform and Export Enhancement Act of 2000, Pub. L. No. 106-387, 114 Stat. 1549 (codified at 22 U.S.C. §§ 7201–7211 (2018)).

<sup>231</sup> Iran Freedom Support Act, Pub. L. No. 109-293, 120 Stat. 1344 (codified at 50 U.S.C. § 1701, 22 U.S.C. § 2151 (2018)).

<sup>232</sup> Comprehensive Iran Sanctions, Accountability and Divestment Act of 2010, Pub. L. No. 111-195, 124 Stat. 1312 (codified at 22 U.S.C. § 8501 *et seq.* (2018)).

<sup>233</sup> *Johnson v. Eisentrager*, 339 U.S. 763, 788 (1950).

<sup>234</sup> U.S. CONST. art I, § 8, cl. 11 ("make rules concerning captures on land and water").

<sup>235</sup> *Id.* § 8, cl. 10.

<sup>236</sup> *Id.* § 8, cl. 11.

<sup>237</sup> John C. Yoo & James C. Ho, *Marque and Reprisal*, HERITAGE FOUND.: THE HERITAGE GUIDE TO THE CONST., <http://www.heritage.org/constitution/#!/articles/1/essays/50/marque-and-reprisal> (last visited Aug. 21, 2018).

marque and reprisal] . . . is nearly related to . . . making war; this being indeed only an incomplete state of hostilities.”<sup>238</sup>

Because privateers—essentially deputized soldiers—remained outside the executive branch’s command and were subject only to rules set by legislatures’ judicial review,<sup>239</sup> scholars believe this authority “support[s] congressional authority over all military actions short of declared war.”<sup>240</sup>

Additionally, only Congress can call up the militia.<sup>241</sup> That the Framers gave Congress rather than the President that power demonstrates their intent to directly endow Congress a say in our national security apparatus. Moreover, because doing so could bring about war by escalating our adversaries’ military postures, one can infer that the Framers intended to give Congress the power to escalate *our* foreign policy posture. In what political scientists term a “security dilemma,” a state’s “attempts to [protect itself] alarms other[s] . . . who fear that undesirable precedents will be set, or who believe that their own vulnerability will be increased.”<sup>242</sup> As enemy nations incorrectly view defensive actions as offensive, they respond in kind, creating a self-perpetuating cycle. Calling a militia up creates such a dilemma: if Congress calls up a militia, other nations could respond in kind, heightening tensions and leading ineluctably from war games to war. That Congress can take such an action is an important data point to infer the Framers’ intent to imbue Congress with the ability to take escalating actions in international relations.

ii. *Congress and State Militias*

Article I, Section 10 of the Constitution provides: “No State shall, *without the Consent of Congress*, . . . keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with . . . a foreign Power, or engage

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<sup>238</sup> Jules Lobel, “*Little Wars*” and the Constitution, 50 U. MIAMI L. REV. 61, 68 (1995) (alteration in original) (footnotes omitted).

<sup>239</sup> See C. Kevin Marshall, *Putting Privateers in Their Place: The Applicability of the Marque and Reprisal Clause to Undeclared Wars*, 64 U. CHI. L. REV. 953, 959–63 (1997).

<sup>240</sup> *Id.* at 953.

<sup>241</sup> The President may only do so under statutory authority. See, e.g., The Militia Act of 1795, ch. 36, 1 Stat. 424 (repealed in part 1861 and current version at 10 U.S.C. §§ 331–335 (2018)); The Insurrection Act of 1807, ch. 39, 2 Stat. 443 (current version at 10 U.S.C. §§ 331–335 (2018)); The Suppression of the Rebellion Act of 1861, ch. 25, 12 Stat. 281 (current version at 10 U.S.C. §§ 331–335 (2018)); Ku Klux Klan (Civil Rights) Act of 1871, ch. 22, §§ 3–4, 17 Stat. 13, 14–15 (expired in part 1873 and current version at 10 U.S.C. § 333 (2018)); Stephen I. Vladeck, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 152 n.9 (2004) (citing Calling Forth Act of 1792, ch. 28, 1 Stat. 264 (repealed 1795)).

<sup>242</sup> Robert Jervis, *Cooperation Under the Security Dilemma*, 30 WORLD POL. 167, 169 (1978).

in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”<sup>243</sup>

In lay terms, Congress is the states’ constitutional gatekeeper to maintaining armies, including personnel and materiel. These forces—the National Guardspersons by 1903<sup>244</sup>—would be under their Governor’s control.<sup>245</sup> Thus, others—governors—must too be authorized to “make” war, further diminishing the President’s claim of sole ownership of military troop direction, let alone foreign affairs broadly.

The upshot of these enumerated powers is that the Constitution anticipates that Congress can authorize aggressive actions, including war-like actions, without presidential consultation or assent. Moreover, the Framers explicitly ensured that Congress could play a substantive role in the foreign policy apparatus, including our troops’ posture. Thus, any actions Congress undertakes to catalyze more aggressive foreign policy would fit squarely within the Framers’ original design of Congress’s powers, affirming their constitutionality.

### iii. *Congress’s Power to Declare War*

As detailed earlier, the President can repel attacks without Congressional approval,<sup>246</sup> but “[n]othing in our Constitution is plainer than that declaration of a war is entrusted only to Congress.”<sup>247</sup> Even if declarations are “obsolete,”<sup>248</sup> Congress’s authority to issue them has not diminished. And that power is extraordinarily important to Congress’s ability to step up a military effort.

Declaring war is not an isolated act; it is the first domino. The repercussions of such an act are vast.<sup>249</sup> Consider some of the federal statutes automatically triggered upon a war’s declaration: the President’s War Powers

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<sup>243</sup> U.S. CONST. art. I, § 10 (emphasis added).

