


2020

War Powers: Congress, the President, and the Courts – A Model Casebook Section

Stephen M. Griffin
Tulane University Law School, sgriffin@tulane.edu

Matthew C. Waxman
Columbia Law School, mwaxman@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship

 Part of the [Comparative and Foreign Law Commons](#), [Constitutional Law Commons](#), [Courts Commons](#), [International Law Commons](#), [Military, War, and Peace Commons](#), [National Security Law Commons](#), [President/Executive Department Commons](#), and the [Public Law and Legal Theory Commons](#)

Recommended Citation

Stephen M. Griffin & Matthew C. Waxman, *War Powers: Congress, the President, and the Courts – A Model Casebook Section*, TULANE PUBLIC LAW RESEARCH PAPER NO. 20-18; COLUMBIA PUBLIC LAW RESEARCH PAPER NO. 14-669 (2020).

Available at: https://scholarship.law.columbia.edu/faculty_scholarship/2704

This Working Paper is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact scholarshiparchive@law.columbia.edu.

War Powers: Congress, the President, and the Courts A Model Casebook Section

Stephen M. Griffin¹
Matthew C. Waxman²

January 12, 2021 Version

Authors' Note: This model casebook section is concerned with the constitutional law of war powers as developed by the executive and legislative branches, with a limited look at relevant statutes and federal court cases. It is intended for use in Constitutional Law I classes that cover separation of powers. It could also be used for courses in National Security Law or Foreign Relations Law, or for graduate courses in U.S. foreign policy. This is designed to be the reading for one to two classes, and it can supplement or replace standard casebook sections on war powers that are shorter and offer less detail. We plan to continue updating this section periodically in response to feedback and events.

Introduction

In this section we discuss the constitutional law of war powers. Because the law of war powers has been developed chiefly by the political branches rather than the judiciary, it arguably should be approached differently from areas of constitutional law in which Supreme Court decisions are predominant. In studying war powers, we can become aware of how the Constitution is interpreted and applied outside the sphere of judicial decision making. What does the Constitution mean and *how* does it mean in an area of law which is rarely determined by the courts?

Discussions of war powers often begin with a presumed conflict between the legislative and executive branches over the location of the power to initiate a war. This conflict has been replicated in constitutional scholarship, in which scholars often choose sides between “congressionalists” and “presidentialists.” Congress’s power to “declare war” in Article I, section 8, clause 11, for example, is opposed to the President’s power as “Commander in Chief of the Army and Navy of the United States” in Article II, section 2.

Debates that focus on these clauses, particularly those that center on the question of war initiation, can conceal that there is actually widespread agreement among scholars on certain issues. One is that other clauses of the Constitution are relevant to a full understanding of the powers of the respective branches with respect to war powers and related issues. These include various congressional powers over military matters plus Congress’s general powers of appropriation and oversight, as well as the presidential power to take care that the laws are faithfully executed and Article II’s vesting of “executive [p]ower” in the president. Among the reasons for considering these additional clauses is that they are relevant to the distribution of

¹ W.R. Irby Chair and Rutledge C. Clement, Jr. Professor in Constitutional Law, Tulane Law School. Email: sgriffin@tulane.edu.

² Liviu Librescu Professor of Law, Columbia Law School; Adjunct Senior Fellow for Law and Foreign Policy, Council on Foreign Relations. Email: matthew.waxman@law.columbia.edu.

powers over determining and carrying out the foreign policy of the United States, of which war powers and military matters are a part.

Another important area of agreement among scholars is that the distribution of powers relevant to war and foreign policy adopted in the U.S. Constitution differs from the allocation of powers in the British government of the eighteenth century. The framers of the Constitution were broadly familiar with this allocation, which left the determination of war and peace to the monarch. This strongly implies that during the ratification process, those Americans familiar with the British constitution would have been on clear notice that the U.S. Congress was granted a role with respect to war powers not granted to the British Parliament. Persuasive evidence further suggests that influential framers regarded congressional control over decisions to commence war as a way of slowing or restraining political impulses toward it.

These areas of agreement are limited and certainly do not resolve all the questions that have been raised during more than two hundred years of constitutional development. Some of these questions were raised quite early in the first decades of the new republic. Among these questions were whether a sudden attack or a “defensive war” was an exception to Congress’s power to control the initiation of war. A defensive war was one in which the U.S. was attacked, suddenly or not, by a foreign power. Another issue was how the Constitution, with its emphasis on “war,” applied to military actions on a small scale, actions sometimes described as being “short of war.” These questions point up that several constitutional clauses hinge on defining “war” – then and now, not easy to do.

Furthermore, debates about war powers often assume that the only relevant issue is war initiation. In fact, the issue of how to constitutionally *conduct* a war is at least of equal interest. The discussion which follows concerns both issues of war initiation and, to a lesser extent, the conduct of war.

One way to make progress with difficulties in approaching war powers responds to the idea of an inevitable two-sided debate between the branches, with each branch claiming *exclusive* powers, by pursuing the alternative of situating war powers within shared powers over American foreign policy. Once the focus is shifted to foreign policy, the problems created by the war powers clauses become more tractable in the sense that it becomes more apparent that the design of the Constitution involves both political branches in determining national policy. This “shared powers” approach also accords with the insight of Justice Jackson in his 1952 “Steel Seizure Case” concurrence that the Constitution “enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.”³ In that case, a fractured majority held that President Truman lacked authority to seize the nation’s steel mills to prevent a labor strike and production stoppage during the Korean War. Jackson’s approach congenially unites war powers inquiries with perhaps the leading case in the law of separation of powers. In addition, it readily encompasses the relevance of leading examples from throughout U.S. history.

³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). We do not cover this case later in this chapter, on the assumption that it is usually covered elsewhere in a syllabus.

An additional consideration that deserves mention before we consider these examples concerns the role of international law within the U.S. constitutional framework. It is easy to show that the Constitution's framers assumed the relevance of this law in the Constitution itself. But this law took on a new significance in the twentieth century when the executive branch negotiated and Congress ratified the United Nations Charter, which imposed substantial limits on the use of military force and established a new institutional framework for authorizing it under international law. Arguably the ratification of Charter changed the legal situation not only for the United States but for other countries as well. In any case, we should not ignore the potential role of treaties and customary international law in affecting views of the national government's war powers.

The Early Republic and American Expansion

The new republic grappled with war powers issues from the moment it was born. Though "Indian Wars" rarely feature much in historical war powers discussions, the country's first conflict, against Native American tribes in the northwest frontier, was already ongoing when George Washington and the first Congress were sworn in. No war was declared. Congress approved military operations by nationalized state militias and the tiny, embryonic Army through broad authorizations to the President to protect border areas and appropriations of funding to continue military operations that had begun before the Constitution was ratified. A 1791 battlefield fiasco led Congress to conduct its first military oversight investigation, to which Washington submitted.

