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## War is More Than a Political Question: Reestablishing Original Constitutional Norms

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# War is More Than a Political Question: Reestablishing Original Constitutional Norms

*John C. Dehn\**

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## INTRODUCTION

This Essay disputes the view that a president’s independent authority to use non-defensive armed military force short of a “major conflict” is merely a political question rather than an issue affirmatively regulated by the Constitution, congressional enactments, and established legal principles of necessity.<sup>1</sup> The Prussian war theorist Carl von Clausewitz

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1. This essay expands upon my public remarks at the symposium on April 5, 2019. The term “military force” refers to armed attacks or hostile territorial invasions by elements of the U.S. armed forces acting as such. It thereby excludes other uses of force, whether armed or unarmed, such as those engaged in pursuant to congressionally-authorized covert action. *See* 50 U.S.C. § 3093(e)(2) (2019) (expressly excluding “traditional . . . military activities”) and cyber intrusion operations that do not result in more than negligible physical damage to persons or property. 10 U.S.C. § 394(b) (2018) (authorizing military cyber activities or operations “short of hostilities” as the term is used in the War Powers Resolution). “Military force” also excludes consensual military presence in a foreign territory for purposes other than using combative force, such as to provide disaster recovery aid or assistance. For excellent commentary on the constitutionality of covert action statutes, see Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035 (1986).

wrote that war is the continuation of politics by other means.<sup>2</sup> This is certainly a fair observation of international relations, in which armed force remains a permissible means for achieving various geopolitical ends.<sup>3</sup> Under the Constitution, however, a decision to use non-defensive military force should *result* from the Constitution's law-making process,<sup>4</sup> rather than—as is now often the case—begin, truncate, or ignore that process.

This Essay briefly reviews the current situation and comprehensively surveys the Constitution's allocation of war- and military-related powers to demonstrate Congress's extensive authority over war and the nation's armed forces. This review strongly confirms the view that the Constitution requires Congress to affirmatively authorize all non-defensive military force and provides Congress with several powers to check a president's use and command of the military. It then briefly posits some of the reasons these constitutional norms have eroded, clarifies why aberrant past practice cannot amend the Constitution's separation of war powers, and explains why Congress must reestablish its authority, briefly suggesting two ways that it may do so.

#### I. THE CURRENT CONSTITUTIONAL PROBLEM

Since World War II, it has become increasingly common practice for presidents to use non-defensive military force abroad without obtaining congressional preapproval, thereby leaving Congress with no meaningful role in the decision. Recent examples include: the Trump Administration's missile strikes against targets in Syria in response to the alleged use of chemical weapons against civilians;<sup>5</sup> the Obama Administration's aerial attacks and other actions supporting United

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2. See 1 CARL VON CLAUSEWITZ, ON WAR 23 (The Floating Press trans., The Floating Press 2010) (1832) (defining war as a “political instrument, a continuation of the same by other means”).

3. Although the use of armed force as a means of settling disputes in international affairs is now tempered by the United Nations Charter, military force is the Security Council's last resort for addressing and resolving threats to the peace, breaches of the peace, and acts of aggression. See U.N. Charter arts. 1–2 (stating the purposes of the United Nations are to maintain peace and to harmonize the actions of nations); *id.* at arts. 39–42 (describing the Security Council's authority to determine the existence of threats to peace and which measures may be undertaken to restore peace, including measures involving the use of armed force).

4. A congressional declaration of war may not properly be termed a “law” but results from the same process by which laws are typically adopted. Other congressional enactments authorizing armed hostilities also result from this process. See, e.g., Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (authorizing use of “necessary and appropriate” military force in response to the attacks against the United States on September 11, 2001).

5. See April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. 1, 1–3 (Steven A. Engel, Assistant Attorney General, Office of Legal Counsel 2018) [hereinafter Syrian Airstrikes Memorandum] (describing strikes and alleged authority to order them).

Nations authorized measures to protect civilians in Libya;<sup>6</sup> and the Clinton Administration's uses of force against Serbia as part of North Atlantic Treaty Organization operations to protect Kosovars, among many others.<sup>7</sup> Of these three examples, only one was authorized by the Security Council of the United Nations (Libya).<sup>8</sup> The Security Council is the only body empowered by international law to use or authorize non-defensive force against other nations.<sup>9</sup> Additionally, none of these uses of military force received prior congressional authorization or formal, post hoc congressional condemnation.<sup>10</sup>

This modern practice is clearly at odds with the Constitution's text and original meaning. A wealth of scholarly commentary concludes that the Constitution grants Congress alone the power to authorize non-defensive military force.<sup>11</sup> Although not expressly mentioned in the Constitution, ample commentary also concludes that a president has inherent constitutional power to defend the nation from an actual or impending attack.<sup>12</sup>

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6. See Authority to Use Military Force in Libya, 35 Op. O.L.C. 1, 1–6 (Caroline D. Krass, Principle Deputy Assistant Att'y Gen., Office of Legal Counsel 2011) [hereinafter *Military Force in Libya Memorandum*] (explaining that the Libyan government's attacks on civilians led to United States military involvement in the conflict based upon United Nations authorization President Obama's constitutional authority and discretion).

7. For a thorough catalog and concise summary of the U.S. uses of military force abroad through late 2017, see BARBARA SALAZAR TORREON, CONG. RESEARCH SERV., R42738, INSTANCES OF USE OF ARMED FORCES ABROAD, 1798–2017 (2017).

8. S.C. Res. 1973, ¶¶ 2, 4 (Mar. 17, 2011) (authorizing all measures necessary to protect certain civilians, but prohibiting an occupation force).

9. See U.N. Charter art. 51 (preserving nations' inherent right of individual or collective self-defense).

10. See TORREON, *supra* note 7 at 17, 25–27 (describing the Serbian and Libyan attacks).

11. See, e.g., DAVID J. BARRON, WAGING WAR: THE CLASH BETWEEN PRESIDENTS AND CONGRESS, 1776 TO ISIS 21–33 (2016) (describing Constitutional Convention debates: “they leaned hard in Congress’s favor when making the decision between war and peace” while recognizing president “would need power to repel sudden attacks”); JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 3 (1993) (asserting that the power to declare war is constitutionally vested in Congress); MICHAEL D. RAMSEY, THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS 218–38 (2007) (arguing that the drafters of the Constitution specifically designed the federal government such that executive power was not centralized in one branch, giving *some* power to the Executive Branch but reserving power that had traditionally gone to a king within a monarchy system instead to Congress, including the power to wage non-defensive war); Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by “Declare War”*, 93 CORNELL L. REV. 45, 47 (2007) (asserting Congress’s unique power to declare war was developed by the Framers of the Constitution). See also William Michael Treanor, *Fame, The Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 696 (1997) (listing numerous other proponents of this view).

12. See, e.g., BARRON, *supra* note 11, at 22 (explaining the constitutional convention acknowledged the necessity of vesting the power to repel a sudden attack in the executive); ELY, *supra* note 11, at 6 (arguing that because some military emergencies can arise faster than Congress can act, the founders intended for the president to be able to act quickly where a clear danger to

Nevertheless, some commentators and courts have asserted that a modern president's inherent, independent constitutional power to use non-defensive military force is a political rather than a legal question.<sup>13</sup> Put differently, they argue that a president's constitutional authority to invade the rights of other nations and their citizens through non-defensive military force—and thereby to risk lives, liberty, and property interests of United States citizens—is subject to the whims of the president and any political responses by Congress. One commentator recently argued that this situation results from the fact that labeling various types of military actions, for example, as “offensive” or “defensive,” is difficult and the Constitution's allocation of war powers to the executive and legislative branches is ambiguous and uncertain in any given context.<sup>14</sup>

Even more troubling, contemporary executive branch legal advisers claim that presidents possess inherent and independent constitutional authority to use non-defensive military force whenever they can make a colorable claim that doing so advances a “national interest” and when the “anticipated hostilities” do not constitute a “war in the constitutional sense.”<sup>15</sup> What is meant by “war in the constitutional sense” is not clear<sup>16</sup> and has changed over time.<sup>17</sup> The term is more recently asserted to mean

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national security develops unexpectedly and requires immediate military response); RAMSEY, *supra* note 11, at 239–48 (arguing that the founders believed that the president retained some powers to use military force as needed); Prakash, *supra* note 11, at 116–18 (stating that historically, the president has had the power to repel “sudden attacks,” such as in the case of thwarting Indian raids).

13. For some such commentary, see, e.g., MARIAH ZEISBERG, *WAR POWERS: THE POLITICS OF CONSTITUTIONAL AUTHORITY* 21–22 (2013) (explaining how the view of presidential power regarding military action has changed over time to one of political rather than juridical dimensions); see also Treanor, *supra* note 11, at 696 (listing scholars who believe executive branch possesses independent constitutional power to initiate military force or that entire matter is political question). For references to judicial decisions, see, e.g., *infra* Section II.C (stating that Congress holds the power for non-defensive war acts).

14. ZEISBERG, *supra* note 13, at 20–21.

15. See, e.g., Syrian Airstrikes Memorandum, *supra* note 5, at 9–10 (describing “quasi-war,” or a situation where limited military engagements are necessary but the concern did not rise to the level of a true declaration of war).

16. See, e.g., *id.* at 9 n.3 and related text (discussing longstanding executive branch view that some military engagements require congressional approval but others, based upon their “scale,” do not—but without any attempt to articulate the “scale” of military conflict that is constitutionally significant).

17. For example, the Truman Administration publicly (but never “formally”) claimed that the Korean conflict was not a “war” requiring congressional approval because it was a “police action” under the authority of the United Nations. See Louis Fisher, *The Korean War: On What Legal Basis Did Truman Act?*, 89 AM. J. INT'L L. 21, 33–34 (1995) [hereinafter Fisher, *Korean War*] (explaining that the Truman administration crafted a narrative that his actions in declaring military action in Korea fell within the presidential military powers but that in reality, Truman preempted Congress in his decision making). It would seem that the scale of American involvement in Korea constituted a “war” in any logical understanding of the term. According to the Congressional

that the *anticipated* intensity and scale of non-defensive military operations will not result in a major military conflict that should require Congress to declare war.<sup>18</sup> It is, of course, dubious to claim that a president's prediction about whether a major conflict will result from a given military attack determines his or her inherent power to order one. This approach fallaciously presumes that the executive branch can accurately predict the responses of other nations.

Executive branch assertions regarding what constitutes a sufficient national interest have also been irreconcilably inconsistent. Some include claims that a use of non-defensive military force will bolster the credibility or authority of the United Nations.<sup>19</sup> Other non-defensive uses of force have clearly violated the United Nations Charter and the will of its Security Council.<sup>20</sup> According to the legal memorandum that rationalized the Trump Administration missile strikes against Syria after the fact, an adequate national interest includes virtually anything a president deems to be so.<sup>21</sup>

The current reality is that presidents may, in practice, get away with using non-defensive military force if Congress ultimately acquiesces in their decision to do so—either by expressing no formal opposition at all or by providing a president with funding and other support.<sup>22</sup> This

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Research Service, as of August 29, 2018, an estimated 1,789,000 Americans served in Korea during the three-year conflict; 36,574 were killed or died as the result of their service, and 103,284 were wounded. LOUIS FISHER, CONG. RESEARCH SERVICE, RL32492, AMERICAN WAR AND MILITARY OPERATIONS CASUALTIES: LISTS AND STATISTICS 2, 8 (2018); *id.* at 8.

18. See, e.g., Syrian Airstrikes Memorandum, *supra* note 5, at 18–22 (conducting “fact-specific assessment of the anticipated nature, scope and duration of the planned military operations,” including “whether U.S. forces were likely to encounter significant armed resistance . . . [or] suffer or inflict substantial casualties”).

19. See, e.g., Fisher, *Korean War*, *supra* note 17, at 33 (discussing Truman administration arguments that intervention in Korea was essential to upholding the United Nations Charter and the “rule of law,” but noting that Truman admitted he would have acted without U.N. approval if needed).

20. The Trump Administration strikes against Syria were not approved by the Security Council of the United Nations. See, e.g., Caitlin A. Buckley, *Learning from Libya, Acting in Syria*, 5 J. STRATEGIC SEC. 81, 88–89 (2012) (discussing international opposition to intervention in Syria, including Russian refusal to allow Security Council action similar to that pertaining to Libya). The legal memorandum rationalizing the strikes in Syria did not even attempt to reconcile them with the United Nations Charter or other international law. See generally Syrian Airstrikes Memorandum, *supra* note 5.