<sup>244</sup> See Act of Jan. 21, 1903, ch. 196, Pub. L. No. 57-33, 32 Stat. 775 (“[T]he militia shall consist of every able-bodied male citizen of the respective States, Territories, and the District of Columbia, and every able-bodied male of foreign birth who has declared his intention to become a citizen, who is more than eighteen and less than forty-five years of age . . .”).

<sup>245</sup> See, e.g., MASS. CONST. art. VII (“The governor shall be commander-in-chief of the military and naval forces of the state.”); N.Y. CONST. art. IV, § 3.

<sup>246</sup> See *supra* Section III.B.1.

<sup>247</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 642 (1952) (Jackson, J., concurring).

<sup>248</sup> See *supra* note 72 and accompanying text.

<sup>249</sup> The extent to which a declaration of war creates international effects is unfortunately beyond the scope of this article.

Act<sup>250</sup> reporting requirements change; the Trading with the Enemy Act<sup>251</sup> restricts economic action; the Wartime Suspension of Limitations Act<sup>252</sup> extends statutes of limitations for certain crimes; the Alien Enemy Act<sup>253</sup> permits large-scale deportations; myriad criminal statutes are opened;<sup>254</sup> warrant requirements change under the Foreign Intelligence Surveillance Act for electronic<sup>255</sup> and physical<sup>256</sup> surveillance; military offenses and jurisdiction changes;<sup>257</sup> military personnel can change command structures;<sup>258</sup> adjustments are made to income taxes;<sup>259</sup> substantial budgetary adjustments are made, including restricting reconciliation bills,<sup>260</sup> capping new discretionary spending,<sup>261</sup> and suspending some sequestration requirements.<sup>262</sup> Among the stranger triggers, assassinating a foreign agent *may* be permissible.<sup>263</sup> The President also has newfound discretionary authority under hundreds of additional statutes.<sup>264</sup>

By readying the country for war, these Congressional actions already step up a military effort. While the President may veto such actions, this will not matter if the law is constitutional and Congress overrides it. Therefore, it must be the case that Congress has the authority to step up military efforts unilaterally.

### 3. The Take Care Clause as Enabling Congressional Powers

“Article II vests ‘[t]he executive Power . . . in a President of the United States of America,’ who must ‘take Care that the Laws be faithfully executed.’”<sup>265</sup> Writing of this to Alexander Hamilton, George Washington stated:

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<sup>250</sup> See 50 U.S.C. § 1543 (2018).

<sup>251</sup> Trading with the Enemy Act, Pub. L. No. 65–91, ch. 106, 40 Stat. 411 (codified at 50 U.S.C. §§ 4301–4341 (2018)).

<sup>252</sup> Wartime Suspension of Limitations Act, 18 U.S.C. § 3287 (2018).

<sup>253</sup> Alien Enemy Act, 50 U.S.C. § 21 *et seq.* (2018).

<sup>254</sup> See, e.g., 18 U.S.C. §§ 443, 757, 792–94, 1038, 1091, 1653, 2153–54, 2381–82, 2384, 2388–89, 2441 (2018).

<sup>255</sup> Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1811, 1844 (2018).

<sup>256</sup> 50 U.S.C. § 1829 (2018).

<sup>257</sup> ELSEA & WEED, *supra* note 76, at 38–40.

<sup>258</sup> 14 U.S.C. § 3(b) (2018) (making the Coast Guard potentially subject to the Navy’s control).

<sup>259</sup> ELSEA & WEED, *supra* note 76, at 41.

<sup>260</sup> 2 U.S.C. § 641(d) (2018).

<sup>261</sup> *Id.* § 642(a).

<sup>262</sup> *Id.* § 907a(b–c).

<sup>263</sup> ELSEA & WEED, *supra* note 76, at 35.

<sup>264</sup> See *id.* at 23–75.

<sup>265</sup> Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 483 (2010) (alteration in original) (citing U.S. CONST. art. II, § 1, cl. 1; *id.* art. II, § 3).

“It is my duty to see the Laws executed—to permit them to be trampled upon with impunity would be repugnant to [that duty].”<sup>266</sup> However, this “elephant[] in [a] mousehole”<sup>267</sup> could permit Congress to force the President to intensify a military effort.

“Only a few Supreme Court cases have interpreted the Take Care Clause.”<sup>268</sup> Nevertheless, relevant jurisprudence yields important lessons. Most importantly, the Clause mandates the Executive execute what *Congress* decides:

In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.<sup>269</sup>

In this way, the Clause is solely a conduit, enabling the Executive to carry out the laws Congress passes under its enumerated powers.<sup>270</sup> Said another way by the Court: “The power to make the necessary laws is in Congress; the power to execute [is] in the President.”<sup>271</sup>

This understanding extends to international relations. In the Pacificus-Helvidius debates, Madison wrote:

A treaty is . . . to have itself the force of a *law*, and to be carried into *execution*, like all *other laws*, by the *executive magistrate*[.]

The power to declare war is subject to similar reasoning. A declaration that there shall be war, is not an execution of laws: it does not suppose preexisting laws to be executed: it is not in any respect, an act merely executive. It is, on the contrary, one of the most deliberative acts that can be performed; and when performed, has the effect of *repealing* all the *laws* operating in a state of peace, so far as they are inconsistent with a state of war: and of *enacting as a rule for the executive, a new code*

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<sup>266</sup> Letter from George Washington to Alexander Hamilton (Sept. 7, 1792), <https://founders.archives.gov/documents/Hamilton/01-12-02-0257> (last visited Aug. 26, 2018).

<sup>267</sup> Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1836 (2016) (quoting *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 468 (2001)); *see id.* at 1836 n.9 (citing Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 64–68 (1994)).