Some of the most important early war powers debates occurred in the "Quasi-War," a naval conflict with France that took place from 1798 to 1800, during the administration of President John Adams. Major controversies—usually a combination of policy disputes and constitutional disputes—included whether unilateral presidential actions that might provoke military responses from France intruded on Congress's powers and whether legislative restrictions on where or how military forces were used intruded on the president's powers. One threshold debate concerned whether this was a proper "war" at all.

Those Americans friendly to France denounced the war as unconstitutional because there was no declaration by Congress. But President Adams could only proceed with the war by consulting with Congress to obtain its support. Adams had to carefully design his plans and submit them to Congress partly because the U.S. did not yet have a navy. In order to prosecute the war successfully, Adams thus had to have Congress's legislative backing. To some, this need for interbranch coordination suggested that Congress not only was thought to control the initiation of hostilities but could authorize them through any legislative means allowed by the Constitution. At the same time, it showed that it would be difficult to successfully prosecute the war without the willing cooperation and leadership of the chief executive. But some Americans, especially those who wound up supporting Thomas Jefferson in the presidential election of 1800, took away another lesson. To them, the war was illegitimate and unconstitutional because there had been no formal declaration of war with France. Indeed, the use of the term "Quasi War" resulted from their persistent objections.

How should we resolve such disputes? In approaching this question we should observe that each foreign war the United States fought in the eighteenth and nineteenth centuries, up to and including the Civil War, produced not only its share of political controversies, but a small group

of federal court cases, including cases decided by the Supreme Court.⁴ So from an early point, the courts were involved in war powers issues, at least in a narrow sense. These cases are mostly known only to specialists today, but they established important precedents and illustrate some of the difficulties of applying the provisions of the Constitution in practice.

In *Bas v. Tingy*, for example, the Court ruled that although the Quasi-War with France may have been what it termed an “imperfect war” because it was limited, it had been constitutionally authorized through legislative acts. That case pit the owner of a private American cargo ship, which was captured by French privateers, against the commander of an armed American vessel, which recaptured it and returned it to the United States. A 1799 statute granted a generous award for recapturing an American vessel from an “enemy” privateer. But was France an “enemy”? Today the early Court’s conclusion is relevant to whether the various authorizations to use military force, which have become common since World War II, are the constitutional equivalent of a formal declaration of war. Whether and how Congress could authorize force short of a formal declaration of war were questions left open in the Constitution’s text and for which its drafting and ratification records provide no clear answers.

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

Washington, J.: The decision of this question must depend upon another, which is whether, at the time of passing the Act of Congress of 2 March, 1799, there subsisted a state of war between the two nations? It may, I believe, be safely laid down that every contention by force between two nations in external matters, under the authority of their respective governments, is not only war, but public war. If it be declared in form, it is called solemn and is of the perfect kind; because one whole nation is at war with another whole nation, and all the members of the nation declaring war, are authorized to commit hostilities against all the members of the other, in every place, and under every circumstance. In such a war, all the members act under a general authority, and all the rights and consequences of war attach to their condition.

But hostilities may subsist between two nations more confined in its nature and extent, being limited as to places, persons, and things, and this is more properly termed imperfect war; because not solemn, and because those who are 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, authorized by the legitimate powers.

Chase, J.: Congress is empowered to declare a general war, or Congress may wage a limited war, limited in place, in objects, and in time. If a general war is declared, its extent and operations are only restricted and regulated by the *jus belli*, forming a part of the law of nations, but if a partial war is waged, its extent and operation depend on our municipal laws.

What, then, is the nature of the contest subsisting between American and France? In my judgment it is a limited partial war. Congress has not declared war in general terms, but Congress has authorized hostilities on the high seas by certain persons in certain cases.

⁴ Here is a partial list, broken out by episodes: Quasi-War with France: *Bas v. Tingy*, 4 U.S. 37 (1800); *Talbot v. Seeman*, 5 U.S. 1 (1801); *Little v. Barreme*, 6 U.S. 170 (1804). War of 1812: *Brown v. United States*, 12 U.S. 110 (1814). Mexican War of 1846–48: *Fleming v. Page*, 50 U.S. 603 (1850). Naval bombardment of Greytown (Nicaragua): *Durand v. Hollins*, 8 F. Cas. 111 (C.C.S.D.N.Y. 1860). Civil War: *The Prize Cases*, 67 U.S. 635 (1863).

In another Quasi-War case, *Little v. Barreme* (1804), the Supreme Court held invalid a naval order that ran counter to legislation authorizing the capture only of certain vessels. Contrary to a view that the Constitution meant to give the President complete and unfettered discretion to direct military operations, Chief Justice John Marshall's opinion for the Court strongly suggests that Congress has some legislative powers to restrict combat activities.

In the first decades of the 19th century, presidential administrations exercised military force in ways that tested—cautiously at first—the boundaries of Article II and Congress's willingness or ability to push back. At the beginning of the Jefferson administration, when the president asked Congress to authorize offensive military action against the piratical Barbary coast state of Tripoli, Alexander Hamilton advocated more forceful actions in a series of newspaper essays. In so doing, he is credited by many scholars with introducing the distinction between “offensive” and “defensive” wars. The idea was that an offensive war was one in which the United States was the belligerent that started a war to acquire territory or punish a state. By contrast, a defensive war was one in which the United States was attacked by a foreign power. Hamilton's innovation was to claim that in the case of defensive war, congressional approval was not required and was, in any case, irrelevant. His notion was that when you are attacked by a foreign power, you are already at war and the president is naturally in the best position to respond.

Such a narrow and bright-line exception to congressional-approval requirements could become a wide and blurry one, however, if “defensive” were understood broadly. The First Seminole War during the James Monroe administration illustrates the point. Seminole Indians were raiding Georgia from sanctuaries in Spanish Florida—territory that the Spanish government could not effectively police. Spanish Florida was also a haven for runaway American slaves, as well as pirates who raided American commerce. In 1818, General Andrew Jackson led a force into Spanish Florida, razing Seminole villages and seizing Spanish forts. These actions set off diplomatic protests from Spain and Britain. Some members of Congress and the press charged that Jackson's destructive campaign was unconstitutionally beyond the president's power without congressional authorization. Jackson had, according to critics, made war against Spain.