21. See Syrian Airstrikes Memorandum, *supra* note 5, at 10 (“The scope of U.S. involvement in the world, the presence of U.S. citizens across the globe, and U.S. leadership in times of conflict, crisis, and strife require that the President have wide latitude to protect American interests by responding to regional conflagrations and humanitarian catastrophes as he believes appropriate. . . . We would not expect that any President would use this power without a substantial basis for believing that a proposed operation is necessary to advance important interests of the Nation.”).

22. Although Congress never clearly authorized hostilities in Korea, it took several actions to

politically-motivated convention,<sup>23</sup> or practice, among our co-equal branches of government is not the original constitutional design.<sup>24</sup> As the Supreme Court has said in another context, “the presence of constitutional issues with significant political overtones does not automatically [create a nonjusticiable] political question. . . .”<sup>25</sup>

This Essay rejects the notion that a president’s independent constitutional authority to use non-defensive military force is, as a matter of constitutional law, left solely to the routine political give and take of the elected branches. In a republic based upon fundamental individual rights to life, liberty, and property—and of a limited central government constrained by fundamental law—legislative acts and well-accepted principles of necessity must govern a president’s legal authority to invade individual rights by a use of military force. A more complete contextual and structural reading of the Constitution’s text, as well as early government practice and relevant Supreme Court precedent, demonstrate that the Framers and ratifiers of the Constitution believed these basic, rule-of-law and separation-of-powers principles to be thoroughly etched into the Constitution’s original design.

## II. CONGRESSIONAL PRIMACY OVER MILITARY FORCE AND THE ARMED FORCES

A careful review of the Constitution’s text reveals that it vests Congress, not the president, with sole control over decisions to use non-defensive military force and with a large measure of superior authority over the nation’s armed forces. Furthermore, early presidents believed, and pre-World War II Supreme Court precedent established, that only express or implied congressional authorization or an imperative necessity to defend the nation, including its territories instrumentalities, and

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support them, including extending the draft, *see* Selective Service Extension Act of 1950, Pub. L. No. 81-599, 64 Stat. 318 (codified June 30, 1950) (stating that the draft extends to every male citizen “now or hereafter in the United States”); 1951 Amendments to the Universal Military Training and Service Act, Pub. L. No. 82-51, 65 Stat. 75 (codified June 19, 1951) (broadly stating that the draft applies to all male citizens from ages eighteen to twenty-six, and that male citizens must register and appear for the draft when military action is declared).

23. For a definition and an analysis of “constitutional conventions”, *see generally* Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U. ILL. L. REV. 1847 (2013).

24. *But see* STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* 48 (2013) (asserting that “beginning with [the] Korea[n conflict] an amendment-level constitutional change” established by the practice of the elected branches now grants the president broad, independent authority to take the nation to war). I address this claim in Part IV, *infra*.

25. *INS v. Chadha*, 462 U.S. 919, 942–43 (1983) (explaining the political question doctrine in the context of Congressional action on deportation versus Executive authority on the matter).

perhaps its citizens, permits the unilateral use of military force by the executive branch.<sup>26</sup>

#### A. Congressional Powers

Article I, Section 8 contains most of the affirmative grants of congressional power. There are eighteen clauses, some containing multiple powers.<sup>27</sup> Commentary discussing a president's independent power to use military force typically focuses on the scope and substance of Congress's power to "declare war."<sup>28</sup> While that analysis is necessary and appropriate, it can be misleading if it ignores the larger context in which the power to declare war is constitutionally situated. To understand Congress's constitutional primacy over the nation's military and its use, a more comprehensive analysis of congressional powers is essential.

Congressional powers over the military, its use, and related matters are numerous and substantial. Seven of the eighteen clauses in Article I, Section 8 explicitly give Congress control over the existence, composition, organization, training, and discipline of the armed forces, including state militias, as well as the funding of military operations, the control of military installations, and the use of military force.<sup>29</sup> Other clauses give Congress integral or closely-related powers. Section 10 of Article I strengthens congressional control by denying similar powers to the states without congressional approval.<sup>30</sup> An analysis of these powers places the power to declare war in a broader context.

In addition to the power "to declare war," Article I, Section 8 grants Congress the following powers, some of which are paraphrased for clarity and brevity.

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26. The precise nature of this defensive power is currently unclear. Executive branch practice has evolved over time. I intend to more thoroughly examine the scope of the presidency's defensive power in future work.

27. U.S. CONST. art. I, § 8 (granting Congress the power to "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," among other powers).

28. See generally RAMSEY, *supra* note 11, at 218–48; Prakash, *supra* note 11; See also John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 242–250 (1996) (arguing that in splitting the power to declare war and fund war between the executive and legislative branches, the framers of the Constitution actually intended to adopt the traditional monarchical system whereby the executive declares war, except for "formal" declarations, and the legislature dictates spending; the framers intended the executive branch to have the power to initiate war and provide an opportunity for the legislature to review such decisions during the appropriations process).

29. U.S. CONST. art. I, § 8, cls. 11–17.

30. *Id.* art. I, § 10 ("No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.").



Clause 11 empowers Congress to “grant letters of Marque and Reprisal, and make rules concerning Captures on Land and Water.”<sup>31</sup> The power to declare war, coupled with these powers, gives Congress sole authority to authorize all non-defensive uses of military force as understood in the founding era.<sup>32</sup> That Congress possesses power to grant letters of marque and reprisal—by which it may commission private individuals to engage in limited punitive, retaliatory, or other military measures—strongly implies that the president does not possess independent constitutional power to engage in even minor uses of force.<sup>33</sup> While the nature and scope of these powers is debated, early justices of the Supreme Court found that limited uses of military force were “public war” that only Congress could authorize and may also, therefore, constrain.<sup>34</sup> Early presidential and congressional practice also provides persuasive evidence that the Framers believed only Congress possesses the constitutional power to authorize the use of non-defensive military force.<sup>35</sup>

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31. U.S. CONST. art. I, § 8.

32. Prakash, *supra* note 11, at 49–50 (“In the context of the Constitution, the grant of ‘declare war’ power means that only Congress can decide whether the United States will wage war.”); *see also* BARRON, *supra* note 11, at 22 (noting the draft Constitution “expressly provided that Congress could declare war” and “even granted Congress the power issue letters of marque and reprisal, [which] allowed only a very limited use of military power”); RAMSEY, *supra* note 11, at 218–38 (describing these clauses as “efforts to shift decisionmaking about offensive war from the executive magistrate . . . to Congress” and stating “the narrow meaning of the declare war clause also fits poorly with the marque-and-reprisal clause”).

33. Prakash, *supra* note 11, at 55; Jules Lobel, “*Little Wars*” and the Constitution, 50 U. MIAMI L. REV. 61, 70 (1995) (“The Marque and Reprisal Clause was inserted in Article I to ensure that lesser forms of hostilities came within congressional power. . . . At minimum, the clause supports a broad interpretation of the Declare War Clause to include all acts of warfare initiated against other nations.”).

34. *See, e.g.,* Bas. v. Tingy, 4 U.S. 37, 40 (1800) (opinion of Washington, J.) (“[E]very contention by force between two nations in external matters, under the authority of their respective governments, is not only war, but public war.”).

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

*Id.* at 40; *see also id.* at 43 (opinion of Chase, J.) (“Congress has not declared war in general terms; but Congress has authorized hostilities on the high seas by certain persons in certain cases. . . . So far it is, unquestionably, a partial war; but, nevertheless, it is a public war . . .”); *id.* at 46 (opinion of Patterson, J.) (finding limited naval conflict to be “a public war between the two nations, qualified, on our part, in the manner prescribed by the constitutional organ of our country”).

35. *See, e.g.,* Prakash, *supra* note 11, at 96–107 (recounting significant early presidential and congressional practice).

Clause 12 grants Congress the power “[t]o raise and support Armies, but no Appropriation” may exceed two years.<sup>36</sup> Related to this power and its two-year limitation, it is no accident: (1) that the House of Representatives—originally the only representatives directly elected by the people<sup>37</sup>—is elected every two years;<sup>38</sup> (2) that no money may be drawn from the treasury except pursuant to appropriations made by law;<sup>39</sup> and (3) that all bills raising revenue must originate in the House of Representatives.<sup>40</sup> Raising and maintaining an army requires funding. If a standing army—an institution thought abhorrent to many in the Founding Era, especially if maintained in times of peace<sup>41</sup>—were to be improperly used for domestic matters, or to fight unnecessary foreign wars, the Constitution ensures that the people can elect new representatives with a mandate to stop funding it.<sup>42</sup>

Clause 13 confers upon Congress the power “[t]o provide and maintain a Navy.”<sup>43</sup> With such a large coast and many navigable waterways, a navy was a necessary and uncontroversial first line of defense for the fledgling nation.<sup>44</sup> Although Congress had the raw ability not to exercise this power, America needed a navy to protect both its territory and its

36. U.S. CONST. art. I, § 8, cl. 12 (granting Congress the power to raise armies).

37. *Id.* art. I, § 2, cl. 1. Originally, Senators were to be chosen by the state legislatures, *id.* art. I, § 3, cl. 1. This was changed by the Seventeenth Amendment, proposed May 13, 1912 and declared by the Secretary of State to have been ratified by thirty-six states on May 31, 1913 pursuant to *id.* art. I, § 3, cl. 1.

38. *Id.* art. I, § 2, cl. 1.

39. *Id.* art. I, § 9, cl. 7.

40. *Id.* art. I, § 7, cl. 1.

41. *See, e.g.*, THE FEDERALIST NO. 8 (Alexander Hamilton) (recounting the dangers of standing armies).

42. THE FEDERALIST NO. 41, at 42 (Alexander Hamilton) (vol. 2, J. and A. McLean, 1788) (“Next to the effectual establishment of the Union, the best possible precaution against danger from standing armies is a limitation of the term for which revenue may be appropriated to their support.”); *see also* THE FEDERALIST NO. 28, at 175 (Alexander Hamilton) (vol. 1, J. and A. McLean 1788) (“Independent of all other reasonings upon the subject, it is a full answer to those who require a more peremptory provision against military establishments in time of peace, to say that the whole power of the proposed government is to be in the hands of the representatives of the people. This is the essential, and, after all, only efficacious security for the rights and privileges of the people, which is attainable in civil society.”). For a more robust analysis on the constitutional implications of the budget power in this context, see Lucas Issacharoff & Samuel Issacharoff, *Constitutional Implications of the Cost of War*, 83 U. CHI. L. REV. 169 (2016). Of course, the current geopolitical environment makes it highly unlikely that the body politic will elect a Congress with a mandate to defund the U.S. military establishment.

43. U.S. CONST. art. I, § 8, cl. 13.

44. *See* THE FEDERALIST NO. 41, *supra* note 42, at 44 (“The palpable necessity of the power to provide and maintain a navy has protected that part of the Constitution against a spirit of censure, which has spared few other parts. It must, indeed, be numbered among the greatest blessings of America, that as her Union will be the only source of her maritime strength, so this will be a principal source of her security against danger from abroad.”).

foreign commerce.<sup>45</sup> In 1794, Congress obliged by authorizing the president to acquire, equip, and employ six ships with specific armaments.<sup>46</sup> Congress also prescribed not only the exact crew membership but also their pay and rations,<sup>47</sup> demonstrating the comprehensive control that Congress may exercise over the existence, composition, and administrative operation of the armed forces should it choose to do so.