<sup>268</sup> Ted Cruz, *The Obama Administration’s Unprecedented Lawlessness*, 38 HARV. J.L. & PUB. POL’Y 63, 70 (2015).

<sup>269</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

<sup>270</sup> *See generally* Goldsmith & Manning, *supra* note 267 (linking the Take Care Clause to different enumerated powers).

<sup>271</sup> *Medellin v. Texas*, 552 U.S. 491, 526 (2008) (citations omitted).

adapted to the relation between the society and its foreign enemy. In like manner a conclusion of peace *annuls* all the *laws* peculiar to a state of war, and *revives* the general *laws* incident to a state of peace.<sup>272</sup>

Madison could not have been clearer: the President is a quarterback running Congress's play call. Moreover, Madison *assumes* the Clause applies to the international realm; logically, Congress must be authorized to legislate in that realm. Therefore, if the Commander-in-Chief and Vesting Clauses are properly viewed as vehicles through which the Executive executes Congress's legislative prerogatives in the foreign relations or military realms, one can infer Congress's constitutional authority to widen military efforts.

#### 4. The Necessary and Proper Clause's Role in Resolving Separation-of-Powers Issues

A second argument can be made based on the Necessary and Proper Clause. A functionalist interpretation of the Clause accepts the Constitution's imperfection:

One scanning the Constitution for a sense of the overall structure of the federal government is immediately struck by its silences. Save for some aspects of the legislative process, it says little about how those it names as necessary elements of government—Congress, President, and Supreme Court—will perform their functions . . . .<sup>273</sup>

In the face of such constitutional chasms, *something* must fill the void. Functionalists argue that that right belongs to Congress, which is endowed “not only its own powers, but also ‘all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.’”<sup>274</sup> Thus, “the text on its own terms contemplates that Congress will determine how [the government's] powers are best exercised.”<sup>275</sup> In other words, the Clause grants Congress “the job of creating and altering the shape of the federal

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<sup>272</sup> James Madison, *Helvidius Number I* (1793), in ALEXANDER HAMILTON & JAMES MADISON, *THE PACIFICUS-HELVIDIUS DEBATES OF 1793–1794*, at 55, 59 (Morton J. Frisch ed., 2007).

<sup>273</sup> Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 597 (1984).

<sup>274</sup> John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1951 (2011) (quoting U.S. CONST. art. I, § 8, cl. 18).

<sup>275</sup> *Id.* (citing Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1800 (1996)).

government . . . .”<sup>276</sup> And, importantly, this view is not strictly academic; the Supreme Court, in addition to other courts, has adopted pragmatism as a North Star for constitutional questions.<sup>277</sup>

Notwithstanding arguments that Congress is impliedly authorized to catalyze foreign policy actions, critics could at best argue that “[t]he Constitution does not directly authorize” Congress from taking such action.<sup>278</sup> But nor does it prohibit Congress from doing so. Such a scenario is exactly when functionalism can reign. And adopting this interpretive lens, the Constitution’s silence on the precise delineations and machinations of warmaking authority would authorize Congress, not the President, to fill the void. Thus, a more hawkish Congress has the authority to force a more dovish President’s hand to let slip the dogs of war.

This interpretive view is not unlimited: functionalists do not adopt the position that the Clause’s role as a backstop or catchall<sup>279</sup> grants Congress unlimited authority. Rather, as the Court itself cautioned upon adopting a functionalist view, pragmatism cannot come at the cost of “creat[ing] a substantial threat to the separation of powers.”<sup>280</sup> In the words of “Justice White’s canonical functionalist dissent[]”<sup>281</sup> in *INS v. Chadha*,<sup>282</sup> the relevant question is whether the act in question “is consistent with the purposes of Art. I and the principles of Separation of Powers which are reflected in that Article and throughout the Constitution.”<sup>283</sup>

Again, Congress’s catalyzing foreign policy developments creates no such threat and remains consistent with the *purposes* of Article I. As shown below, the Framers specifically contemplated and foresaw Congress’s role in foreign affairs. Effectuating that role does not jeopardize the separation of powers; it bolsters the Framers’ vision for co-equal branches of government.

## 5. Past Practices: AUMFs and Seeking Congressional Approval

“In separation-of-powers cases this Court has often ‘put significant weight upon historical practice.’”<sup>284</sup> Two significant historical sources bolster the constitutional theory that Congress can increase foreign or military

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<sup>276</sup> Strauss, *supra* note 273, at 598.

<sup>277</sup> See Manning, *supra* note 274, at 1952–58 (compiling cases).

<sup>278</sup> *INS v. Chadha*, 462 U.S. 919, 977 (1983) (White, J., dissenting).

<sup>279</sup> Which is also subtly reinforced by its position as the final enumerated power, where catchall clauses typically reside.

<sup>280</sup> *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 854 (1986).

<sup>281</sup> Manning, *supra* note 274, at 1953.

<sup>282</sup> 462 U.S. 919 (1983).

<sup>283</sup> *Id.* at 977 (White, J., dissenting).

<sup>284</sup> *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2091 (2015) (citation omitted).



aggressiveness: Presidents seeking authorizations of the use of military force and the authorizations themselves.

Often in our nation's early days the President explicitly requested Congressional assent to hostilities below that of declared war. In 1805, Spanish forces used their territory in what is now Florida as a staging ground for incursions into America's newly acquired Louisiana Purchase.<sup>285</sup> Pressured to act, Thomas Jefferson asked Congress for authority to attack:

Considering that Congress alone is constitutionally invested with the power of changing our condition from peace to war, I have thought it my duty to await their authority for using force[.] The course to be pursued will require the command of means which it belongs to Congress exclusively to yield or to deny.<sup>286</sup>

But Congress denied Jefferson's request, and he did not pursue the matter further.<sup>287</sup>

This position was reaffirmed several years later. "Napoleon Bonaparte seized power in 1799 after overthrowing the French revolutionary government. During this time, U.S. and French negotiators were concluding negotiations to end the Quasi-War with France."<sup>288</sup> Hemorrhaging money to pay for the war effort, the French sought international credit in the fledgling United States.