It remains unknown whether President Monroe personally approved these actions in advance, but ultimately the Monroe administration endorsed Jackson's campaign as defensive. The administration argued that the President's authority to deal with immediate Indian threats penetrating the Georgia border encompassed discretion to take other actions that were incidentally necessary to that defensive mission. In this case that included incursions beyond the border into Spanish Florida. Congressional opponents were aghast at this capacious interpretation of defensive powers, but they were unable to muster support for resolutions rejecting it in either legislative house. A lesson that would repeat throughout American history was that politically popular battlefield success deflated pressure within Congress to strongly assert its constitutional prerogatives. If the slow-moving machinery of congressional deliberation was supposed to be a brake on war, once the executive branch moved on its own, the same feature became a bug, as congressional opponents faced high procedural barriers to pushing back.

The Mexican War of 1846-48 is probably the most prominent example in the nineteenth century of a war that was regarded as created by the president. President James Polk took office in 1845 with the objective of increasing the size of the country through westward expansion, which

went under the popular name “manifest destiny.” However, Mexico was not about to give up the top third of its territory, including the present-day states of California, Arizona, and New Mexico. When it became clear diplomacy would not lead to a sale, Polk arguably created the conditions under which a war would happen by ordering troops already stationed in Texas into a disputed territory which Mexico regarded as its own. Then he claimed the United States had been attacked first once U.S. troops stumbled into Mexican forces. Congress almost immediately passed a bill Polk requested declaring a state of war as well as creating and funding a large force of federal volunteers and state militia to wage it. Despite the expansion of the United States being popular, the notion of a war with Mexico, a war in which the United States was arguably the aggressor, was very controversial. Further, some Americans were disturbed by the idea that the president could, by unilateral action, instigate a war, even if Congress then blessed it.

Message of President James Polk to Congress, May 11, 1846 (excerpts)

In my message at the commencement of the present session I informed you that upon the earnest appeal both of the Congress and convention of Texas I had ordered an efficient military force to take a position “between the Nueces and the Del Norte.” This had become necessary to meet a threatened invasion of Texas by the Mexican forces, for which extensive military preparations had been made....

The movement of the troops to the Del Norte was made by the commanding general under positive instructions to abstain from all aggressive acts toward Mexico or Mexican citizens and to regard the relations between that Republic and the United States as peaceful unless she should declare war or commit acts of hostility indicative of a state of war....

The Mexican forces at Matamoras assumed a belligerent attitude, ... [b]ut no open act of hostility was committed until the 24th of April. A party of dragoons of 63 men and officers were on the same day dispatched from the American camp up the Rio del Norte, on its left bank, to ascertain whether the Mexican troops had crossed or were preparing to cross the river, “became engaged with a large body of these troops, and after a short affair, in which some 16 were killed and wounded, appear to have been surrounded and compelled to surrender.” ...

The cup of forbearance had been exhausted even before the recent information from the frontier of the Del Norte. But now, after reiterated menaces, Mexico has passed the boundary of the United States, has invaded our territory and shed American blood upon the American soil. She has proclaimed that hostilities have commenced, and that the two nations are now at war....

In further vindication of our rights and defense of our territory, I invoke the prompt action of Congress to recognize the existence of the war, and to place at the disposition of the Executive the means of prosecuting the war with vigor, and thus hastening the restoration of peace.

Congressional Act Signed by President May 13, 1846 (excerpts)

Whereas, by the act of the Republic of Mexico, a state of war exists between that Government and the United States:

Be it enacted by [Congress], That, for the purpose of enabling the government of the United States to prosecute said war to a speedy and successful termination, the President be, and he is hereby, authorized to employ the militia, naval, and military forces of the United States, and to call for and accept the services of any number of volunteers, not exceeding fifty thousand, who may offer their services... to serve twelve months...; and that the sum of ten millions of dollars, out of any moneys in the treasury, or to come into the treasury, not otherwise

appropriated, be, and the same is hereby, appropriated for the purpose of carrying the provisions of this act into effect.

The Mexican War was a congressionally-declared one—the second formally-declared one in American history; the War of 1812 against Britain had been the first—but the text of Polk’s message to Congress and the resulting war act highlight several important and recurring points. First, besides the fact that Polk had used his diplomatic and military command powers to maneuver the United States into war, the president also supplied Congress with the information upon which it based its war decision and fomented political pressure to take it. Second, aside from any independent constitutional requirement that Congress approve the war, Polk had to go to Congress for a very basic reason: the United States lacked sufficient standing military forces, so waging war required special legislative authorization and funding for them. Although Polk obtained a declaration of war from Congress, it thus occurred in politically questionable circumstances, as it was attached to military appropriations which Congress could not easily oppose. Later, in a rare formal rebuke—though carrying no legal consequences—the House of Representatives in 1848 passed a resolution pronouncing the war “unnecessarily and unconstitutionally begun” (an upstart Illinois congressman, Abraham Lincoln, helped lead this opposition).

Note that the war declaration set no limits on the objectives of the war. In another recurring pattern, the president therefore had much discretion as far as war aims (at least until he had to return to Congress for more funding when the war raged longer than expected). Polk’s ambitious aims included the capture and retention of the northern provinces of Mexico, which he ultimately achieved in the peace treaty.

The Civil War to World War II

The Civil War posed so many new and unexpected legal and constitutional issues with respect to war powers that it forced the commentators of the time to write the first treatises on the subject. We focus here only on a few issues raised by the war that relate especially well to our discussion: emergency presidential powers and the relationship between domestic war powers law and international law.

As to the first—emergency presidential powers—President Lincoln took many unilateral actions immediately after the secessionist Confederacy attacked the Union military base, Fort Sumter, in South Carolina in April 1861. At that moment Congress was not in session. Among other steps, Lincoln acting on his own mobilized and even expanded the Union’s land and naval forces; ordered a maritime blockade of Confederate ports to stop southern trade and hinder the supply of Confederate troops; and, fearing that the Washington D.C. might be cut off from the north, authorized in certain areas the suspension of *habeas corpus*.

In evaluating Lincoln’s actions, there is a strong division of opinion among legal scholars, political scientists and historians. Some see Lincoln as not claiming power in his own right. He was rather standing in for Congress during a period when it was not in session and could not be easily assembled. On this view, Lincoln was not making any claim of presidential authority, inherent or otherwise. Others believe Lincoln was making a significant claim of presidential authority under Article II. The latter view, for example, was assumed by the Bush administration after the September 11, 2001 terrorist attacks by al-Qaeda. If, however, we follow the former

view, a congressional endorsement was essential to establishing the constitutionality of Lincoln's actions. The scholars arguing for this view find strong support in the fact that in July 1861 Lincoln *did* submit his actions to Congress for their approval after-the-fact. In general, they granted it, except as to the suspension of habeas corpus. This was only approved later and with qualifications. The substantial issues of individual rights raised by Lincoln's actions are not considered here.