Under clause 14, Congress is given the power to “make rules for the government and regulation of the land and naval forces.”<sup>48</sup> Not only may Congress decide whether to have armed forces, exactly how many, and exactly how they will be paid, equipped and supplied, it also has express—according to the Supreme Court “plenary”—authority to regulate the conduct of the armed forces once created.<sup>49</sup> Executive branch legal advisors have sometimes claimed that presidents possess the constitutional power to violate international and some domestic laws regulating war.<sup>50</sup> However, the Uniform Code of Military Justice (UCMJ) enacted by Congress requires members of the armed forces to comply with these laws and subjects them to criminal prosecution for unauthorized acts of violence in war.<sup>51</sup> The Supreme Court has consistently required the president and executive branch to comply with applicable provisions of the UCMJ, including those that incorporate

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45. *Id.*

46. Act to Provide a Naval Armament, sess. 1, ch. 12, 1 Stat. 350 (Mar. 27, 1794).

47. *Id.* at 350–51. Interestingly, in the alternative, the Act authorized and empowered the president to acquire, “by purchase or otherwise,” a similar naval force not exceeding that provided for in the Act. *Id.*

48. U.S. CONST. art. I, § 8, cl. 14.

49. *Weiss v. United States*, 510 U.S. 163, 177 (1994) (quoting *Chappell v. Wallace*, 462 U.S. 296, 301 (1983)) (“[T]he Constitution contemplates that Congress has ‘plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline.’”); *Coleman v. Tennessee*, 97 U.S. 509, 514 (1879) (noting that Congress’s “control over the whole subject of the formation, organization, and government of the national armies, including therein the punishment of offenses committed by persons in the military service, would seem to be plenary”); see also *Solorio v. United States*, 483 U.S. 435, 446 (1987) (“The unqualified language of Clause 14 suggests that whatever these concerns, they were met by vesting in Congress, rather than the Executive, authority to make rules for the government of the military.”).

50. U.S. DEP’T DEF., WORKING GROUP REPORT ON DETAINEE INTERROGATION IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY, AND OPERATIONAL CONCERNS 24 (2003) [hereinafter U.S. Dep’t of Def. Working Group Report], <http://hrlibrary.umn.edu/OathBetrayed/Rumsfeld%204-4-03.pdf> [<https://perma.cc/YQY7-GGLM>] (claiming the president has complete discretion in conduct of hostilities not subject to international law or even congressional regulation).

51. See generally John C. Dehn, *Why a President Cannot Authorize the Military to Violate (Most of) the Law of War*, 59 WM. & MARY L. REV. 813 (2018).

international laws regulating war by reference.<sup>52</sup> Indeed, a comprehensive study concluded that the Court “has never held that any statutory limitations on substantive executive war powers have unconstitutionally infringed upon the core prerogatives of the commander-in-chief.”<sup>53</sup>

Clause 15 empowers Congress “[t]o provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions.”<sup>54</sup> Although not often cited as such, this congressional power—coupled with the power to provide and maintain a navy, the president’s constitutional designation as commander in chief, and the president’s oath<sup>55</sup>—are the strongest textual evidence of the president’s independent constitutional power and obligation to defend the nation.<sup>56</sup> With no plans for a standing army, a president would first need a navy and then, potentially, access to land forces to resist any foreign invasion until Congress could convene to more comprehensively address the situation.<sup>57</sup> Congress’s power to *provide for* calling forth the militia implicitly recognizes that the executive branch inherently possesses this defensive responsibility, but empowers Congress to place controls upon a president’s access to and use of the personnel necessary to exercise it.<sup>58</sup> Current statutes grant the executive branch broad discretion to use the state militias (the organized elements of which are now called the national

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52. See, e.g. *Hamdan v. Rumsfeld*, 554 U.S. 557, 628 (2006) (concluding “compliance with the law of war is the condition upon which the authority of Article 21 [of the UCMJ, which preserves authority to use military commissions,] is granted”).

53. David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—a Constitutional History*, 121 HARV. L. REV. 941, 1106 (2008).

54. U.S. CONST. art. I, § 8, cl. 15.

55. *Id.* art. II, § 1, cl. 8 (emphasis added) (“I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, *preserve, protect and defend* the Constitution of the United States.”).

56. See *The Prize Cases*, 67 U.S. 635, 668 (1862) (“If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority.”).

57. Note that the Constitution requires Congress to convene only once per year. U.S. CONST. art. I, § 4, cl. 2.

58. THE FEDERALIST NO. 29, at 178 (Alexander Hamilton) (vol. 1, J. and A. McLean 1788) (“The power of regulating the militia, and of commanding its services in times of insurrection and invasion are natural incidents to the duties of superintending the common defense, and of watching over the internal peace of the Confederacy.”). An excellent student Note traces how and why Congress initially placed more stringent conditions on calling forth the militia, particularly for domestic emergencies, but relaxed them over time. See generally Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149 (2004).

guard)<sup>59</sup> and federal armed forces for various international and domestic emergencies and other matters.<sup>60</sup>

Clause 16 gives Congress the power to, “[p]rovide 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 . . . .”<sup>61</sup> Similar to the armed forces of the United States, Congress controls not only the ability to levy and federalize the state militias, but also to regulate them once federalized and to dictate their organization and training by the states.<sup>62</sup>

Article I, Section 8 adds several related powers, including the powers to tax and to “provide for the common defense,”<sup>63</sup> “to define and punish piracies . . . and [other] offences against the law of nations,”<sup>64</sup> “to exercise exclusive legislation in all cases whatsoever, over . . . all places purchased . . . for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings,”<sup>65</sup> and to enact any legislation needed to fully exercise these powers, in the form of the Necessary and Proper Clause.<sup>66</sup>

In total, then, more than half of Congress’s Article I, Section 8 powers directly relate to its authority to create the armed forces and to regulate their use. Every use of military force, even defensive force, requires

59. 10 U.S.C. § 246(b) (2019).

60. *See* 10 U.S.C. §§ 12301–12304(b) (2019) (providing for calling up reserve components, including national guard units, for various international and domestic purposes); *see also* 10 U.S.C. §§ 252–253 (2019) (providing president with discretion to determine when the active or reserve military is needed to execute domestic laws, to determine how many troops are required, and to “take such measures he considers necessary”).

61. U.S. CONST. art. I, § 8, cl. 16.

62. *Id.* art. I, § 8, cl. 16 (emphasis added) (“[R]eserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia *according to the discipline prescribed by Congress* . . .”).

63. *Id.* art. I, § 8, cl. 1.

64. *Id.* art. I, § 8, cl. 10.

65. *Id.* art. I, § 8, cl. 17.

66. *Id.* art. I, § 8, cl. 18. If there is any question how much work the Necessary and Proper Clause does in this context, note that it has resulted in the creation of a Coast Guard, an Air Force and, perhaps soon, a Space Force.

[The Department of Defense] recently developed a series of additional proposals that would authorize the creation of an 11th unified combatant command responsible for space. Separately, the Trump Administration called for Congress to establish by 2020 a new military service branch—Space Force—with the goal of asserting “American dominance in space.” The new service branch would be the first since the creation of the U.S. Air Force (previously part of the Army) in 1947.

STEVEN A. HILDRETH ET AL., Cong. RESEARCH SERV., IF10950, TOWARD THE CREATION OF A U.S. “SPACE FORCE” (2018). President Trump directed the creation of a space-focused combatant command on December 18, 2018. *See* Establishment of United States Space Command as a Unified Combatant Command, 83 Fed. Reg. 65483 (Dec. 18, 2018).

several acts of legislation. These include acts not only creating and equipping the armed forces, but also authorizing, funding and regulating their training and actual operation, whether in domestic or foreign affairs.<sup>67</sup> All of this undermines the common executive branch claim that a president has substantial autonomous discretion to “direct the military” or to use military force short of major war in any way he or she sees fit.<sup>68</sup>

Other elements of the United States Constitution strengthen congressional control over the nation’s armed forces and their use by denying similar powers to the several states. Article I, Section 10 forbids states from maintaining troops or ships of war in times of peace without the consent of Congress,<sup>69</sup> and prohibits states from granting letters of marque and reprisal.<sup>70</sup> It also prohibits states from engaging in war “unless actually invaded or in such imminent danger as will not admit of delay.”<sup>71</sup> These clauses further clarify that absent a need to defend the nation from an actual or imminent attack, Congress alone controls the existence and use of the nation’s armed forces.<sup>72</sup>

These complementary congressional powers are likely why the Supreme Court declared in 1801 that “the whole powers of war” are constitutionally vested in Congress rather than the president.<sup>73</sup> This phrasing potentially encompasses not only Congress’s sole power to authorize non-defensive uses of military force, including their scope and related matters (such as compensation for prize captures), but also the power to create, regulate, and put conditions upon the access to and use of the national armed forces for any legitimate purpose.

### *B. Presidential Military and War Powers*

Although an exegesis of presidential powers is beyond the scope of this Essay, a few key points are essential. The presidency is vested with “the executive power.”<sup>74</sup> Some commentators argue this grant includes

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67. Congress generally adjusts the manpower and funds equipment acquisition, maintenance and military operations in annual legislation. *See, e.g.*, National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, 131 Stat. 1283 (Dec. 12, 2017) (authorizing appropriations for military activities, construction, and defense activities for 2018).

68. This alleged presidential power was highly leveraged in the legal rationalization for the missile strikes on Syria. *See* Syrian Airstrikes Memorandum, *supra* note 5, at 4–6 (discussing the president’s powers as Commander in Chief).

69. U.S. CONST. art. I, § 10, cl. 3.

70. *Id.* art. I, § 10, cl. 1.

71. *Id.* art. I, § 10, cl. 3.

72. *See* THE FEDERALIST NO. 26 (Alexander Hamilton) (discussing importance of national legislative control over the military to preservation of individual rights).

73. *Talbot v. Seeman*, 5 U.S. 1, 28–29 (1801).

74. U.S. CONST. art. II, § 1.

broad power to conduct the nation's foreign affairs, qualified only by express grants of foreign affairs powers to Congress, while others posit that the Constitution confers no comprehensive foreign affairs powers upon the presidency.<sup>75</sup> The president is also denominated "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>76</sup> Whatever the scope of these presidential powers, nothing in the structure or text of the Constitution suggests that they in any way diminish Congress's express or implied powers over the military, or its singular constitutional authority over non-defensive use of military force.<sup>77</sup>

Indeed, *The Federalist* strongly suggests that the Constitution subordinates the presidency to Congress in almost all matters involving the armed forces, except for commanding them in battle, including the authority to initiate a non-defensive use of military force. For example, several of Hamilton's essays refer to the office of the presidency as only a "chief magistrate," with one stating that a president possesses authority "in few instances greater, in some instances less, than those of a governor of New York."<sup>78</sup>

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75. See, e.g., H. JEFFERSON POWELL, *THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS: AN ESSAY IN CONSTITUTIONAL INTERPRETATION* 8–19 (2002) (surveying views of foreign affairs scholars).

76. U.S. CONST. art. II, § 2.

77. Note here that the Necessary and Proper Clause suggests exactly the opposite conclusion, in that Congress is expressly granted the power not only "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers" but also, "[a]ll other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." *Id.* art. I, § 8, cl. 18. In his essays in *The Federalist Papers*, Alexander Hamilton refers to the president and vice president as the "executive department." See THE FEDERALIST NOS. 67, 70 (Alexander Hamilton) (indicating that all powers granted to the president are subject to regulation by Congress). See also John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 46 (2014) (asserting that the latter section of the Necessary and Proper Clause "gives Congress express authority over the implementation of the coordinate branches' powers. Hence, the notion that the president is the sole repository of the executive power does not resolve to what degree, and by what means, Congress may regulate the exercise of such presidential power."). As Justice Jackson said in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." 343 U.S. 579, 635 (1952).

78. THE FEDERALIST NO. 67, *supra* note 77. The use of the term magistrate here is no accident. Hamilton refers to the presidency as a "magistrate" or "chief magistrate" multiple times, including in *The Federalist* No. 67, *The Federalist* No. 68, *The Federalist* No. 69, *The Federalist* No. 71, *The Federalist* No. 72, *The Federalist* No. 73, *The Federalist* No. 74. and in several other places, in each case distinguishing it from a monarch or hereditary chief magistrate. THE FEDERALIST NOS. 67–68, 71–74 (Alexander Hamilton). The term "magistrate" in relation to the presidency has particular import for the use of military force that I will examine in more detail in future work.