When France persisted in her refusal to pay long-standing claims for damage to American shipping during the Napoleonic wars, [Andrew] Jackson, instead of moving on his own, took care to ask Congress for a law "authorizing reprisals upon French property, in case provision shall not be made for the payment of the debt[.]" Jackson was not seeking a blank check but rather authorization to act in case of a formal refusal on the part of the French government.<sup>289</sup>

Again, Congress refused such authority.

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<sup>285</sup> ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 23 (1973).

<sup>286</sup> *Id.* (quoting 1 MESSAGES AND PAPERS OF THE PRESIDENTS 377–78 (J.D. Richardson ed., 1897)).

<sup>287</sup> *Id.*

<sup>288</sup> *Napoleonic Wars and the United States, 1803–1815*, OFF. OF THE HISTORIAN, DEP'T OF STATE, <https://history.state.gov/milestones/1801-1829/napoleonic-wars> (last visited on Aug. 21, 2018).

<sup>289</sup> SCHLESINGER, *supra* note 285, at 28–29 (quoting 3 MESSAGES AND PAPERS OF THE PRESIDENTS 1325 (J.D. Richardson, ed., 1897)) (emphasis added).

True, these instances occurred in an “era in which the presidential war power was ‘still in its infancy,’ and when Congress micromanaged wars.”<sup>290</sup> This though should not blunt the practice’s precedential importance.<sup>291</sup>

The other important source of history is authorizations for the use of military force, or AUMFs. Today, AUMFs are the focus of much legal scholarship in international affairs and national security, but AUMFs date back to the Quasi-War with France in the late 1790s.<sup>292</sup> Even back then, Congress, not the President, dictated the terms of military engagement, marking their territory in warmaking power. For example, two such legislative actions “did not authorize [the President] to use all of the armed forces of the United States or to conduct military incursions beyond specified military targets, and they limited the geographical scope of the authorized conflict to the high seas.”<sup>293</sup> As the Supreme Court wrote:

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 part of the law of nations; but if a partial war is waged, its extent and operation depend on our municipal laws.<sup>294</sup>

Indeed, “[m]ost authorizations to use force in U.S. history have been of this limited or partial nature.”<sup>295</sup> Their exhaustive analysis also notes “even when Congress has declared war, it has always taken the additional step of authorizing the President to use force to prosecute the war.”<sup>296</sup>

[The] survey of authorizations to use force shows that Congress has authorized the President to use force in many different situations, with varying resources, an array of goals, and a number of different restrictions. All of the authorizations restrict

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<sup>290</sup> Bradley & Goldsmith, *supra* note 220, at 2093 (citing LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 104 (2d ed. 1996)).

<sup>291</sup> Especially so when, as Professor Lawrence Tribe prophetically noted, “we are all originalists now.” Laurence H. Tribe, *Comment*, in ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 65, 67 (1997).

<sup>292</sup> See Bradley & Goldsmith, *supra* note 220, at 2072–73 (citing Act of May 28, 1798, ch. 48, 1 Stat. 561; Act of June 28, 1798, ch. 62, 1 Stat. 574 (supplementing Act of May 28, 1798)).

<sup>293</sup> *Id.* at 2073.

<sup>294</sup> *Bas v. Tingy*, 4 U.S. 37, 43 (1800) (“[The authorizations permitted] a limited, partial, war. Congress has not declared war in general terms; but congress has authorized hostilities on the high seas by certain persons in certain cases.”).

<sup>295</sup> Bradley & Goldsmith, *supra* note 220, at 2073. For a more complete analysis on authorizations of force in the United States history, see *id.* at 2072–78.

<sup>296</sup> *Id.* at 2062.

targets, either expressly (as in the Quasi-War statutes' restrictions relating to the seizure of certain naval vessels), implicitly (based on the identified enemy and stated purposes of the authorization), or both.<sup>297</sup>

But Goldsmith and Bradley are careful to highlight the “four crucial differences” between authorizations granted during a declared war and those issued during sub-war hostilities: during a declared war, the authorization does not limit the President’s resources or “military forces,” “methods of force,” “authorized targets,” or purpose, namely to win the war.<sup>298</sup>

Congress’s role in sub-war hostilities has been both prominent and precise. Congress has often “restrict[ed] the resources and methods of force that the President can employ, sometimes expressly restrict[ed] targets, identif[ied] relatively narrow purposes for the use of force, and sometimes impos[ed] time limits or procedural restrictions” for sub-war conflicts.<sup>299</sup>

This historical precedent demonstrates that Congress has the power to escalate sub-war hostilities. Therefore, under Jackson’s *Youngstown* framework, “[w]hen the President takes measures incompatible with the expressed or implied will of Congress”—namely escalating tensions—the President’s actions would not pass constitutional muster because he would not be “rely[ing] only upon” powers exclusively endowed to his office.<sup>300</sup>

#### 6. Discretionary and Constitutional Exceptions to the Take Care Clause

If Congress passes a law to catalyze military efforts, the President is constitutionally obligated to enforce it. “To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible.”<sup>301</sup> Usually. There remain two overarching theories as to how the President may not faithfully and fully enforce or execute the law: prosecutorial discretion and constitutional concerns. Each is explained in turn.

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<sup>297</sup> *Id.* at 2077.