The contention that Lincoln had unilateral authority to act militarily against the Confederacy was supported by the Supreme Court in *The Prize Cases*. As noted above, one of Lincoln's emergency actions after Fort Sumter fell was instituting a blockade of Southern ports. This was an act of economic warfare, attempting to choke off the Confederacy's trade with Europe. When Congress convened in July 1861, one of its legislative acts validated the president's move, authorizing him to close ports of areas rebelling against the government. When the owners of four vessels captured and condemned as blockade runners between April and July 1861 sued, the financial stakes may have seemed trifling but the legal stakes were immense. Among the questions raised in litigation were whether the entire war against the Confederacy was constitutional at all, and if so whether the president had authority to wage it without clear congressional approval. The Supreme Court ruled on these issues nearly two years after war erupted.

***The Prize Cases*, 67 U.S. 635 (1862) (excerpts)**

Grier, J.: Had the President a right to institute a blockade of ports in possession of persons in armed rebellion against the Government, on the principles of international law, as known and acknowledged among civilized States? ...

The right of prize and capture has its origin in the "*jus belli*," and is governed and adjudged under the law of nations. To legitimate the capture of a neutral vessel or property on the high seas, a war must exist *de facto*, and the neutral must have knowledge or notice of the intention of one of the parties belligerent to use this mode of coercion against a port, city, or territory, in possession of the other.

Let us enquire whether, at the time this blockade was instituted, a state of war existed which would justify a resort to these means of subduing the hostile force. ...

By the Constitution, Congress alone has the power to declare a national or foreign war. It cannot declare war against a State, or any number of States, by virtue of any clause in the Constitution. The Constitution confers on the President the whole Executive power. He is bound to take care that the laws be faithfully executed. He is 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. He has no power to initiate or declare a war either against a foreign nation or a domestic State. But, by the Acts of Congress of February 28th, 1795, and 3d of March, 1807, he is authorized to call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations and to suppress insurrection against the government of a State or of the United States.

If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader or States organized in rebellion, it is nonetheless a war although the declaration of it be "unilateral." ...

[T]herefore, we are of the opinion that the President had a right, *jure belli*, to institute a blockade of ports in possession of the States in rebellion which neutrals are bound to regard.

Nelson, J., dissenting: The Acts of 1795 and 1805 did not, and could not under the Constitution,

confer on the President the power of declaring war against a State of this Union, or of deciding that war existed, and upon that ground authorize the capture and confiscation of the property of every citizen of the State whenever it was found on the waters. The laws of war, whether the war be civil or *inter gentes*, as we have seen, convert every citizen of the hostile State into a public enemy, and treat him accordingly, whatever may have been his previous conduct. This great power over the business and property of the citizen is reserved to the legislative department by the express words of the Constitution. It cannot be delegated or surrendered to the Executive. Congress alone can determine whether war exists or should be declared, and until they have acted, no citizen of the State can be punished in his person or property unless he has committed some offence against a law of Congress passed before the act was committed which made it a crime and defined the punishment. The penalty of confiscation for the acts of others with which he had no concern cannot lawfully be inflicted.

What academic presidentialists, as well as some executive branch lawyers and federal judges, have taken away from *The Prize Cases* is that in time of national emergency or serious danger, the president has the authority to take unilateral action to defend the country and that it is not a matter for the judiciary to decide otherwise. Under that reading, the Court carved out from Congress's power to control war initiation a broad presidential power to defend American interests. Another reading, however, is a very narrow presidential power, applicable only to repelling invasions or direct military attacks on the United States. The Court also invoked the authority of Congress with respect to the war—early Congresses had passed statutes delegating to the President power to use state militias and national military forces to suppress insurrections—so *The Prize Cases'* bearing on unilateral presidential powers is unclear.

The Prize Cases were cited in the twentieth century by executive branch lawyers for the proposition that the president has far-reaching authority to use military force during foreign crises. But *The Prize Cases* limited themselves to a situation in which hostilities were begun by the opposing side. And they did not undermine earlier decisions, such as *Little v. Barreme* mentioned above, holding, at least in some circumstances, that the executive branch would have to obey specific directives from Congress.

The Prize Cases also highlight the complex relationship between domestic war powers law and international law. The Lincoln administration famously took contrasting positions in terms of how international law applied to the Civil War. That is, it contended that the war was indeed a war between nations for the purposes of using tactics, such as blockading ports, allowed by international law. From the standpoint of domestic law, however, Lincoln took the firm position that the Confederacy was not an independent state or nation—that is, it had no valid legal existence under the Constitution.

One way in which international law may be relevant to domestic war powers is in defining the scope of Article II commander-in-chief authority. Note that *The Prize Cases* treat international law as a source of authority and also a boundary: the president in war may draw on international law as justification for action (instituting a blockade) but must conduct it in accordance with international law (specific international blockade rules).

Although today the scope of presidential war powers is more contentious than the scope of congressional war powers, the Civil War, World War I, and World War II all involved exercises of legislative power (including Article I's Necessary and Proper Clause⁵) that would have been beyond Congress's constitutional authority in peacetime. That is because, among other reasons, the industrial revolution and then the onset of "total war"—conflict involving mobilization of entire societies—required unprecedented regulation of the domestic economy. In the Civil War, for example, Congress legislated unprecedented government control of railroads and it provoked major controversy in introducing the first national paper currency ("greenbacks") not backed by hard coin. In World War I, Congress delegated to the president almost complete control of resources like food and fuel. Those actions were all justified legally as congressional "war powers"—necessary to the waging of industrial-scale war—at a time when the federal government's economic powers were still normally understood to be quite constrained constitutionally and the peacetime federal administrative apparatus was small. Congress authorized similar government interventions in World War II, though the constitutional ground had greatly shifted by then; following the New Deal and its resulting jurisprudence, Congress's peacetime economic powers were much broader than in World War I, and the administrative state had grown significantly. A major question left open in these conflicts is whether there are any real limits on constitutional powers to wage war when the Congress and the president act in concert and regard asserted powers as necessary to victory.

The expansion of presidential and congressional powers during wartime in those major conflicts also raised the question of when wars, and hence war powers, end. An important second-order constitutional question is which branches of government decide on that endpoint, and how procedurally to draw the curtain on war and war powers. Supreme Court cases from the Civil War, World War I, and World War II wrestled with versions of these questions. In general, the Court took the view that war powers may outlive the end of major combat operations (for instance, the November 1918 Armistice), because they may still be necessary to fulfill war aims or military demobilization. Also, the Court was quite deferential to the political branches in assessing those continuing conditions.⁶

The Cold War

To the extent the legality of war powers has been determined by the practice of the executive and legislative branches, what happened in the late nineteenth century and the twentieth has proved powerfully suggestive. Until the Korean War in 1950, the most significant military actions undertaken by the United States in the Spanish-American War, and World Wars I and II were explicitly approved by Congress in formal declarations. President Truman's unilateral action to take the nation to major war in Korea following the June 1950 North Korean invasion was thus a break in this practice. North Korea's invasion was supported by the Soviet Union and

⁵ Article I, Section 8, Clause 18 says that Congress has the power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof."