Regarding the commander in chief power, Hamilton clarified that a president's "authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it."<sup>79</sup> He described it as "nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy."<sup>80</sup> Hamilton further explained that the powers of "the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies, all which, by the Constitution under consideration [are granted] to the legislature."<sup>81</sup> Hamilton thus clearly viewed the president's power as "commander in chief" to include only the authority to lead the military in the pursuit of national objectives established by Congress rather than independent authority to establish such objectives.<sup>82</sup>

It is true that Hamilton extolled the virtues of an energetic, independent and unitary executive.<sup>83</sup> To assuage concerns about creating an executive with too much power, however, he clarified that the president would remain "subordinate to the laws of the legislature" although not "fully dependent upon the legislature."<sup>84</sup> He buttressed this with a rhetorical question: "what would be to be feared from an elective magistrate of four years duration with the confined authorities of a president of the United States?"<sup>85</sup> Thus, while Hamilton observed that "in the conduct of war . . . the energy of the executive is the bulwark of the national security," he nowhere suggested that the president would have independent constitutional authority to initiate a war or any other non-defensive use of military force, or to violate any related domestic legislation limiting that force. In fact, Hamilton several times expressly rejected any such notion.

*The Federalist* also explains why both the executive branch and the states are, and must be, subordinate to Congress when it comes to using non-defensive military force. In *The Federalist No. 3*, John Jay clarified that the national government must possess the foreign affairs and war powers to prevent self-interested states from giving other nations just

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79. THE FEDERALIST NO. 69 (Alexander Hamilton) (vol. 2, J. and A. McLean 1788).

80. *Id.*

81. *Id.*

82. *Id.* at 234 (emphasis added) ("The [president] would have a right to command the military and naval forces of the nation; the [king of Great Britain], in addition to this right, possesses that of *declaring* war, and of *raising* and *regulating* fleets and armies by his own authority."). Hamilton later refers to the president's power as the "direction of war" rather than its initiation. THE FEDERALIST NO. 74 (Alexander Hamilton).

83. THE FEDERALIST NO. 70, *supra* note 77.

84. THE FEDERALIST NO. 71 (Alexander Hamilton).

85. *Id.*



cause for war when not in the national interest.<sup>86</sup> Later, Jay also explained why Congress, rather than the president, must possess sovereign powers related to the use of military force. He observed:

[A]bsolute monarchs will often make war when their nations are to get nothing by it, but for the purposes and objects merely personal, such as thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans. These and a variety of other motives, which affect only the mind of the sovereign, often lead him to engage in wars not sanctified by justice or the voice and interests of his people.<sup>87</sup>

Jay then explained how the Constitution prevented this situation. He acknowledged that “inducements to war” then existed and will often arise, and that they can be manipulated to justify military action.<sup>88</sup> It is therefore essential, Jay argued, that one national *government* possess the power to decide when to use military force:

One government can collect and avail itself of the talents and experience of the ablest men, in whatever part of the Union they may be found. It can move on uniform principles of policy. It can harmonize, assimilate, and protect the several parts and members, and extend the benefit of its foresight and precautions to each.<sup>89</sup>

Most tellingly, Jay referred to the national government making these decisions as a collective entity rather than an individual:

[N]ot only fewer just causes of war will be given by the national government, but it will also be more in *their* power to accommodate and settle them amicably. *They* will be more temperate and cool, and in that respect, as well as in others, will be more in capacity to act advisedly . . . .<sup>90</sup>

Jay thereby clearly distinguished the careful conduct expected of a pluralistic government from the unpredictable conduct expected of a chief executive with untrammelled discretion to use military force. He thereby strongly indicates that the “government” deciding these important issues under the Constitution would include Congress, not merely the president.

Jay further explained that a single national government would place the militias under a unified command to be used for the benefit of the whole union:

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86. THE FEDERALIST NO. 3 (John Jay).

87. THE FEDERALIST NO. 4, at 16–17 (John Jay) (vol. 1, J. and A. McLean 1788).

88. *Id.* at 18 (“[W]henver such inducements may find fit time and opportunity for operation, pretenses to color and justify them will not be wanting.”).

89. *Id.*

90. THE FEDERALIST NO. 3, *supra* note 86, at 15 (vol. 1, J. and A. McLean 1788).

It can apply the resources and power of the whole to the defense of any particular part, and that more easily and expeditiously than State governments or separate confederacies can possibly do, for want of concert and unity of system. It can place the militia under one plan of discipline, and, by putting their officers in a proper line of subordination to the Chief Magistrate, will, as it were, consolidate them into one corps, and thereby render them more efficient than if divided . . . .<sup>91</sup>

Jay continued, “[a]s to those just causes of war which proceed from direct and unlawful violence, it appears equally clear to me that one good national government affords vastly more security against dangers of that sort than can be derived from any other quarter.”<sup>92</sup>

At this point it is important to recall that the Constitution grants Congress the power to establish the national system for organizing, training, regulating and calling forth the state militias.<sup>93</sup> The president is given only the power to command them “when called into actual service” pursuant to the system enacted by Congress.<sup>94</sup> This arrangement reinforces the view that the commander in chief power refers only to a centralized commander that executes national policies established and limited by Congress.<sup>95</sup> It does not grant the president autonomous constitutional authority to use or to direct the military in any way he or she desires in either domestic governance or foreign affairs.

*The Federalist* also clarifies why the Constitution does not grant the president entirely independent power to conduct the nation’s foreign affairs generally. Some essays focus on the need for a unified confederation to protect against foreign influence and interference with domestic tranquility.<sup>96</sup> In his essays on the executive department, however, Hamilton attempted to allay concerns about the potential power of the presidency by explaining that Congress may constrain or check the

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91. THE FEDERALIST NO. 4, *supra* note 87, at 18–19.

92. THE FEDERALIST NO. 3, *supra* note 86, at 14.

93. *See supra* Section I.A (describing Congressional powers over the military and their enumeration in Article I, Section 8 of the Constitution).

94. U.S. CONST. art. II, § 2. *See also* THE FEDERALIST NO. 69, *supra* note 79, at 233–34 (“The President will have only the occasional command of such part of the militia of the nation as by legislative provision may be called into the actual service of the Union.”).

95. THE FEDERALIST NO. 74, *supra* note 82, at 269 (“Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms a usual and essential part in the definition of the executive authority.”).

96. *See, e.g.*, THE FEDERALIST NOS. 2–5 (John Jay) (discussing the necessity of acting as a unified nation to preserve the peace and tranquility of the nation from the interference and influence of foreign nations).

exercise of almost all of the presidency's powers, especially those related to foreign affairs.<sup>97</sup>

Specifically related to foreign influence and executive power, Hamilton noted the threat of "cabal, intrigue and corruption . . . chiefly from the desire in foreign powers to gain an improper ascendant in our councils . . . by raising a creature of their own to the chief magistracy of the Union."<sup>98</sup> He then explained why it would be "utterly unsafe and improper to" entrust the treaty making power solely to "an elective magistrate of four years duration."<sup>99</sup>

[A] man raised from the station of a private citizen to the rank of chief magistrate, possessed of a moderate or slender fortune, and looking forward to a period not very remote when he may probably be obliged to return to the station from which he was taken, might sometimes be under temptations to sacrifice his duty to his interest, which it would require superlative virtue to withstand. An avaricious man might be tempted to betray the interests of the state to the acquisition of wealth. An ambitious man might make his own aggrandizement, by the aid of a foreign power, the price of his treachery to his constituents. The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate

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97. See, e.g., THE FEDERALIST NO. 67 (Alexander Hamilton) (describing the limited power of the President to appoint temporary Senate seats in Legislative recess).

98. THE FEDERALIST NO. 68 (Alexander Hamilton) (vol. 2, J. and A. McLean 1788). He argued that the electoral college and other requirements created by the Constitutional Convention regarding those eligible to hold the presidency were essential to prevent such foreign influence.

But the convention have guarded against all danger of this sort, with the most provident and judicious attention. They have not made the appointment of the President to depend on any preexisting bodies of men, who might be tampered with beforehand to prostitute their votes; but they have referred it in the first instance to an immediate act of the people of America, to be exerted in the choice of persons for the temporary and sole purpose of making the appointment. And they have excluded from eligibility to this trust, all those who from situation might be suspected of too great devotion to the President in office.

*Id.* at 228. Relatedly, Hamilton thought a president's eligibility for reelection would encourage him or her to act in the national rather than personal interest, the latter of which might result from having a predetermined, constitutionally-limited time in office.

An avaricious man, who might happen to fill the office, looking forward to a time when he must at all events yield up the emoluments he enjoyed, would feel a propensity, not easy to be resisted by such a man, to make the best use of the opportunity he enjoyed while it lasted, and might not scruple to have recourse to the most corrupt expedients to make the harvest as abundant as it was transitory; though the same man, probably, with a different prospect before him, might content himself with the regular perquisites of his situation, and might even be unwilling to risk the consequences of an abuse of his opportunities. His avarice might be a guard upon his avarice.

THE FEDERALIST NO. 72, at 257–58 (Alexander Hamilton) (vol. 2, J. and A. McLean 1788).

99. THE FEDERALIST NO. 75, at 273–74 (Alexander Hamilton) (vol. 2, J. and A. McLean 1788).

created and circumstanced as would be a President of the United States.<sup>100</sup>

If these concerns surround the treaty making power, they are undoubtedly amplified when it comes to the delicate and potentially momentous decisions to use non-defensive military force, just as Jay suggested.<sup>101</sup>

In sum, *The Federalist* points decidedly toward the conclusion that Congress, not the presidency, possesses sole constitutional power to authorize all non-defensive uses of military force, and plays an important role constraining the presidency's command of the military and its conduct of foreign affairs matters more generally. They also indicate that Congress has substantial authority to regulate even defensive military force, including the access to, and the organization and regulation of, the military forces necessary to exercise it.

### C. Judicial Precedent

The broadly-held original understanding that Congress possesses sole constitutional power over non-defensive uses of military force explains why pre-World War II Supreme Court precedent consistently held that only express or implied congressional authorization, or an imperative defensive or protective necessity, justifies an invasion or deprivation of the rights of United States citizens or of foreign nationals by military force. For example, naval commanders who captured *foreign-flagged* vessels that were beyond the scope of congressionally-authorized hostilities were held liable for trespass,<sup>102</sup> even if their actions were consistent with executive branch orders or guidance.<sup>103</sup> During the Mexican-American War, an Army commander who seized the private property of a United States citizen without adequate proof of an imperative necessity to do so was personally responsible for damages.<sup>104</sup> Similarly, a Civil War commander who ordered the criminal prosecution of a United States citizen by military tribunal when the civil courts were open was required to pay nominal damages.<sup>105</sup>

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100. *Id.* at 274.

101. See THE FEDERALIST NO. 4, *supra* note 87 (describing the need to use force in a uniform manner to protect against foreign interference and influence).

102. *Little v. Berreme*, 6 U.S. 170, 177–79 (1804); *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 122–26 (1804).

103. See, e.g., *Little*, 6 U.S. at 178–79 (discussing how the law “shall be carried into effect” against naval commanders even though the president had ordered naval captains to seize vessels engaged in illicit commerce).

104. *Mitchell v. Harmony*, 54 U.S. 115, 137 (1851).

105. *Milligan v. Hovey*, 17 F. Cas. 380 (C.C.D. Ind. 1871). However, the trial by military tribunal was found unconstitutional in *Ex parte Milligan*, 71 U.S. 2, 128–29 (1866).

Many other Supreme Court decisions confirm the view that only express or clearly implied congressional authorization, or an imperative defensive necessity, is needed to justify an abrogation of life, liberty or property rights by military force.<sup>106</sup> Put differently, a president or subordinate commander's domestic legal authority to invade individual rights by a use of military force is governed by congressional enactments and well-established doctrines of necessity rather than the uncertainties of domestic political posturing or the whims of the executive branch.<sup>107</sup>

### III. HOW CONGRESS AND THE PEOPLE LOST CONTROL

In light of the Constitution's text and structure, as well as its well-documented original understanding, it is both surprising and alarming that the modern presidency has accrued so much practical (if not legal) power in this area. A variety of factors have contributed to this situation. Most significantly, Congress has relinquished several of its relevant powers—often appropriately—without jealously guarding its remaining powers, in particular, its plenary powers to limit funding for military operations and to authorize the use of non-defensive military force. This Part briefly surveys significant developments that appear to have emboldened presidents to use non-defensive force unilaterally.