<sup>298</sup> *Id.* at 2074–75 (footnote omitted).

<sup>299</sup> *Id.* at 2078.

<sup>300</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring).

<sup>301</sup> *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 613 (1838).

*i. Discretion*

While obligated to enforce the law, the President has some implicit degree of discretion in *how* to do so. The Executive's discretion is widely accepted—though not blindly so—particularly in criminal prosecution and agency determinations.

The decision to charge a criminal is itself discretionary. “[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”<sup>302</sup>

Analogous discretion has also been read into agency decision making by the judiciary, as “an agency decision not to enforce [a statute] often involves a complicated balancing of a number of factors which are peculiarly within its expertise.”<sup>303</sup> Because “[t]he agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities,” the agency should determine what violations to pursue.<sup>304</sup> In Goldsmith's and Manning's view, this holding stands for the proposition “that the discretion implicit in decisions not to enforce a statute lay beyond the power of courts to review.”<sup>305</sup> Indeed, some simply deemed the holding sufficient to prove that the Executive is afforded discretion in enforcing laws more broadly.<sup>306</sup>

Analogous concerns mirror those of the judiciary when overseeing our military leaders' execution of a military effort. Courts have made this point, albeit when dealing with Congressional intent to temper war efforts. In *Crockett v. Reagan*,<sup>307</sup> 29 Congresspersons sued the President, seeking: “declaratory judgments that [President Reagan] violated the [War Powers Resolution], and a writ of mandamus and/or an injunction directing that [he] immediately withdraw

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<sup>302</sup> *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); *see also Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489–90 (1999) (finding prosecutorial discretion appropriate in deportation proceeding because courts cannot judge authenticity or adequacy of executive branch's reasons for deportation); *Town of Newton v. Rumery*, 480 U.S. 386, 396 (1987) (holding prosecutorial discretion appropriate because prosecutor, not courts, evaluate strength of case, allocation of resources, and enforcement priorities); *Wayte v. United States*, 470 U.S. 598, 607–08 (1985) (discussing factors prosecutors may consider in prosecutorial decisions).

<sup>303</sup> Goldsmith & Manning, *supra* note 267, at 1847 (quoting *Heckler v. Cheney*, 470 U.S. 821, 831 (1985)).

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *See* Daniel Stepanicich, Comment, *Presidential Inaction and the Constitutional Basis for Executive Nonenforcement Discretion*, 18 U. PA. J. CONST. L. 1507, 1510 (2016).

<sup>307</sup> 558 F. Supp. 893 (D.D.C. 1982), *aff'd* 720 F.2d 1355 (D.C. Cir. 1983).

all United States Armed Forces, weapons, and military equipment and aid from El Salvador and prohibiting any further aid of any nature.”<sup>308</sup>

The Court dismissed the case for a notable reason: “The Court lacks the resources and expertise (which are accessible to the Congress) to resolve disputed questions of fact concerning the military situation in El Salvador . . . . The subtleties of factfinding in this situation should be left to the political branches.”<sup>309</sup>

A president could take advantage of this. For example, facing a law aimed at ratcheting up military efforts, a President could nominally enforce it; he could cite his discretion in bad faith and as pretext for his objection thereof. If this happens, as explained in the next sub-section, Congress likely has the authority to sue him in order to compel his compliance.

## ii. *Executive Constitutionality Analysis*

In addition to only halfheartedly applying the law per his “discretion,” the President could interpret a law to be unconstitutional and subsequently not enforce it.

The Supreme Court has cautioned against the Executive Branch’s unilateral decision to ignore the law: “the Constitution . . . is silent on the subject of unilateral Presidential action that either repeals or amends parts of duly enacted statutes. There are powerful [arguments] for construing constitutional silence . . . as [a] prohibition.”<sup>310</sup> Yet some scholars hold that if the President believes a law to be unconstitutional, he can choose to not enforce it.<sup>311</sup>

This view rests on the assumption that “the President’s paramount obligation in ensuring the faithful execution of the laws is to uphold the Constitution as the supreme law of the land.”<sup>312</sup> “If the President is to take an

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<sup>308</sup> *Id.* at 896; *see also* *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (“The President, both as Commander-in-Chief and as the Nation’s organ for foreign affairs, has available intelligence services whose reports neither are nor ought to be published to the world.”).

<sup>309</sup> *Crockett v. Reagan*, 558 F. Supp. 893, 898–99 (D.D.C. 1982).

<sup>310</sup> *Clinton v. City of New York*, 524 U.S. 417, 439 (1998).

<sup>311</sup> Another dimension beyond this article’s scope complicates things: the executive’s choice not to defend a statute in court. *See, e.g.*, *United States v. Windsor*, 570 U.S. 744, 753 (2013) (citing 28 U.S.C. § 530D and noting the Obama Administration’s refusal to defend the Defense of Marriage Act despite enforcing its provisions). For an exhaustive review of this idea, *see* Carlos A. Ball, *When May a President Refuse to Defend a Statute? The Obama Administration and DOMA*, 106 NW. U. L. REV. COLLOQUY 77 (2011).

<sup>312</sup> Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7, 10 (2000).

oath to uphold the Constitution, enforcing laws that are themselves unconstitutional could not fulfill that duty.”<sup>313</sup>

Professor Dawn E. Johnsen outlined the non-enforcement argument: the President should respect a “presumption of constitutionality, . . . [which] should be overcome only when non-enforcement would allow the President responsibly and usefully to advance constitutional norms and dialogue regarding their definition.”<sup>314</sup> Johnsen then posits two overarching principles for non-enforcement: scarcity and deference. First, if the President overuses non-enforcement, it infringes too much on requisite bicameralism and presentment, if not the legislative process more broadly.<sup>315</sup> Second, because “[i]t is emphatically the province and duty of the judicial department to say what the law is”<sup>316</sup>—meaning the judiciary is owed deference in adjudicating constitutional questions—the President’s analysis should only be “afford[ed] greater weight to the President’s views when the President possesses special institutional expertise of relevance.”<sup>317</sup> This certainly extends to foreign relations. Therefore, if the President feels Congress enacted a bill that reaches too far in ratcheting up America’s military posture, he could argue he is permitted to not enforce it. How can Congress respond? That’s easy: sue him.