⁶ See, e.g. *Stewart v. Kahn*, 78 U.S. 493 (1870); *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146 (1919); *Ruppert v. Caffey*, 251 U.S. 264 (1920); *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948); *Ludecke v. Watkins*, 335 U.S. 160 (1948).

Communist China. Although Truman obtained U.N. Security Council approval to defend South Korea, meaning the Korean intervention did not violate international law, domestically and constitutionally Truman's position was far more uncertain and later occasioned great dispute.

Department of State Memorandum, Authority of the President to Repel the Attack in Korea, July 3, 1950 (excerpts)

The President, as Commander in Chief of the Armed Forces of the United States, has full control over the use thereof. He also has authority to conduct the foreign relations of the United States. Since the beginning of United States history, he has, upon numerous occasions, utilized these powers in sending armed forces abroad. The preservation of the United Nations for the maintenance of peace is a cardinal interest of the United States. Both traditional international law and article 39 of the United Nations Charter and the resolution pursuant thereto authorize the United States to repel the armed aggression against the Republic of Korea. ...

The basic interest of the United States is international peace and security. The United States has, throughout its history, upon orders of the Commander in Chief to the Armed Forces and without congressional authorization, acted to prevent violence and unlawful acts in other states from depriving the United States and its nationals of the benefits of such peace and security. A tabulation of 85 instances of the use of American Armed Forces without a declaration of war was incorporated in the *Congressional Record* for July 10, 1941....

In many instances, of course, the Armed Forces have been used to protect specific American lives and property. In other cases, however, United States forces have been used in the broad interests of American foreign policy, and their use could be characterized as participation in international police action. ...

The continued defiance of the United Nations by the North Korean authorities would have meant that the United Nations would have ceased to exist as a serious instrumentality for the maintenance of international peace. The continued existence of the United Nations as an effective international organization is a paramount United States interests. The defiance of the United Nations is ... a threat to international peace and security, a threat to the peace and security of the United States and to the security of United States forces in the Pacific.

These interests of the United States are interests which the President as Commander in Chief can protect by the employment of the Armed Forces of the United States without a declaration of war.

This justification and the ensuing controversy are sometimes regarded as the origin of the modern war powers debate. The arguments in the 1950 memorandum formed a template that future presidential administrations used to justify military intervention.⁷ Unlike the prior major wars, Truman deliberately (and after consultation with congressional leaders) decided not to ask for a declaration of war or other legislative authorization from Congress. Congress did, however, quickly pass emergency funding for the war and took other actions, such as extending the draft, that arguably provided implicit congressional approval for the conflict. It is also important to keep in mind that in the years between World War II and the Korean War's outbreak, Congress had funded a massive standing military—far larger than any previous period—and through appropriations and authorizations expressed its support for a foreign policy of containing

⁷ Through at least the 1960s, the executive branch viewed Truman's action as a positive precedent supporting broad authority by the president. By the 1990s, though, a different view had taken hold in which Korea was viewed as perhaps beyond the president's constitutional power.

Communist aggression. Additionally, the advent of nuclear weapons dramatically raised the stakes of any conflict and generally bolstered views among political leaders that presidents needed discretion to act quickly in crises.

The Truman administration's Korea justification, including the memorandum excerpted above, included a long list of prior presidential uses of force, cited as precedent for unilateral presidential power to engage in military intervention. The legal status of the incidents on this list is contested. Many of the incidents on the list were never properly investigated and set in their historical context. Some no doubt were actions presidents would either not take today or would be illegal under domestic or international law. Further, if they were offered in the common law spirit of reasoning by analogy, none of them seemed analogous to the scale and nature of some interventions launched in the Cold War period.

Other than prior executive uses of military force, the leading justification for the legality of Truman's action lies with the effect of the U.N. Charter. The Charter was a treaty duly ratified by the United States. As a matter of international law the Charter was understood to outlaw war and justify only the defensive use of armed force except where authorized by the U.N. Security Council. Many legal scholars attribute to the Charter the reason why no state—not just the United States—ever again resorted to the formal use of a declaration of war. Under the legal order established by the Charter, a literal declaration of war might be regarded as an open admission of offensive or non-justified armed force, potentially sanctioning the nations of the world to respond in kind. Indeed, some commentators argued in the post-World War II environment that declarations of war were obsolete—and that therefore Congress's "declare war" power was essentially irrelevant.

Yet if this was in fact the legal position of the executive branch, it made little impression on members of Congress and had no influence on the debate over presidential use of force under the Constitution. Americans continued to criticize presidents for military actions made without the consent of Congress. Both sides of the debate tended to assume that Congress's power to "declare war" was the substantive power to initiate war rather than being a reference to formal declarations under international law.

In any case, the persistent constitutional criticism of Truman's action (and the unpopularity of the Korean conflict) led presidents starting with Eisenhower to seek Congress's advance approval for military action by means of a legislative authorization separate from appropriations. This led to the current situation in which what are termed "Authorizations to Use Military Force," or AUMFs, are used to prospectively provide congressional sanction to the president to set the armed forces into motion. Even if the Korean War justification provided a template for presidents to justify future unilateral wars, the major wars since then—Vietnam, the Iraq wars of 1991 and 2003, and the conflict against al-Qaeda and its allies—have entailed such congressional authorizations.

President Lyndon B. Johnson's Message to Congress, August 5, 1964 (excerpts)

Last night I announced to the American people that the North Vietnamese regime had conducted further deliberate attacks against U.S. naval vessels operating in international waters, and I had therefore directed air action against gunboats and supporting facilities used in these hostile operations. This air action has now been carried out with substantial damage to the boats and facilities. Two U.S. aircraft were lost in the action....

As President of the United States I have concluded that I should now ask the Congress, on its part, to join in affirming the national determination that all such attacks will be met, and that the United States will continue in its basic policy of assisting the free nations of the area to defend their freedom.

Joint Resolution of Congress, August 7, 1964 (excerpts)

Resolved, That the Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.

SEC. 2 The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in southeast Asia. Consonant with the Constitution of the United States and the Charter of the United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.

SEC. 3. This resolution shall expire when the President shall determine that the peace and security of the area is reasonably assured by international conditions created by action of the United Nations or otherwise, except that it may be terminated earlier by concurrent resolution of the Congress.