First, since World War II, geopolitical realities have changed rather drastically. Due to the nature and global distribution of military power—including intercontinental nuclear weapons—as well as the globalized

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106. For a more complete collection and categorization of relevant precedent, including the relevant doctrines of necessity expressly and implicitly recognized in it, see generally John C. Dehn, *The Commander-in-Chief and the Necessities of War: A Conceptual Framework*, 83 *TEMPLE L. REV.* 599, 616–48 (2011) [hereinafter Dehn, *Necessities*]; see also John C. Dehn, *Customary International Law, the Separation of Powers, and the Choice of Law in Armed Conflict*, 102 *CARDOZO L. REV.* 2089, 2134–152 (2016) [hereinafter Dehn, *Choice of Law*].

107. Dehn, *Necessities*, *supra* note 106, at 616–48. Situations of extreme emergency may be one area in which politics may supersede law. In theory, such situations allow a president to violate the law so long as he informs Congress and they ratify his behavior. The problem is that, in practice, presidents are often immune from civil suit for their official military actions, see, e.g., *Durand v. Hollins*, 8 F. Cas. 111 (C.C.S.D.N.Y. 1860) (No. 4186) (dismissing claim for property damage in Nicaraguan town caused by naval bombardment independently ordered by the president), and Congress does not take formal action to check the president. This extreme emergency power may in fact be more properly considered a political rather than a legal power, in that Congress may ratify whatever it wishes and the compelling government interests at stake would likely result in judicial deference, as occurred in *Korematsu v. United States*, 323 U.S. 214, 217–18 (1944). For a discussion, see Dehn, *Necessities*, *supra* note 106, at 651–61. In my view, it is a mistake to translate this theoretical, extreme emergency power to any use of military force that does not implicate the most significant security interests of the United States. Proponents of the “political question” view of war powers see things differently. See, e.g., Henry P. Monaghan, *Presidential War-Making*, 50 *B.U. L. REV.* 19, 23 (1970) (“[T]he existence of an emergency is largely a political not a judicial question. If the president abuses his power, the only recourse is subsequent congressional action and, ultimately, the displeasure of the electorate.”).

economy and other factors, America now defines its strategic interests quite broadly.<sup>108</sup> At least annually, Congress funds and equips a large, complex and well-trained military force to protect those interests.<sup>109</sup> As the Framers feared, however, presidents with readily available armed forces are often tempted to use them in ways that do not clearly benefit the nation's long-term interests.<sup>110</sup>

Second, Congress has not only raised, equipped and maintained a large and permanent national armed force, it has also provided said force with significant funding to conduct global operations. This includes naval vessels conducting maritime patrols far from United States shores.<sup>111</sup> It also includes substantial numbers of troops semi-permanently stationed in other countries.<sup>112</sup> As the commander in chief and chief diplomat with

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108. See, e.g., Donald J. Trump, *The National Security Strategy for the United States of America*, WHITE HOUSE (Dec. 2017), <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf> [<https://perma.cc/28KS-NNR5>] (describing America's strategic vision as "protecting the American people and preserving our way of life, promoting our prosperity, preserving peace through strength, and advancing American influence in the world"); Barack Obama, *National Security Strategy*, WHITE HOUSE (Feb. 2015) [hereinafter Obama NSS], [https://obamawhitehouse.archives.gov/sites/default/files/docs/2015\\_national\\_security\\_strategy\\_2.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/2015_national_security_strategy_2.pdf) [<https://perma.cc/FCK9-H96R>] (characterizing America's strategic agenda as "ambitious"); George W. Bush, *The National Security Strategy for the United States of America*, WHITE HOUSE (Mar. 2006), <https://georgewbush-whitehouse.archives.gov/nsc/nss/2006/> [<https://perma.cc/29XC-YE3N>] (stating America's strategy as "to protect the security of the American people"); see also RONALD O'ROURKE, CONG. RESEARCH SERVICE, R43838, *A SHIFT IN THE INTERNATIONAL SECURITY ENVIRONMENT: POTENTIAL IMPLICATIONS FOR DEFENSE—ISSUES FOR CONGRESS 2* (2018) (discussing the shift towards "grand strategy" of the US defense budgets, plans, and programs).

109. See NESE F. DEBRUYNE & BARBARA SALAZAR TORREON, CONG. RESEARCH SERVICE, R98756, *DEFENSE AUTHORIZATION AND APPROPRIATIONS BILLS: FY1961–FY2019*, at 1 (2018) ("Congress oversees the defense budget primarily through two yearly bills: the defense authorization and defense appropriations bills.").

110. See James Madison, *Letters of Helvidius No. 4* (Sept. 14 1793) available at <https://founders.archives.gov/documents/Madison/01-15-02-0070> [<https://perma.cc/F4P5-NK27>] ("It is in war . . . that laurels are to be gathered, and it is the executive brow they are to encircle. The strongest passions, and most dangerous weaknesses of the human breast; . . . the honorable or venial love of fame, are all in conspiracy against the desire and duty of peace."). Treanor, *supra* note 11, at 700 ("The founding generation believed that, if the President could commit the nation to war, his desire for fame might lead him into war even when war was not in the national interest."); see also THE FEDERALIST NO. 4, *supra* note 87 and related text (describing how human nature may cause single person to seek personal gain, glory, and ambition through war).

111. See, e.g., Obama NSS, *supra* note 108, at 13 (stressing importance of maritime security from the Arctic, to the Caribbean, to Southeast Asia and Horn of Africa).

112. See, e.g., UNITED STATES EUROPEAN COMMAND, FACT SHEET: U.S. MILITARY PRESENCE IN EUROPE (1945–2016) (May 26, 2016), <https://www.eucom.mil/doc/35220/u-s-forces-in-europe> [<https://perma.cc/77L3-NE9W>] (showing roughly 62,000 United States active military personnel authorized in Europe); MARK E. MANYIN ET AL., CONG. RESEARCH SERVICE, R41481, *U.S.-SOUTH KOREA RELATIONS 10–11* (2017) (discussing length of U.S. troop presence in South Korea).

at least some discretion to conduct the nation's foreign affairs,<sup>113</sup> a president enjoys substantial discretion—subject to funding constraints—to employ the military in non-hostile ways that he or she deems geopolitically useful.<sup>114</sup> Regular congressional funding, which now includes a large “slush fund” for “overseas contingency operations,”<sup>115</sup> provides presidents with ample monetary means to threaten, provoke, or initiate a use of military force without first consulting Congress.<sup>116</sup>

Third, presidents and their legal advisors have arguably ignored or misinterpreted the text of the War Powers Resolution (WPR). After presidential excesses related to the conflict in Vietnam and its spillover to Cambodia, Congress attempted to reaffirm its authority over the nation's use of military force by adopting the WPR over President Nixon's veto.<sup>117</sup> It requires congressional notification and subsequent approval of certain military deployments likely to result in the use of non-defensive military force.<sup>118</sup>

Executive branch legal advisors argue that the WPR authorizes a president to use the military in any way he or she desires for some period of time,<sup>119</sup> or that the WPR is an unconstitutional intrusion upon presidential powers.<sup>120</sup> These arguments effectively nullify a codified section of the WPR, which declares:

[t]he constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised *only* pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created

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113. See, e.g., POWELL, *supra* note 75, at 95–98 (describing where the Constitution grants the power to determine foreign relations, which includes authority granted to the president).

114. *Id.* at 119–22.

115. See generally BRENDAN W. MCGARRY & EMILY M. MORGENSTERN, CONG. RESEARCH SERV., R44519, OVERSEAS CONTINGENCY OPERATIONS FUNDING: BACKGROUND AND STATUS 9 (2019).

116. For an analysis of the constitutional power to threaten or provoke war, see Matthew C. Waxman, *The Constitutional Power to Threaten War*, 123 YALE L.J. 1626, 1635 (2014).

117. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (November 7, 1973) (codified at 50 U.S.C. §§ 1541–1549 (2019)).

118. 50 U.S.C. §§ 1543–1544 (2019).

119. See Syrian Airstrikes Memorandum, *supra* note 5, at 7 (arguing the War Powers Resolution implicitly approves unilateral presidential uses of military force and, in a footnote, arguing that its constraints do not limit the president).

120. See, e.g., Overview of the War Powers Resolution, 8 Op. O.L.C. 271, 274–75 (Theodore B. Olson, Asst. Atty. Gen., Office of Legal Counsel 1984) (“The Executive Branch has taken the position from the very beginning that § 2(c) of the WPR does not constitute a legally binding definition of Presidential authority to deploy our armed forces.”).

by attack upon the United States, its territories or possessions, or its armed forces.<sup>121</sup>

In other words, Congress attempted to reestablish, and the executive branch has effectively ignored, what the Framers of the Constitution clearly understood: that a president may use military force only pursuant to congressional authorization or an imperative necessity to defend the nation, its possessions, or its instrumentalities.<sup>122</sup>

Fourth, despite the WPR, Congress has failed to formally and consistently condemn presidents for unconstitutional uses of military force.<sup>123</sup> One cannot help but wonder if this apathy is in part the product of its members' excessive partisanship or political cowardice—a desire to avoid accountability at the ballot box for formally taking a position with respect to a specific military endeavor.

For example, when the Obama administration sought specific congressional authorization to fight the Islamic State, a Republican-controlled Congress demurred.<sup>124</sup> When the Obama administration sought congressional authorization to strike Syria for its alleged use of chemical weapons, Congress failed to give it, and several Republican members expressed skepticism of its utility.<sup>125</sup> When the Trump administration conducted missile strikes against Syria without seeking congressional preapproval, some of those same Republican members of Congress expressed approval or tentative approval.<sup>126</sup> Perhaps these inconsistent responses were influenced by the 2008 Democratic presidential primaries—in which a central focus was a candidate's vote

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121. 50 U.S.C. § 1541(c); Overview of the War Powers Resolution, *supra* note 120, at 274 (claiming that, although enacted, the Senate and House dispute over this section, now codified at 50 U.S.C. § 1541(c), was resolved by agreeing that it represents only policy, not law, and that it therefore has no legal effect).

122. The defense of US citizens abroad is a more difficult constitutional question that I intend to address in future work.

123. See *infra* Part IV (discussing the argument that authority is granted by Congressional failure to condemn unconstitutional uses of military force).

124. See, e.g., Jennifer Steinhauer, *A Congress That Doesn't Want to Weigh In on War*, N.Y. TIMES (Dec. 9, 2015), <https://www.nytimes.com/2015/12/10/us/politics/a-congress-that-doesnt-want-to-weigh-in-on-war.html?module=inline> [<https://perma.cc/HJC9-LBS2>] (quoting members of Congress unwilling to approve a new authorization to use military force against the Islamic State).

125. Peter Baker & Jonathan Weisman, *Obama Seeks Approval for Strike in Syria*, N.Y. TIMES (Aug. 31, 2013), <https://www.nytimes.com/2013/09/01/world/middleeast/syria.html> [<https://perma.cc/DP7B-6SFM>].

126. Nicholas Fandos, *Divided on Strikes, Democrats and Republican Press for Clearer Syria Strategy*, N.Y. TIMES (Apr. 14, 2018), <https://www.nytimes.com/2018/04/14/us/politics/congress-syria-trump.html> [<https://perma.cc/AA6Y-6U6E>].



or firmly expressed opinion with respect to the questionable 2003 Iraq invasion.<sup>127</sup>

Fifth, the courts largely avoid adjudicating cases that implicate the use of military force, particularly its initiation. There are notable but limited examples of judicial review with respect to the adoption of specific measures within an existing conflict, including *Hamdi v. Rumsfeld*, *Hamdan v. Rumsfeld*, and *Boumediene v. Bush*.<sup>128</sup> However, federal courts most often dismiss cases that involve a president's unilateral use of military force,<sup>129</sup> including those brought under the WPR.<sup>130</sup> The upshot of this liberal judicial application of political question, official immunity, and other judicial avoidance doctrines is to leave essential legal questions about the war powers unanswered or ambiguous.<sup>131</sup> As noted earlier, however, the federal courts traditionally adjudicated cases involving the executive's use of military force to abrogate individual rights, including its authority to resort to the non-defensive use of war powers.<sup>132</sup>

A final factor seems to be that "we the people" no longer demand accountability for most decisions to use military force. One might be

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127. See, e.g., Robert P. Saldin, *Foreign Affairs and the 2008 Election*, 6 FORUM 1, 8–9 (2008) (discussing benefits of Obama's "unique position" opposing the Iraq war).

128. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Boumediene v. Bush*, 553 U.S. 723 (2008).