### C. *Suing a Non-Compliant President*

Accepting that Congress is legally permitted to ratchet up the war effort, one question looms: enforcing Congress’s actions. Can Congress force an uncooperative President to comply?<sup>318</sup> Issues of the standing and the political question doctrines arise.

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<sup>313</sup> Cruz, *supra* note 268, at 74 (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 723 (3d ed. 2000)).

<sup>314</sup> Johnsen, *supra* note 312, at 12.

<sup>315</sup> *Cf. INS v. Chadha*, 462 U.S. 919, 951 (1983).

[T]he Framers were acutely conscious that the bicameral requirement and the Presentment Clauses would serve essential constitutional functions . . . . The President’s unilateral veto power, in turn, was limited by the power of two-thirds of both Houses of Congress to overrule a veto thereby precluding final arbitrary action of one person.

*Id.*

<sup>316</sup> *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

<sup>317</sup> Johnsen, *supra* note 312, at 13.

<sup>318</sup> Infamously, if apocryphally, Andrew Jackson once said: “John Marshall has made his decision; now let him enforce it.” *Worcester v. Georgia*, NEW GA. ENCYCLOPEDIA, <http://www.georgiaencyclopedia.org/articles/government-politics/worcester-v-georgia-1832> (last visited Aug. 26, 2018).

### 1. Questions of Standing

“In limiting the judicial power to ‘Cases’ and ‘Controversies,’ Article III of the Constitution restricts it to the traditional role of Anglo–American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law.”<sup>319</sup> Justice Scalia penned “the irreducible constitutional minimum of standing”:

First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical[.] Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.<sup>320</sup>

These requirements ensure that “the plaintiff has ‘alleged such a personal stake in the outcome of the controversy’ as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court’s remedial powers on his behalf.”<sup>321</sup> Otherwise the judiciary would be “‘roving commissions assigned to pass judgment on the validity of the Nation’s laws.’”<sup>322</sup> On the other hand, too narrow a reading of standing ensures that “some questions of law will *never* be presented to this Court, because there will never be anyone with standing to bring a lawsuit.”<sup>323</sup>

Assume Congress enacts a statute over the President’s veto, who then does not “take care that [it] be faithfully executed.”<sup>324</sup> The majority of Congresspersons would understandably want to sue to enjoin the President’s inaction. Should they do so, the case would “implicate[] the constitutionality of

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<sup>319</sup> *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009) (citing U.S. CONST. art. III).

<sup>320</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (citations and quotations omitted).

<sup>321</sup> *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

<sup>322</sup> *Shelby Cty. v. Holder*, 570 U.S. 529, 581 (2013) (Ginsburg, J., dissenting) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 610–11 (1973)).

<sup>323</sup> *United States v. Windsor*, 570 U.S. 744, 781 (2013) (Scalia, J., dissenting) (citing *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974); *United States v. Richardson*, 418 U.S. 166, 179 (1974)).

<sup>324</sup> U.S. CONST. art. III.

another Branch's actions and thus merits an 'especially rigorous' standing analysis."<sup>325</sup>

In *Raines v. Byrd*,<sup>326</sup> the Supreme Court held that six members of Congress<sup>327</sup> did not have standing to sue over the constitutionality of the Line Item Veto Act.<sup>328</sup> But the Court has never considered a case in which the plaintiffs constitute a majority of Congresspersons. Because the suit would likely be filed in District of Columbia federal courts, such precedent is both applicable and demonstrative that the Congressperson-plaintiffs would likely have standing. Many cases filed in the D.C. District and circuit courts with analogous plaintiffs have been upheld, a number of which have explicitly stated that germane precedent "does not stand for the proposition that Congress can never assert its institutional interests in court. Instead, it expressly leaves that possibility open[.]"<sup>329</sup>

The Supreme Court's most recent standing case, *Arizona State Legislature v. Arizona Independent Redistricting Commission*,<sup>330</sup> is also instructive. The Court found the Arizona state legislature had standing to challenge Arizona's independent redistricting committee.<sup>331</sup> Importantly, the D.C. District Court observed, the *Arizona* Court:

carefully distinguished *Raines*, emphasizing its narrow holding "that six *individual Members* of Congress lacked standing to challenge the Line Item Veto Act." The *Arizona* Court reiterated that there was "some importance to the fact that [the *Raines* plaintiffs] not been authorized to represent their respective Houses of Congress." In contrast, the *Arizona*

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<sup>325</sup> U.S. House of Rep. v. Burwell, 130 F. Supp. 3d 53, 57 (D.D.C. 2015) (citing *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2665 n.12 (2015)).

<sup>326</sup> 521 U.S. 811 (1997).

<sup>327</sup> Four Senators and two Congressmen. *Id.* at 814 n.1.

<sup>328</sup> *Id.* at 829–30.

<sup>329</sup> *Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1, 14 (D.D.C. 2013); *see also* *United States v. Am. Tel. & Tel. Co. (AT&T)*, 551 F.2d 384 (D.C. Cir. 1976); *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974); *Comm. on Judiciary, U.S. House of Rep. v. Miers*, 558 F. Supp. 2d 53, 68 (D.D.C. 2008) ("*Raines* and subsequent cases have not undercut either the precedential value of *AT&T*] or the force of its reasoning."); *U.S. House of Rep. v. U.S. Dep't of Commerce*, 11 F. Supp. 2d 76, 89 (D.D.C. 1998) ("The finding of an injury in this matter neither conflicts with *Raines v. Byrd* nor gives rise to a doctrine of legislative standing.").