Legal Memorandum by Leonard C. Meeker, State Department Legal Advisor, for Submission to the Senate Committee on Foreign Relations, March 4, 1966 (excerpts)

The President of the United States has full authority to commit United States forces in the collective defense of South Viet-Nam. This authority stems from the constitutional powers of the President. However, it is not necessary to rely on the Constitution alone as the source of the President's authority, since the SEATO treaty—advised and consented to by the Senate and forming part of the law of the land—sets forth a United States commitment to defend South Viet-Nam against armed attack, and since the Congress—in the joint resolution of August 10, 1964, and in authorization and appropriations acts for support of the U.S. military effort in Viet-Nam—has given its approval and support to the President's actions. United States actions in Viet-Nam, taken by the President and approved by the Congress, do not require any declaration of war, as shown by a long line of precedents for the use of United States armed forces abroad in the absence of any congressional declaration of war.

As this document shows, the executive branch suggested in the Vietnam War that mutual defense treaties might provide an independent domestic law basis for military action. In the early decades of the Cold War, the United States forged such alliances, for example, with partners in Western Europe and East Asia. Subsequent administrations backed off the argument that defense treaties supplied a domestic law justification to intervene militarily, which was not well supported

by treaty texts or Senate records. However, the executive branch has continued to argue that defense of allies and the credibility of alliance commitments are important security interests that the president is constitutionally empowered to protect with force.⁸ The political branches together pushed an expanding global role for the United States, and so too expanded understandings of American interests that the president may defend.

As the Vietnam War dragged on and American casualties mounted (more than 58 thousand U.S. servicemembers died in it between 1964 and 1975), public and Congressional opposition also mounted. In 1971, Congress cut off funding for controversial ground operations in neighboring Cambodia, and in 1973, following a cease-fire agreement, Congress barred funding for further military operations in the conflict. Focusing only on legislation passed by Congress and signed by the President understates Congress's influence, however. Televised congressional hearings on the war's conduct in the mid-1960s helped shift public opinion against the war, and the threat of congressional funding restrictions hastened the Nixon administration's peace negotiations.

Nevertheless, concern about an unbalanced system of war powers grew in both houses of Congress as the Vietnam War seemed to go without end. One result was the 1973 War Powers Resolution (WPR).⁹ Influential members of Congress believed that both Presidents Johnson and Nixon had deliberately deceived them and the American public during the course of the war. Yet Congress, always concerned about being seen to undermine troops in the field, was not willing to approve the WPR until President Nixon officially declared the war over following the signing of a treaty of peace with North Vietnam in early 1973. Years-long congressional deliberation over war powers finally came to fruition when the WPR—which remains a key component of the war powers framework—passed over Nixon's veto.

War Powers Resolution of 1973 (Excerpts)

SEC. 2. (a) It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgement of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.

SEC. 4(a) In the absence of a declaration of war, in any case in which United States Armed Forces are introduced—

(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;

(2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or

(3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation; the president shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth--

(A) the circumstances necessitating the introduction of United States Armed Forces;

⁸ See Mira Rapp-Hooper & Matthew Waxman, *Presidential Alliance Powers*, THE WASHINGTON QUARTERLY (Summer 2019).

⁹ Pub. L. No. 93-148, 87 Stat. 555 (1973), 50 U.S.C. secs. 1541-1548.

- (B) the constitutional and legislative authority under which such introduction took place; and
- (C) the estimated scope and duration of the hostilities or involvement.

SEC. 5(b) Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4(a)(1), whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

Pres. Nixon's Message Vetoing the War Powers Resolution, Oct. 24, 1973 (excerpts)

The proper roles of the Congress and the Executive in the conduct of foreign affairs have been debated since the founding of our country. Only recently, however, has there been a serious challenge to the wisdom of the Founding Fathers in choosing not to draw a precise and detailed line of demarcation between the foreign policy powers of the two branches....

[The War Powers Resolution] would attempt to take away, by a mere legislative act, authorities which the President has properly exercised under the Constitution for almost 200 years....

The only way in which the constitutional powers of a branch of the Government can be altered is by amending the Constitution — and any attempt to make such alterations by legislation alone is clearly without force....

While I firmly believe that a veto of [the War Powers Resolution] is warranted solely on constitutional grounds, I am also deeply disturbed by the practical consequences of this resolution. For it would seriously undermine this Nation's ability to act decisively and convincingly in times of international crisis.

Although backed by bipartisan majorities in Congress and overwhelming public support, the WPR has nonetheless been the source of controversy ever since. For their part, presidents have had little difficulty with the idea of keeping Congress informed and generally consulting with it with respect to military actions abroad. But the automatic termination of the use of armed force—in effect, commanding the president to cease the use of military force when he or she had reason to believe that it was in the national security interests of the United States—has often struck presidents and their advisers as unwise or even unconstitutional. Nonetheless, despite much publicity to the contrary, not all presidents objected to the WPR while in office or argued that it was unconstitutional. As constitutional scholars eventually pointed out, the Department of Justice's Office of Legal Counsel (OLC) conceded the constitutionality of the WPR in the Carter administration. OLC has not reversed that position.

The controversy over the WPR is better understood against the background of the knotty problem created by the permanent military capacity given to the president in the wake of World War II and the Cold War. Once this capacity was created, the president as the commander in chief of the armed forces has de facto “first mover” status regardless of the other provisions of the Constitution. This creates the dilemma the authors of the WPR tried to solve: how to control a

future President Polk who deliberately creates the conditions for military conflict and expects Congress to automatically support the troops by authorizing war. The WPR put presidents on notice that Congress would not always comply. It continues to provide the framework under which, at least, presidents notify Congress of the use of armed force on a regular basis. Whether legally binding or not, the 60-day clock also raises the political costs of extended military interventions lacking congressional authorization.

Contemporary War Powers

During much of the Cold War, the executive branch argued that the existential stakes of superpower struggle and precarious nuclear balance justified broad presidential discretion to use force, including to defend allies. After the Cold War, its argument was turned upside down; now the low risks of intervention were cited as justifying that discretion. In the 1999 Kosovo conflict, for example, the president claimed constitutional authority to conduct an intensive air campaign. When that intervention extended beyond the WPR's 60-day cap, the executive branch argued that Congress had implicitly approved it through an emergency appropriation, notwithstanding a provision of the WPR stating that approval should not be inferred from funding decisions. The following case illustrates some barriers to judicial resolution of these issues.

***Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000) (excerpts)**

Silberman, J.: On March 24, 1999, President Clinton announced the commencement of NATO air and cruise missile attacks on Yugoslav targets. Two days later he submitted to Congress a report, "consistent with the War Powers Resolution," detailing the circumstances necessitating the use of armed forces, the deployment's scope and expected duration, and asserting that he had "taken these actions pursuant to [his] authority . . . as Commander in Chief and Chief Executive." On April 28, Congress voted on four resolutions related to the Yugoslav conflict: It voted down a declaration of war 427 to 2 and an "authorization" of the air strikes 213 to 213, but it also voted against requiring the President to immediately end U.S. participation in the NATO operation and voted to fund that involvement. The conflict between NATO and Yugoslavia continued for 79 days, ending on June 10 with Yugoslavia's agreement to withdraw its forces from Kosovo and allow deployment of a NATO-led peacekeeping force.

Appellants, 31 congressmen opposed to U.S. involvement in the Kosovo intervention, filed suit prior to termination of that conflict seeking a declaratory judgment that the President's use of American forces against Yugoslavia was unlawful under both the War Powers Clause of the Constitution and the War Powers Resolution ("the WPR"). The WPR requires the President to submit a report within 48 hours "in any case in which United States Armed Forces are introduced . . . into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances," and to "terminate any use of United States Armed Forces with respect to which a report was submitted (or required to be submitted), unless the Congress . . . has declared war or has enacted a specific authorization for such use of United States Armed Forces" within 60 days. Appellants claim that the President did submit a report sufficient to trigger the WPR on March 26, or in any event was required to submit a report by that date, but nonetheless failed to end U.S. involvement in the hostilities after 60 days. The district court granted the President's motion to dismiss.

The government does not respond to appellants' claim on the merits. Instead the government challenges the jurisdiction of the federal courts to adjudicate this claim on three separate grounds: the case is moot; appellants lack standing, as the district court concluded; and

the case is nonjusticiable. Since we agree with the district court that the congressmen lack standing it is not necessary to decide whether there are other jurisdictional defects.

Silberman, J., concurring: Appellants argued that we should consider in our standing analysis that if congressmen lack standing only military personnel might be able to challenge a President's arguably unlawful use of force, and it would be undesirable to put the armed forces in such a position. Although that is not a consideration that bears on standing, that argument leads me to observe that, in my view, no one is able to bring this challenge because the two claims are not justiciable. We lack "judicially discoverable and manageable standards" for addressing them, and the War Powers Clause claim implicates the political question doctrine.

Tatel, C.J., concurring: In my view, were this case brought by plaintiffs with standing, we could determine whether the President, in undertaking the air campaign in Yugoslavia, exceeded his authority under the Constitution or the War Powers Resolution.

To begin with, I do not agree that courts lack judicially discoverable and manageable standards for "determining the existence of a `war.'" Whether the military activity in Yugoslavia amounted to "war" within the meaning of the Declare War Clause is no more standardless than any other question regarding the constitutionality of government action. ...

Although courts have ... determined the existence of war as defined by the Constitution, statutes, and contracts, in this case plaintiffs' War Powers Resolution claim would not even require that we do so. We would need to ask only whether, and at what time, "United States Armed Forces [were] introduced into hostilities or into situations where imminent involvement in hostilities [was] clearly indicated by the circumstances." 50 U.S.C. § 1543(a)(1). On this question, the record is clear. ...

The undisputed facts of this case are equally compelling with respect to plaintiffs' constitutional claim. If in 1799 the Supreme Court could recognize that sporadic battles between American and French vessels amounted to a state of war, and if in 1862 it could examine the record of hostilities and conclude that a state of war existed with the confederacy, then surely we, looking to similar evidence, could determine whether months of daily airstrikes involving 800 U.S. aircraft flying more than 20,000 sorties and causing thousands of enemy casualties amounted to "war" within the meaning of Article I, section 8, clause 11.

The AUMFs of the 2000s authorizing the wars in Afghanistan and Iraq did not occasion similar controversy because they satisfied the condition expressed in the WPR. Yet they were the source of other controversies. The September 2001 Authorization is of greatest significance here, not the least because it is considered to be still in effect. It was an immediate reaction to the devastating 9/11 terrorist attacks on New York City and Washington, D.C.

Joint Resolution, Signed September 18, 2001 (excerpts)

[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Despite what some members of Congress may have thought, the September 2001 AUMF was not limited geographically to Afghanistan or organizationally to the al-Qaeda terrorist group. Further, it clearly authorized a broad range of military force, both overt and covert. Although some still questioned whether the United States was at “war” in a legal sense, after *Hamdi v. Rumsfeld* in 2004,¹⁰ all three branches were on record, in effect, as regarding the AUMF as the legal and constitutional equivalent of a declaration of war. In that case, the Court upheld detention without trial of enemy al-Qaeda fighters as a traditional incident of war, implicitly authorized by the AUMF.

The most heated controversy of the war against al-Qaeda surrounded how that war was waged. Early in the conflict, the Bush Administration Justice Department took the position that actions, including severe interrogation methods and warrantless electronic surveillance used on certain categories of individuals, were matters of exclusive presidential discretion, by virtue of his commander-in-chief powers. Under that view, Congress was constitutionally precluded from regulating such activities in the context of war. Supporters of this position emphasize the importance of unitary executive agility, or what Alexander Hamilton referred to in *Federalist 70* as “decision, activity, secrecy, and dispatch.” Following reforms in which Congress imposed additional statutory restrictions on detainee treatment, the Bush Administration subsequently backed off that extreme position, while still—like previous presidents, though perhaps more broadly—claiming some zone of presidential military discretion constitutionally protected from congressional interference. That boundary remains ambiguous and untested. Indeed, one of the challenges of determining legal lines in this area is that the political branches’ actions and reactions produce few clear resolutions of clashing constitutional positions, let alone authoritative judicial rulings on them.

Memorandum for the Files by Steven G. Bradbury, Principal Deputy Attorney General for the Office of Legal Counsel, “Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001,” Jan. 15, 2009 (excerpts)

It is well established that the President has broad authority as Commander in Chief to take military actions in defense of the country. Furthermore, this Office has recognized that Congress may not unduly constrain or inhibit the President's exercise of his constitutional authority in these areas. We have no doubt that the President's constitutional authority to deploy military and intelligence capabilities to protect the interests of the United States in time of armed conflict necessarily includes authority to effectuate the capture, detention, interrogation, and, where appropriate, trial of enemy forces, as well as their transfer to other nations.

At the same time, Article I, Section 8 of the Constitution also grants significant war powers to Congress. We recognize that a law that is constitutional in general may still raise serious constitutional issues if applied in particular circumstances to frustrate the President's ability to fulfill his essential responsibilities under Article II. Nevertheless, the sweeping assertions in [certain prior] opinions ... that the President's Commander in Chief authority categorically precludes Congress from enacting any legislation concerning the detention, interrogation, prosecution, and transfer of enemy combatants are not sustainable.