129. See, e.g., *El-Shifa Pharm. Indus. Co. v. United States*, 55 Fed. Cl. 751, 774 (2003), *aff'd*, 378 F.3d 1346, 1361–70 (Fed. Cir. 2004), *cert. denied*, 545 U.S. 1139 (2005) (dismissing the claim and stating that "the Court may not look behind the President's discharge of his Constitutional duties as Commander in Chief"); *El-Shifa Pharm. Indus. Co. v. United States*, 402 F. Supp. 2d 267, 276 (D.D.C. 2005), *aff'd*, 559 F.3d 578 (D.C. Cir. 2009), *reh'g en banc granted*, 330 F. App'x 200 (D.C. Cir. 2009), *aff'd*, 607 F.3d 836 (D.C. Cir. 2010) (en banc) (dismissing the claim as involving sovereign immunity and presents a nonjusticiable political question).

130. See, e.g., *Crockett v. Reagan*, 558 F. Supp. 893, 902–03 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983) (dismissing a claim that the president's decision to supply military aid violated the WPR as a nonjusticiable political question); *Sanchez Espinoza v. Reagan*, 568 F. Supp. 596, 602 (D.D.C. 1983), *aff'd*, 770 F. 2d 202 (D.C. Cir. 1985) (dismissing allegations that the president's foreign assistance in Nicaragua violated the WPR as the allegations presented a nonjusticiable political question).

131. See, e.g., Steven I. Vladeck, *The New National Security Canon*, 61 AM. U.L. REV. 1295, 1329 (2012) (suggesting that at the Circuit level, more is going on than "faithful application of existing precedent," leaving room for ambiguity in resolution).

132. See, e.g., *The Prize Cases*, 67 U.S. 635, 647 (1862) (describing the two scenarios: power to repel insurrections and invasions, which was given to the president by Congress, and the power to declare war, which is limited to Congress alone). Note that there were two grounds for the majority decision upholding Lincoln's resort to non-defensive war measures after the attack on Fort Sumter. The first was that statutes authorized the president to determine how to respond to a rebellion and therefore implicitly authorized him to determine that a war existed. *Id.* at 668. The other was that Congress had ratified his actions. *Id.* at 670–71. The dissent would have required Congress to formally recognize the existence of a civil war before non-defensive force was permitted. *Id.* at 690–95.

tempted to claim that this indifference stems from a democracy deficit that resulted from ending the draft. Because less than one percent of the American public now serves in the military,<sup>133</sup> a majority of Americans may no longer be attuned to or sufficiently interested in military forays abroad. This problem may also stem from or be exacerbated by a significant lack of constitutional and civic literacy.<sup>134</sup> Whatever the reason(s), the apparent lack of general public interest or concern about the Constitution's allocation of war powers likely relates to the nature of the threats present in the world today and the perceived need for a large, powerful, responsive and agile military to confront them.<sup>135</sup>

The upshot of these and other factors is an executive branch emboldened to initiate non-defensive military force without consulting Congress, without sufficient consideration for long-term American interests, and without clear domestic legal authority to abrogate the rights of other nations, of foreign nationals, or of United States citizens. If we learn anything from President's Trump border emergency declaration,<sup>136</sup> or from his more recent decision to target and kill an Iranian general that might have escalated to a wider war,<sup>137</sup> it should be that making it too easy for a president to unilaterally declare or create an emergency, and too difficult for Congress to control or reverse those decisions, upsets the constitutional equilibrium, ignores the will of the people, and undermines the rule of law.<sup>138</sup> This situation is unlikely to change unless the people

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133. GEORGE M. REYNOLDS & AMANDA SHENDRUK, COUNCIL ON FOREIGN RELATIONS, DEMOGRAPHICS OF THE U.S. MILITARY 1–2 (Apr. 24, 2018), <https://www.cfr.org/article/demographics-us-military> [<https://perma.cc/M2DG-X6VA>] (placing number at approximately 0.5 percent of the US population).

134. See Sheila Kennedy, *Civic Ignorance and Democratic Accountability*, 51 LOY. U. CHI. L.J. 419 (2019).

135. As Alexander Hamilton observed,

Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war, the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they at length become willing to run the risk of being less free.

THE FEDERALIST NO. 8, *supra* note 41, at 41 (vol. 2, J. and A. McLean 1788). Although Hamilton was here speaking of the risk of standing armies that would be created by a failure of the colonies to unite in a new constitutional confederacy, his observation has proven salient in both the national and international context at least since the attacks of September 11, 2001.

136. Declaring a National Emergency Concerning the Southern Border of the United States, Fed. Reg. 34, 4949, 4949–50 (Feb. 20, 2019).

137. See generally President Donald Trump, Remarks by President Trump on the Killing of Qasem Soleimani (Jan. 3, 2020) (transcript available at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-killing-qasem-soleimani/> [<https://perma.cc/2P83-YUK7>]).

138. When granting a partial preliminary injunction against the Trump Administration's attempt to use emergency authorities to divert federal funds to construction of a border barrier otherwise

and their elected representatives demand respect for the original constitutional design and understanding.

#### IV. WHY ABERRANT PRACTICE CANNOT ESTABLISH NEW CONSTITUTIONAL LAW

In light of these developments, some commentators appear to have assimilated their contemporary views of the Constitution to current realities. One commentator, echoing the claims of many constitutional scholars, has proposed that constitutional concerns surrounding the use of military force should focus on whether Congress and the presidency engage in proper “war politics” and doubts the relevance of “juristic norms.”<sup>139</sup> Another suggests that the Constitution has effectively been amended by practice to permit presidents to use at least some non-defensive force unilaterally.<sup>140</sup> Some add to these views the idea that we must construe independent presidential power to use non-defensive force more broadly in light of modern geopolitical complexities.<sup>141</sup> Still another commentator suggests that Congress’s power to declare war is a very narrow and limited power to formally declare war, and that

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lacking congressional authorization in *Sierra Club v. Trump*, 379 F. Supp. 3d 883, 927 (N.D. Cal. 2019), *motion to stay denied*, 2019 WL 2305341, at \*2 (N.D. Cal. 2019), the court observed

Congress’s “absolute” control over federal expenditures—even when that control may frustrate the desires of the Executive Branch regarding initiatives it views as important—is not a bug in our constitutional system. It is a feature of that system, and an essential one. The Appropriations Clause is “a bulwark of the Constitution’s separation of powers among the three branches of the National Government, and is particularly important as a restraint on Executive Branch officers.”

*Id.* at 54 (citations omitted). *See also* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952) (Jackson, J., concurring) (“Presidential claim[s] to a[n emergency] power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.”).

139. ZEISBERG, *supra* note 13, at 21–24. *See also* POWELL, *supra* note 75, at 126 (“[T]here is no way to disentangle the constitutional from the policy and the political in questions about the formulation and implementation of United States foreign affairs.”); Monaghan, *supra* note 107, at 32 (“To my mind, therefore, any attempt to circumscribe on constitutional grounds the president’s power to use armed force abroad confuses political with constitutional issues.”).

140. *See, e.g.*, GRIFFIN, *supra* note 24, at 48 (discussing how practice can be decisive from a legal point of view).

141. *See, e.g.*, Monaghan, *supra* note 107, at 27 (“Whatever the intention of the framers, the military machine has become simply an instrument for the achievement of foreign policy goals, which, in turn, have become a central responsibility of the presidency. . . . [T]he only limitation upon presidential power has been that imposed by political considerations. That is the teaching of our history.”); *id.* at 28 (“A line between aggressive and defensive action might have been workable in the era of Jefferson and Madison . . . . But that distinction can have little meaning for the president of a great global power in a highly complex and interdependent world.”).

Congress's sole means to limit a president's misuse of the armed forces is to deny funding for military measures to which it objects.<sup>142</sup>

All of these approaches significantly discount the importance of—or grossly misinterpret—the Constitution's original design and meaning. The first embraces alleged ambiguity that has largely been manufactured by aberrant executive branch practice over time. The last appears to be a misreading of history and precedent.<sup>143</sup> The others expressly claim or implicitly suggest that the elected branches of government may alter the original constitutional design and meaning by later practice. This Essay's earlier analysis addressed the arguments underpinning the claims based in the Constitution's text. This Part will therefore address whether subsequent practice can alter a well-established, original constitutional meaning regarding the Constitution's functional allocation of the power to use military force.

Historical practice is often considered when addressing ambiguities in the text or original meaning of the Constitution, particularly in situations involving the separation of powers.<sup>144</sup> Sometimes referred to as

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142. Yoo, *supra* note 28, at 193–94. Other commentators more or less agree with this view. See Treanor, *supra* note 11, at 696–97 (listing pro-Executive commentators).

143. Professor Yoo's misreading of history and precedent has been refuted in significant measure by other commentators. See, e.g., GRIFFIN, *supra* note 24, at 41–45 (stating that Yoo's project is contrary to advice regarding war powers, ignores the change in American thinking through pre- to post-Revolutionary period, and Yoo does not cite direct evidence to support his position); RAMSEY, *supra* note 11, at 448 n.42–43 (stating that Yoo's argument as it pertains to the clause preventing the president's unilateral initiation of war is unfounded in text or historical practice); Prakash, *supra* note 11, at 58 (outlining that Yoo's assertion is incorrect because if the Constitution wanted to give the president war-making powers, it would have). A full account of the inaccuracies in Yoo's scholarship would require extensive commentary. To provide one example, Professor Yoo's analysis of some of the Supreme Court precedent discussed earlier, *Bas v. Tingy*, 4 U.S. 37 (1800), *Talbot v. Seeman*, 5 U.S. 1 (1801), *Little v. Barreme*, 6 U.S. 170 (1804), and *Murray v. The Schooner Charming Betsy*, 6 U.S. 64 (1804), *supra* Section II.A, and related text, is superficial and misleading. Professor Yoo first deceptively claims that “none of these cases called upon the Supreme Court to decide that the president was waging war in violation of the Constitution, or that Congress had failed to declare that a state of war existed, or that courts could step in to adjudicate inter-branch disputes over war.” Yoo, *supra* note 28, at 293. Although these statements are true as far as they go, they elide the fact that each of these cases did require the Court to determine the ability of executive branch officers to claim authority to use certain war powers against certain targets, as well as the relative authority of Congress and the president to authorize and limit the use of those powers. After a cursory and seemingly result-oriented analysis, Yoo concludes that “[n]either *Bas*, *Talbot*, nor *Little* (nor all three added together) constituted the *Marbury* [*v. Madison*] of foreign relations law.” *Id.* at 294. While not the *Marbury* of “foreign relations law,” the cases do engage in *Marbury*-style judicial review of war measures and therefore strongly support the idea that the courts have a role in policing rights invasions when they have jurisdiction over the subject matter and parties. For a collection and analysis of similar precedent, see Dehn, *Choice of Law*, *supra* note 106, at 2134–40 (referencing the *Charming Betsy* case, the *Little* case, and *The Prize Cases*, among many others).

144. *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014) (justifying resort to “the practice of the government” particularly in separation of powers cases). For analysis of this approach in the context

“historical gloss,” the basic notion is that gaps or ambiguities in the Constitution’s text or meaning can be clarified by the practice of the government.<sup>145</sup> The idea that the elected branches of government can *alter* the Constitution’s separation of powers by later practice rather than formal amendment or constitutionally compliant legislation, however, is suspect. This is particularly the case, it would seem, when doing so substantially alters the functional constitutional basis for invading fundamental individual rights.

The first problem with the notion that the Constitution’s separation of powers can be altered rather than merely clarified by historical practice is that it is, at bottom, a claim that the elected branches of government can do informally what the text of the Constitution indicates they cannot do formally without the consent of the people through their state representatives.<sup>146</sup> In *Marbury v. Madison*, Chief Justice Marshall stated the truism that no branch of government may act in violation of the Constitution, whether by formal legislation or other official act.<sup>147</sup> As Marshall noted, the Constitution declares that only laws made “in pursuance” of its terms are supreme law of the land.<sup>148</sup> Furthermore, the idea that all government officials must act consistently with the Constitution arises naturally from the fact of a written constitution and its requirement that each member of government swear an oath of loyalty to it.<sup>149</sup> To paraphrase Marshall’s rhetorical question, why should all members of the federal and state governments swear an oath to the Constitution of the United States if it forms no rule for their official acts?<sup>150</sup>

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of the separation of powers, see Curtis A. Bradley & Niel S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 261–62 (2017) (stating that while the historical gloss approach is frequently used, the approach is not fully defined); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 414–15 (2012) (emphasizing four overarching points in the analysis of historical gloss and the separation of powers).