<sup>330</sup> 135 S. Ct. 2652 (2015).

<sup>331</sup> *Id.* at 2666.



Legislature was “an institutional plaintiff asserting an institutional injury.”<sup>332</sup>

The D.C. District Court thought this persuasive, finding that the House of Representatives—which voted to sue two Cabinet Secretaries for improper enforcement of the ACA—had standing.<sup>333</sup> Therefore, there is reason to believe that should the President insufficiently enforce a law, Congress may have standing to sue. Thus, fears of an uncooperative President should not deter Congress from exercising its constitutional authority to ratchet up a war effort.<sup>334</sup>

## 2. Prudential Standing Considerations

Satisfying the jurisdictional standing requirements may not be enough. “[T]here may be prudential, as opposed to Art. III, concerns about sanctioning the adjudication of” such a case.<sup>335</sup> There exists no specific, enumerated factors that comprise these concerns, but in an act “of judicial self-governance,”<sup>336</sup> courts can decide not to hear a case if relevant “prudential factors that counsel

<sup>332</sup> U.S. House of Rep. v. Burwell, 130 F. Supp. 3d 53, 69 (D.D.C. 2015) (emphasis in original) (citations omitted) (citing *Ariz. State Legislature*, 135 S. Ct. at 2664).

<sup>333</sup> *Id.* For background on the case, see, for example, Michael A. Memoli, *GOP-Led House Votes to Sue Obama in First-of-Its-Kind Lawsuit*, L.A. TIMES (July 30, 2014), <http://www.latimes.com/nation/la-na-house-votes-to-sue-obama-20140730-story.html>.

<sup>334</sup> True, by this logic, the converse could apply, and the President could sue Congress to enjoin a law’s enforcement. “As [the Court] indicated in *Raines v. Byrd*, if Congress can sue the Executive for the erroneous application of the law that ‘injures’ its power to legislate, surely the Executive can sue Congress for its erroneous adoption of an unconstitutional law that ‘injures’ the Executive’s power to administer” the law. *United States v. Windsor*, 570 U.S. 744, 790 (2013) (Scalia, J., dissenting) (citing *Raines v. Byrd*, 521 U.S. 811, 828 (1997)). Scholars have adopted this position. See, e.g., Peter Raven-Hansen & William C. Banks, *From Vietnam to Desert Shield: The Commander in Chief’s Spending Power*, 81 IOWA L. REV. 79, 118 (1995) (citing Panel Discussion, *The Appropriations Clause and the Necessary and Proper Clause*, 68 WASH. U. L.Q. 623, 646 (1990) (remarks of Kate Stith, law professor, Yale University)). So, too, have Supreme Court Justices, see *Goldwater v. Carter*, 444 U.S. 996, 997 (1979) (Powell, J., concurring) (“The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse.”) (emphases added)), and other federal appeals judges, see *Crockett v. Reagan*, 558 F. Supp. 893, 899 (D.D.C. 1982), *aff’d* 720 F.2d 1355 (D.C. Cir. 1983) (“Certainly, were Congress to pass a resolution to the effect that a report was required under the WPR, or to the effect that the forces should be withdrawn, and the President disregarded it, a constitutional impasse appropriate for judicial resolution would be presented.”). That said, this view is not without its detractors, however. Cf. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 497 (2010) (“Perhaps an individual President might find advantages in tying his own hands. But the separation of powers does not depend on the views of individual Presidents, nor on whether ‘the encroached-upon branch approves the encroachment.’”) (citations omitted)).

<sup>335</sup> *Windsor*, 570 U.S. at 760 (citing *INS v. Chadha*, 462 U.S. 919, 940 (1983)).

<sup>336</sup> *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

against hearing [a] case . . . ‘outweigh the concerns underlying the usual reluctance to exert judicial power.’”<sup>337</sup>

One concern is the precedent the case would set. As Justice Kennedy wrote in *United States v. Windsor*, “[t]he integrity of the political process would be at risk if difficult constitutional issues were simply referred to the Court as a routine exercise.”<sup>338</sup> Yet just after offering that cautionary warning, Kennedy stated that courts ought not prioritize precedent—militating against adjudication—when the cause of action is “not routine,”<sup>339</sup> as was the case in *Windsor*. So, too, would be litigation between a majority of Congresspersons and the President concerning Congressional action to increase military aggressiveness, favoring adjudication.

Moreover, if recent holdings are indicative, prudential standing concerns may be losing influence. Writing for a unanimous Court, Justice Scalia highlighted a change in the prudential standing doctrine:

While we have at times grounded our reluctance to entertain such suits in the “counsels of prudence” (albeit counsels “close[ly] relat[ed] to the policies reflected in” Article III), we have since held that such suits do not present constitutional “cases” or “controversies.” They are barred for constitutional reasons, not “prudential” ones.<sup>340</sup>

Therefore, it is likely that the non-routine case of political branches suing one another over the constitutionality of Congressional action to ramp-up foreign intervention surpasses any everlasting albeit decreasing prudential concerns.

### 3. Sufficiently Political to Forego the Thicket?

Assuming Congress aims to enforce a catalyzing law, it need also be wary of the political question doctrine, which “excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.”<sup>341</sup>

What constitutes a nonjusticiable political question comes from the Supreme Court’s 1962 decision in *Baker v. Carr*.<sup>342</sup> Couching the question “as

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<sup>337</sup> *Windsor*, 570 U.S. at 745 (citing *Warth*, 422 U.S. at 500–01).

<sup>338</sup> *Id.* at 763.

<sup>339</sup> *Id.* at 745.

<sup>340</sup> *Lexmark Int’l Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 n.3 (2014) (alteration in original) (citations omitted).

<sup>341</sup> *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986).

<sup>342</sup> 369 U.S. 186 (1962).

essentially a function of the separation of powers[.]” Justice Brennan articulated a six-factor test:

a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>343</sup>

Importantly, a court “need only conclude that one factor is present, not all.”<sup>344</sup>

Many cases relating to the military and foreign affairs are dismissed under the political question doctrine because relevant precedent provides cover. Arguably the safest refuge can be found in *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*<sup>345</sup> In that case, the Court gave the President constitutional leeway in international affairs, including deferring to related agency decisions,<sup>346</sup> because such military and foreign policy judgments

are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.<sup>347</sup>

Said differently, a court’s “duty to defer to the Executive’s military and foreign policy judgment is at its zenith”<sup>348</sup> because “[t]he Constitution primarily delegates the foreign affairs powers ‘to the political departments of the government, Executive and Legislative,’ not to the Judiciary.”<sup>349</sup> There is also a

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<sup>343</sup> *Id.* at 217.

<sup>344</sup> *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005).

<sup>345</sup> 333 U.S. 103 (1948).

<sup>346</sup> *Id.* at 110–14.

<sup>347</sup> *Id.* at 111.

<sup>348</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 682 (2006) (Thomas, J., dissenting).

<sup>349</sup> *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 213 (2012) (Breyer, J., dissenting) (quoting *Chicago & S. Air Lines, Inc.*, 333 U.S. at 111).

pragmatic dimension: “By their very nature, military decisions must be made and revised in battle on a real-time basis; judicial decisions rarely are or can be.”<sup>350</sup> Thus, many courts deem “[d]isputes involving foreign relations . . . [the] ‘quintessential sources of political questions,’”<sup>351</sup> requiring dismissal under the doctrine. This may embolden Congress to pass such a law, betting courts dismiss claims over the law’s constitutionality.

But just because a cause of action implicates military matters does not foreclose its adjudication by the judiciary. “[I]t is emphatically the province and duty of the judicial department to say what the law is.’ That duty will sometimes involve the ‘[r]esolution of litigation challenging the constitutional authority of one of the three branches,’ but courts cannot avoid their responsibility merely ‘because the issues have political implications.’”<sup>352</sup>

Indeed, as Chief Justice Roberts wrote in *Zivotovsky v. Clinton*, “[t]he courts are fully capable of determining whether this statute may be given effect, or instead must be struck down in light of authority conferred on the Executive by the Constitution.”<sup>353</sup>

*Zivotosky* provides a good comparative. President Bush argued that a statute allowing Jerusalem-born U.S. citizens to record “Israel” as their place of birth on their passports—allegedly undermining then-Executive policy not to recognize Jerusalem as Israel’s capital—“impermissibly interfere[d] with the President’s constitutional authority to conduct the Nation’s foreign affairs and to supervise the unitary executive branch.”<sup>354</sup> After both the D.C. district and circuit court found the question nonjusticiable,<sup>355</sup> the majority of the high court disagreed, holding that “the only real question for the courts is whether the statute is constitutional[,]” which courts *must* adjudicate.<sup>356</sup>

Such would be the case here, too: courts would be called upon not to determine whether the country should step up military action, but “whether the statute impermissibly intrudes upon Presidential powers under the Constitution.”<sup>357</sup> Therefore, though the political question doctrine may appear a convenient shield, courts cannot reasonably avail themselves of such a duck-and-cover.

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<sup>350</sup> Sidak, *supra* note 10, at 115.

<sup>351</sup> *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 841 (D.C. Cir. 2010) (quoting *Bancoult v. McNamara*, 445 F.3d 427, 433 (D.C. Cir. 2006)).

<sup>352</sup> *Zivotofsky*, 566 U.S. at 196 (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803) and *INS v. Chadha*, 462 U.S. 919, 943 (1983)).

<sup>353</sup> *Id.* at 191.

<sup>354</sup> *Id.* at 192 (quoting Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, 2 PUB. PAPERS 1698 (Sept. 30, 2002)).

<sup>355</sup> *Id.* at 193–94.

<sup>356</sup> *Id.* at 196.

<sup>357</sup> *Id.*

## V. CONCLUSION

A day will come when a hawkish Congress will consider how to spur a dovish Commander-in-Chief to action. As demonstrated above, the two most likely congressional strategies to do so are by using appropriations and AUMFs, if not outright declarations of war. These prerogatives are mighty levers, as the Framers intended; this article offered arguments as to why Congress is authorized to pull on them.

Having looked to Congress's enumerated powers, one can infer Congress's ability to increase international action. Moreover, the Necessary and Proper Clause—not the Vesting Clause—acts as the constitutional backstop clause, suggesting all mixed powers rest ultimately with Congress. Still more, the Take Care Clause also offers support to Congress's claim to authority in the arena of foreign affairs. Finally, historical precedent for requests and grants of AUMFs buttress these theories. The devil will be in the details, but these broad strokes demonstrate why Congress has a legitimate claim to step up military action as a tool in foreign affairs.

The question explored in this essay, however, speaks to a greater clash of ideas: should Congresspersons, the most accountable agents—at least by election standards—drive the broader agenda, or should the President be afforded “a degree of discretion and freedom”<sup>358</sup> from the legislature for pragmatic reasons? As is often the case in separation of powers questions, the answer lies not in analogical reason, but in each person's fundamental assumptions and understanding of our democratic system.

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<sup>358</sup> United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936).