145. Bradley & Siegel, *supra* note 144, at 257; Bradley & Morrison, *supra* note 144, at 413–14.

146. See U.S. CONST. art. V (requiring concurrence of three fourths of state legislatures or state conventions to amend the Constitution).

147. *Marbury v. Madison*, 5 U.S. 137, 180 (1803) (“[T]he particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written Constitutions, that a law repugnant to the Constitution is void, and that courts, as well as other departments, are bound by that instrument.”).

148. *Id.* at 180. See U.S. CONST. art. VI, § 2 (stating the Constitution, laws of the United States, and treaties, shall be the supreme “Law of the Land”).

149. *Marbury*, 5 U.S. at 176–80.

150. *Id.* at 180. Marshall refers to the judiciary and Congress in this section of the opinion, but his logic is equally applicable to any member of either federal and state governments, all of whom are constitutionally required to take a similar oath. See U.S. CONST. art. II, § 1, cl. 8 (prescribing

Marshall addressed the idea that subsequent practice may clarify constitutional meaning in *McCulloch v. Maryland*:

[A] doubtful [constitutional] question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice. An exposition of the constitution, deliberately established by legislative acts . . . ought not to be lightly disregarded.<sup>151</sup>

Marshall thus provided three requirements necessary to giving interpretive weight to government practice. First, the Constitution's meaning must be ambiguous. Second, the ambiguity and any related subsequent government practice cannot pertain to "great principles of liberty." And third, the relevant practice of the elected branches must be "deliberately established," which in *McCulloch* involved statutes to which both the executive and legislative branches assented.<sup>152</sup>

Similarly, in *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Frankfurter posited that "[d]eeply embedded traditional ways of conducting government *cannot supplant* the Constitution or legislation, but they give meaning to the words of a text or supply them."<sup>153</sup> He therefore posited:

[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on executive [p]ower vested in the President . . .<sup>154</sup>

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the president's oath); *id.* art. VI, § 3 ("The Senators and Representatives before mentioned, and the members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by Oath or Affirmation to support this Constitution.").

151. *McCulloch v. Maryland*, 17 U.S. 316, 401 (1819).

152. *Id.*

153. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J. concurring) (emphasis added).

154. *Id.* at 610–11. This is not a claim that original meaning must always control constitutional interpretation. It is a narrower claim that the functional allocation powers in the respective branches of government cannot be altered without a valid congressional delegation or formal amendment. Some might be tempted to assert that the Court's abandonment of a strict non-delegation doctrine with respect to legislative powers proves the opposite. However, some scholarly commentary persuasively argues that the non-delegation doctrine was more myth than fact. See Eric A. Posner & Adrian Vermule, *Interring the Non-Delegation Doctrine*, 69 U. CHI. L. REV. 1721, 1722–23 (2002) ("[T]here just is no constitutional nondelegation rule, nor has there ever been. The nondelegation position lacks any foundation in constitutional text and structure, in standard

Frankfurter's requirement for a consistent, *unchallenged* and unbroken practice is similar to Marshall's view that a practice must be "deliberately established," requiring actual or readily apparent assent to a government practice by both elected branches of government. A majority of the Supreme Court effectively embraced this approach in *Dames & Moore v. Regan*.<sup>155</sup>

Applying these tenets to the constitutional power to use military force undermines any argument that historical gloss has amended the Constitution. Both Marshall and Frankfurter advanced the entirely logical proposition that practice cannot violate or supplant the Constitution, and neither limits this claim to its text. In other words, neither the text nor a broadly held, firmly established original constitutional meaning or understanding regarding the separation of powers may be altered by subsequent practice on later claims of ambiguity or by aberrant government practice.<sup>156</sup> A proper reading of the Constitution's text and adoption history, as well as a review of early practice and judicial precedent clearly establishes that there is no substantial ambiguity regarding the Constitution's original allocation of the power to *initiate* non-defensive military force to Congress alone.<sup>157</sup> True ambiguity surrounds only the scope of a president's authority to use defensive force when another nation has begun or declared war against the United

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originalist sources, or in sound economic and political theory. Nondelegation is nothing more than a controversial theory that floated around the margins of nineteenth-century constitutionalism—a theory that wasn't clearly adopted by the Supreme Court until 1892, and even then only in dictum. The Court's invocation of the rule to invalidate two statutes in 1935 was nothing more than a local aberration, no more to be taken as constitutionally fundamental than, say, the original package doctrine, the doctrine of irrebuttable presumptions, or any of a myriad other constitutional eccentricities that few now bother remembering.”)

155. *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981). See also *United States v. Midwest Oil Co.*, 236 U.S. 459, 473 (1915) (giving interpretive weight to historical practice).

156. Recent commentary suggests that giving a prominent if not primary role to originalist constructions of the Constitution's text is preferable. See Curtis A. Bradley & Nigel S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE L.J. 1213, 1230 (2015) (stating that the text in constitutional practice is not able to be changed by common law methods but has to be changed through a formal amendment). Bradley and Siegel posit that “the authoritative meaning of the constitutional text [is] determined by a process of constructed constraint” and that “the theory of constructed constraint suggests . . . that originalists have conceded too little ground, not too much.” *Id.* at 1270.

157. Prakash, *supra* note 11, at 93–94 (“If one looks to the Framers, it is clear that they regarded the power to “declare war” as encompassing the power to start a war. The same is true of the Ratifiers—they too believed the Constitution granted Congress the power to start a war. If we look for the original public meaning, public usage in Europe and America confirms that to enter into a war was to declare it. Finally, if we look to those who implemented the Constitution in its early years, we see a consensus that only Congress could take the nation from peace into war. While a constitution surely could incorporate the narrow, formal definition of “declare war,” there is no evidence that the federal Constitution did or that anyone regarded it as so doing.”)

States.<sup>158</sup> Assertions that contemporary ambiguity resulting from unilateral presidential practice and instances of congressional acquiescence reduces the issue to merely a political question or amends the Constitution are highly problematic.<sup>159</sup>

Marshall also asserted that any constitution-clarifying government practice may not pertain to a matter involving “the great principles of liberty.” Presumably, Marshall here speaks of the fundamental principles protecting life, liberty, and property as highlighted in the Declaration of Independence, among other places.<sup>160</sup> The gist of Marshall’s concern appears to be that the practice of the elected branches should not be determinative when it amounts to altering the government’s power to affect fundamental individual rights.

Marshall’s concern logically applies to any government practice that substantially alters the functional constitutional basis or authority for abrogating such individual rights. Preserving the Constitution’s separation of powers is an important aspect of protecting these basic liberty interests. As Justice Scalia explained in his *NLRB v. Noel Canning* concurrence, the Constitution’s “core, government-structuring provisions are no less critical to preserving liberty than are the later adopted provisions of the Bill of Rights.”<sup>161</sup> He noted, these “structural provisions reflect the founding generation’s deep conviction that ‘checks and balances provisions were the foundation of a structure of government that would protect liberty.’”<sup>162</sup> He continued “[i]t is for that reason that ‘the claims of individuals—not of Government departments—have been the principal source of judicial decisions concerning separation of powers and checks and balances.’”<sup>163</sup>

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158. Compare *id.* at 94–112 (concluding the president is limited to strictly defensive measures even if another nation has declared war on the United States) with Michael D. Ramsey, *The President’s Power to Respond to Attacks*, 93 CORNELL L. REV. 169, 177 (2007) (arguing “historical evidence supports president’s ability to use offensive military measures if another country initiates war”). See also *The Prize Cases*, 67 U.S. 635, 668 (1862) (“If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority.”).

159. But see *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014) (“These precedents show that this Court has treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute . . .”).

160. For an excellent analysis of the modern importance of the Declaration of Independence in constitutional interpretation, see Alexander Tsesis, *The Declaration of Independence and Constitutional Interpretation*, 89 S. CAL. L. REV. 369 (2016).

161. *Noel Canning*, 573 U.S. at 570 (Scalia, J., concurring).

162. *Id.* at 571 (quoting *Bowsher v. Synar*, 478 U.S. 714, 722 (1986)).

163. *Id.* (quoting *Bond v. United States*, 564 U.S. 211, 222 (2011)).



Although many commentators sympathetic to the “political question” view of war powers consider it to be primarily or exclusively a foreign affairs power,<sup>164</sup> there is no question that this power also implicates fundamental liberty interests. As noted earlier, the cases in which the courts have engaged in judicial review of war measures conclusively establish that this power entails legal authority to invade rights to life, liberty, or property, including those of Americans.<sup>165</sup> This entails, among other things, the ability to deprive American citizens of these rights by confiscating their property,<sup>166</sup> or forcing them to serve in the active armed forces—for example via a draft or a reserve component activation<sup>167</sup>—to support a given military conflict. It also includes the power to impose domestic emergency measures incident to any resulting conflict,<sup>168</sup> as well as the power to generate fiscal requirements to support a protracted military engagement that Congress and, ultimately the people, will be required to fund.

Even more significantly, the power to initiate non-defensive military force includes the power to capture and detain or to kill foreign nationals and even American citizens who are properly determined to be part of an “enemy” armed force.<sup>169</sup> The Supreme Court has also upheld the capture

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164. See, e.g., POWELL, *supra* note 75, at 130–31 (stating that controversies regarding exercises of foreign policy are usually political questions which are not within the purview of the judiciary to resolve); ZEISBERG, *supra* note 13, at 21 (stating hostilities within the Constitution are a political question regarding the security power); Monaghan, *supra* note 107, at 23 (stating reliance on the political question doctrine is appropriate in foreign affairs).

165. See *supra* Section II.C (detailing the judicial precedent Congress possesses over non-defensive uses of military force).

166. See, e.g., *Little v. Barreme*, 6 U.S. 170, 174–75 (1804) (implicitly finding ships and vessels may be seized when they carry goods that may defeat the U.S.’s measures); *The Prize Cases*, 67 U.S. 635, 655 (1862) (stating a citizen’s property may be liable to capture and confiscation); *Mitchell v. Harmony*, 54 U.S. 115, 133 (1851) (stating as a general rule, it is not legal to trade with a public enemy and if caught, the goods are liable to seizure and confiscation).

167. Regarding the draft, see Selective Service Extension Act of 1950, Pub. L. No. 81-599, 64 Stat. 318 (codified June 30, 1950) (empowering the president to order the Reserves into the active military with or without their consent for no more than a twenty-one consecutive month period). Regarding reserve component activation, see U.S. CONST. art I, § 8, cl. 16 (stating that Congress has the power to reserve the “[a]ppointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress[.]”).

168. See, e.g., U.S. CONST. art. I, § 9 (providing for suspension of writ of habeas corpus).

169. For concise analysis of constitutional issues arising in a case involving the targeting of “enemy” American citizens, including a review of relevant Supreme Court precedent, see generally John C. Dehn & Kevon Jon Heller, *Debate, Targeted Killing: The Case of Anwar Al-Alaqui*, 159 U. PA. L. REV. 175 (2011); John C. Dehn, *Targeting Citizens in Armed Conflict: Examining the Threat to the Rule of Law . . . in Context*, CATO UNBOUND: J. DEBATE (June 8, 2011), <https://www.cato-unbound.org/2011/06/08/john-c-dehn/targeting-citizens-armed-conflict-examining-threat-rule-law-context> [<https://perma.cc/9QMP-QPCR>] (arguing judicial precedent clearly holds or implies that the president has constitutional authority to kill or capture and detain U.S. citizens properly deemed enemies at war with the United States).

or destruction of the property of American citizens when properly deemed enemy property.<sup>170</sup> Allowing a president unilateral authority to use non-defensive military force removes Congress from a constitutional decision-making process that is meant to limit courses of action that threaten to and often do deprive individuals, including American citizens, of basic rights in these ways.

Modern limitations on judicial remedies for injuries arising from military operations do not alter the conclusion that the decision to use military force implicates great principles of liberty. Both Congress and the courts have made it more difficult to obtain judicial remedies for individual rights invasions by government officials,<sup>171</sup> particularly in relation to military operations and other matters arising outside the United States.<sup>172</sup> These contemporary restrictions on judicial remedies may alter the perception of whether great liberty principles are implicated by the use of non-defensive military force. They do not, however, change the fact the power to use military force includes the power to deprive American citizens and foreign nationals of their fundamental rights. Why would the Framers have devoted so much attention to congressional control of the military establishment and the use of military force if not to protect the people from abuses of those institutions and powers?<sup>173</sup>

The last factor relevant to whether historical practice provides competent evidence of constitutional meaning is that there must be relatively clear and, when necessary, consistent agreement about a given practice between the executive and legislative branches. Under

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170. See *Prize Cases*, 67 U.S. at 671–75 (upholding capture and condemnation of property of citizens of states in rebellion against authority of the United States); *Miller v. U.S.*, 78 U.S. 268, 304–08 (1870) (similar); *Juragua Iron Co. v. United States*, 212 U.S. 297, 307–11 (1909) (refusing compensation for destruction of American citizen deemed enemy property in enemy territory).

171. See generally *Vladeck*, *supra* note 131; see also *El-Shifa Pharm. Indus. Co. v. United States*, 55 Fed. Cl. 751, 764 (2003), *aff'd*, 378 F.3d 1346 (Fed. Cir. 2004), *cert. denied*, 545 U.S. 1139 (2005) (resolving that “[t]he Constitutional protection afforded by the Takings Clause is not intended to compensate for destruction of enemy war-making property through the exercise of military force.”); *El-Shifa Pharm. Indus. Co. v. United States*, 402 F. Supp. 2d 267, 276 (D.D.C. 2005), *aff'd*, 559 F.3d 578 (D.C. Cir. 2009), *reh’g en banc granted*, 330 F. App’x 200 (D.C. Cir. 2009), *aff’d*, 607 F.3d 836 (D.C. Cir. 2010) (en banc) (stating the political question doctrine prevents courts from reviewing claims of political branches’ decisions regarding foreign policy or national security).

172. For example, the Federal Tort Claims Act, codified at 28 U.S.C. §1346(b), §1402(b), §2401(b), and §§ 2671–2680, converts claims against federal employees acting within the scope of their office or employment into claims against the United States, 28 U.S.C. § 2679(d). Jurisdiction is then barred for claims “arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war,” 28 U.S.C. § 2680(j), and claims “arising in a foreign country,” 28 U.S.C. § 2680(k).

173. For a discussion of the dangers attending standing armies and the continual danger of war, see *THE FEDERALIST* NO. 8, *supra* note 41.

Marshall's reasoning in *McCulloch*, this can take the form of enacted legislation, although legislation is not always dispositive if found to violate clear constitutional requirements or constraints.<sup>174</sup> According to Frankfurter, it can also arise from a long, unbroken executive practice known to and accepted by Congress. Neither is present in this area of constitutional law.

The WPR alone is strong evidence that Congress does not accept or agree with modern presidential assertions of unilateral power to use non-defensive military force.<sup>175</sup> Commentators have documented other, more-recent situations in which Congress did not entirely acquiesce in assertions of presidential power in this area,<sup>176</sup> despite noting institutional factors that limit Congress's ability to do so.<sup>177</sup> Although a thorough review of recent congressional reactions is beyond the scope of this Essay, the evidence is clear enough that not all claims of a unilateral presidential power to use non-defensive military force have gone unchallenged by Congress. To claim that modern presidential practice coupled with, at best, inconsistent congressional responses somehow alters or clarifies the Constitution is to give a dangerous and—in light of the Constitution's original allocation of war- and military-related powers to Congress—*entirely unwarranted* institutional preference to the historical practice of the presidency.<sup>178</sup>

#### V. REESTABLISHING ORIGINAL CONSTITUTIONAL NORMS OVER NON-DEFENSIVE MILITARY FORCE

Because the Constitution allocates superior authority over the military establishment and its use to Congress, and because historical practice cannot alter this original meaning, it is imperative that Congress aggressively reassert its powers. Specifically, this requires that Congress more closely control funding for military operations as well as more consistently and formally condemn unconstitutional uses of force. This

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174. The clearest example here is *I.N.S. v. Chadha*, in which the Court held unconstitutional a one-house, legislative "veto" of executive branch discretionary decisions made pursuant to a statute. 462 U.S. 919, 959 (1983). The Court noted that the congressional veto was legislative in nature in part because it was "action that had the purpose and effect of altering the legal rights, duties and relations of persons." *Id.* at 952.

175. See Bradley & Morrison, *supra* note 144, at 467 ("[A]ny claim of congressional acquiescence in this area needs to take account of the War Powers Resolution—and not just the sections that some commentators construe as accepting a certain measure of unilateral presidential authority.").

176. *Id.* at 461–68.

177. *Id.* at 440–44.

178. See also *id.* at 468 ("[C]ongress's influence on presidential war powers should not be judged simply by the rare times when it enacts legislation restricting presidential action.").

Part briefly explains why this congressional response is necessary and suggests how Congress might respond to constitutionally aberrant presidential uses of force in the future.

First, it is important to recall that the oath taken by every member of Congress requires them to support the Constitution.<sup>179</sup> As Marshall stated, this means that these elected officials are legally and morally obligated to abide by the Constitution, and therefore to maintain the Constitution's separation of powers. Given its effect on fundamental rights, this is especially true of the power to initiate the use of non-defensive military force.

As earlier discussed, however, Congress has exercised some of its powers in ways that effectively cede much of its ability to check executive power by limiting the size and nature of the military establishment. If Congress accepts that the contemporary geopolitical environment requires a large, complex, heavily-equipped, and highly-trained military with significant discretionary funding to defend and advance American interests, then its powers to control the existence, size, and composition of the armed forces is no longer a significant tool with which to check presidential abuses of power. For similar reasons, exercising its constitutional power to place restrictions on access to the modern militia in response to external threats is also likely to be viewed as unwise policy. Given the centrality of these congressional powers to the Framers' approach to preventing presidential abuses of the war powers and tyranny, their effective nullification in response to the current strategic environment is a significant loss.<sup>180</sup>

In light of these realities, Congress must more tightly control the availability and expenditure of funds for military operations. One approach is for Congress to prohibit the expenditure or commitment of funds for the purpose of supporting or conducting any military deployments, attacks or other activities that are inconsistent with the WPR, particularly the section clarifying the limits of the president's constitutional authority to use military force.<sup>181</sup> If Congress wants to

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179. U.S. CONST. art. VI, § 3.

180. Interestingly, in response to an apparent concern that the two-year limitation on funding was inadequate insurance against tyranny that might be imposed by a large standing army, Hamilton wrote,

[I]f the defense of the community . . . should make it necessary to have an army so numerous as to hazard its liberty, this is one of those calamities [*sic*] for which there is neither preventative nor cure. It cannot be provided against by any possible form of government . . . .

THE FEDERALIST NO. 26, *supra* note 72, at 167–68 (vol. 2, J. and A. McLean 1788).

181. See 50 U.S.C. § 1541(c) (stating the president may use military force in a declaration of war, with specific statutory authorization, or in a national emergency created by attack on the U.S.,

grant the executive branch broader discretion to use force for a given geopolitical situation, it can specifically provide for that discretion, either by authorizing the stationing of troops there, which may defend themselves if attacked, or in some other aspect of its annual authorizing and funding legislation. This would give Congress a greater role in identifying the nation's key strategic interests that merit a rapid military response.

There are certainly drawbacks to this proposal. One is that the executive branch has claimed constitutional authority to violate similar fiscal limitations in the past.<sup>182</sup> Another is that giving Congress a role in defining geopolitical interests that justify a rapid military response reduces strategic agility. Unforeseen events can rapidly alter the geopolitical environment. Regular coordination and review of strategic priorities between the executive and legislative branches would likely be time-consuming and difficult, but are essential to this proposal. Finally, there is a risk that partisan politics coupled with the volume of information needed to determine and establish these priorities might render Congress either a rubber stamp for executive branch preferences or an insurmountable obstacle to updating strategic priorities. Congress would need to prioritize its institutional responsibilities to the nation over its partisan attitudes toward a sitting president.<sup>183</sup>

Congress must also more aggressively defend its sole constitutional authority to authorize non-defensive military force. The executive branch typically cites instances of congressional intransigence or acquiescence to unilateral presidential uses of non-defensive force to support its claims of presidential power to engage in them.<sup>184</sup> Congress must more consistently and forcefully counter these claims through formal action

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the U.S. territories, its possessions, or its armed forces).

182. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, B-326013, DEPARTMENT OF DEFENSE—COMPLIANCE WITH STATUTORY NOTIFICATION REQUIREMENT 5 (2014) (in response to GAO inquiry, the Department of Defense asserted that a funding limitation on the transfer of Taliban prisoners unconstitutionally intruded on the president's powers). For an analysis of this report and related matters, see Celidon Pitt, *Fair Trade: The President's Power to Recover Captured U.S. Servicemembers and the Recent Prisoner Exchange with the Taliban*, 83 FORDHAM L. REV. 2837, 2840–41 (2015) (arguing the exchange was illegal) and *id.* at 2876–85 (stating the president violated spending restriction and appropriations riders).

183. For discussion and analysis of one way in which partisan politics influences the political process related to wars, see generally Michael T. Heaney, *The Partisan Politics of Antiwar Legislation in Congress, 2001–2010*, 2011 U. CHI. LEGAL F. 129.

184. See, e.g., Syrian Airstrikes Memorandum, *supra* note 5, at 5–7 (explaining that historically, the president has acted without Congress' explicit authorization prior to taking military action); Military Force in Libya Memorandum, *supra* note 6, at 7–9 (stating that historical practice generally permits the president to initiate military force despite the absence of congressional approval and Congress has implicitly recognized the presidential authority to do so).

that identifies and condemns presidential overreach and reasserts its institutional prerogatives.<sup>185</sup>

It also bears noting that neither the Constitution nor any laws made pursuant to it—including any laws prohibiting the use of federal funds for unauthorized military forays—are self-enforcing. Congress must exercise its other constitutional authorities whenever a president ignores such laws. These authorities primarily include the power to pass joint resolutions that articulate a “sense of Congress” disagreeing with presidential action,<sup>186</sup> the power to censure a president,<sup>187</sup> or, if ultimately necessary, the power to impeach a president.<sup>188</sup>

#### CONCLUSION

The constitutional authority to use our nation’s substantial military force to damage or destroy lives and property is not and should never be reduced to merely a political question. The use of military force always raises questions of law regarding the government’s authority to deprive individuals, including Americans, of their most fundamental individual rights. The text and structure of the Constitution, as well as *The Federalist* essays, show that the Framers saw these risks and principles clearly and designed our founding document accordingly. While a legal requirement for congressional preapproval of non-defensive force may be perceived as an inefficient mechanism for addressing the complex geopolitical environment that now exists, it is the binding legal framework established by our fundamental law. So long as it remains unamended, their oaths obligate both Congress and the presidency to reestablish and to respect these original constitutional norms when addressing the nation’s contemporary security needs.

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185. See, e.g., Joint Resolution Regarding United States Policy Toward Haiti, Pub. L. No. 103-423, 108 Stat. 4358 (1994) (outlining the requirements the president and executive branch must follow when using non-defensive force).

186. See, e.g., *id.* (expressing “sense of Congress” that “the President should have sought and welcomed Congressional approval before deploying United States Armed Forces to Haiti.”).

187. On the constitutionality of a congressional censure, see Jack Chaney, *The Constitutionality of Censuring the President*, 61 OHIO ST. L.J. 979, 989 (2000) (arguing censure is unconstitutional Bill of Attainder); James C. Ho, *Misunderstood Precedent: Andrew Jackson and the Real Case Against Censure*, 24 HARVARD J.L. & PUB. POL. 283, 303–07 (2000) (similarly asserting that censure power is not founded in the historical record).

188. U.S. CONST. art. I, § 2, cl. 5 (“The House of Representatives . . . shall have the sole power of impeachment”); *id.* art. I, § 3, cl. 6–7 (providing Senate power to try impeachment, prescribing procedure, and limiting penalties). Others have suggested “charter” legislation for the domestic national security system. See Harold Hongju Koh, *Why a President Almost Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 95 YALE L.J. 1255, 1338–342 (1988) (asserting that charter legislation would restore balance to national security matters).