¹⁰ 542 U.S. 507 (2004).

Congress's power to "define and punish ... Offences against the Law of Nations," U.S. Const, art. I, § 8, cl. 10, provides a basis for Congress to establish the federal crime of torture, in accordance with U.S. treaty obligations under the Convention Against Torture, and the War Crimes Act offenses, in accordance, for example, with the "grave breach" provisions of the Geneva Conventions. ...Furthermore, the power "[t]o make Rules for the Government and Regulation of the land and naval Forces," U.S. Const, art. I, § 8, cl. 14, gives Congress a basis to establish standards governing the U.S. military's treatment of detained enemy combatants, including standards for, among other things, detention, interrogation, and transfer to foreign nations. ...

The Captures Clause of Article I, which grants Congress power to "make Rules concerning Captures on Land and Water," *id.* cl. 11, also would appear to provide separate authority for Congress to legislate with respect to the treatment and disposition of enemy combatants captured by the United States in the War on Terror.

The 2001 AUMF remained relevant into the Obama and Trump administrations, as both cited it as a justification for actions taken in Syria and Iraq against the Islamic State (ISIS). This broad application of the AUMF was not contested by Congress or successfully in the courts—illustrating the leeway presidents have in interpreting such legislation.

Nevertheless, the apparent neutralization of much of the original al-Qaeda organization and the long length of time that had passed since 2001 raised serious questions that were echoed by the Obama administration. Many members of Congress thought that the AUMF should be reauthorized or entirely rethought considering the change in circumstances. The Obama administration, too, proposed updating and limiting the law. However, Congress has been unable to agree on a new AUMF.

President Obama seemed at times less interested than recent predecessors in defending broad unilateral power to initiate military intervention. Still, he stopped short of backing off that position.¹¹ For example, when Syrian government forces used chemical weapons in their civil war, crossing a "redline" Obama had declared, he requested congressional authorization for air strikes while also stating that he had constitutional power to launch them. Congress declined to authorize strikes, and Obama did not carry them out.¹²

The Obama administration's legal justification for participating in coalition military action against the Libyan government in 2011 encapsulates the general modern executive branch view across administrations (though a similar Justice Department analysis justifying the Trump administration's 2018 military strikes against Syrian chemical weapons facilities could be read as

¹¹ For an argument that he may have even strengthened it, see Jack Goldsmith & Matthew Waxman, *The Legal Legacy of Light-Footprint Warfare*, THE WASHINGTON QUARTERLY (Summer 2016).

¹² In prepared remarks on September 10, 2013, Obama stated:

[E]ven though I possess the authority to order military strikes, I believed it was right, in the absence of a direct or imminent threat to our security, to take this debate to Congress. I believe our democracy is stronger when the President acts with the support of Congress. And I believe that America acts more effectively abroad when we stand together. This is especially true after a decade that put more and more war-making power in the hands of the President, and more and more burdens on the shoulders of our troops, while sidelining the people's representatives from the critical decisions about when we use force.

taking a more expansive presidentialist view¹³). Military intervention to prevent Libyan government atrocities had been authorized by the U.N. Security Council (UNSC).

Opinion of Caroline Krass, Principal Deputy Assistant Attorney General, Department of Justice Office of Legal Counsel, April 1, 2011 (excerpts)

Earlier opinions of this Office and other historical precedents establish the framework for our analysis. As we explained in 1992, Attorneys General and this Office have concluded that the President has the power to commit United States troops abroad, as well as to take military action, for the purpose of protecting important national interests, even without specific prior authorization from Congress. This independent authority of the President, which exists at least insofar as Congress has not specifically restricted it, derives from the President's unique responsibility, as Commander in Chief and Chief Executive, for foreign and military affairs, as well as national security.

This understanding of the President's constitutional authority reflects not only the express assignment of powers and responsibilities to the President and Congress in the Constitution, but also, as noted, the "historical gloss" placed on the Constitution by two centuries of practice. "Our history," this Office observed in 1980, "is replete with instances of presidential uses of military force abroad in the absence of prior congressional approval." Since then, instances of such presidential initiative have only multiplied, with Presidents ordering, to give just a few examples, bombing in Libya (1986), an intervention in Panama (1989), troop deployments to Somalia (1992), Bosnia (1995), and Haiti (twice, 1994 and 2004), air patrols and airstrikes in Bosnia (1993-1995), and a bombing campaign in Yugoslavia (1999), without specific prior authorizing legislation.

We have acknowledged one possible constitutionally-based limit on this presidential authority to employ military force in defense of important national interests—a planned military engagement that constitutes a "war" within the meaning of the Declaration of War Clause may require prior congressional authorization. In our view, determining whether a particular planned engagement constitutes a "war" for constitutional purposes instead requires a fact-specific assessment of the "anticipated nature, scope, and duration" of the planned military operations. This standard generally will be satisfied only by prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period.

Under the framework of these precedents, the President's legal authority to direct military force in Libya turns on two questions: first, whether United States operations in Libya would serve sufficiently important national interests to permit the President's action as Commander in Chief and Chief Executive and pursuant to his authority to conduct U.S. foreign relations; and second, whether the military operations that the President anticipated ordering would be sufficiently extensive in "nature, scope, and duration" to constitute a "war" requiring prior specific congressional approval under the Declaration of War Clause.

In our view, the combination of at least two national interests that the President reasonably determined were at stake here—preserving regional stability and supporting the UNSC's credibility and effectiveness—provided a sufficient basis for the President's exercise of his constitutional authority to order the use of military force. [The opinion goes on to explain the executive branch's view that the operation serves these interests].

¹³ Memorandum Opinion of Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, "April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities," May 31, 2018, <https://www.justice.gov/olc/opinion/file/1067551/download>.

[T]urning to the second element of the analysis, we do not believe that anticipated United States operations in Libya amounted to a “war” in the constitutional sense necessitating congressional approval under the Declaration of War Clause.

As in the case of the no-fly zone patrols and periodic airstrikes in Bosnia before the deployment of ground troops in 1995 and the NATO bombing campaign in connection with the Kosovo conflict in 1999—two military campaigns initiated without a prior declaration of war or other specific congressional authorization—President Obama determined that the use of force in Libya by the United States would be limited to airstrikes and associated support missions.

Considering the historical practice of even intensive military action—such as the 17-day-long 1995 campaign of NATO airstrikes in Bosnia and some two months of bombing in Yugoslavia in 1999—without specific prior congressional approval, as well as the limited means, objectives, and intended duration of the anticipated operations in Libya, we do not think the “anticipated nature, scope, and duration” of the use of force by the United States in Libya rose to the level of a “war” in the constitutional sense, requiring the President to seek a declaration of war or other prior authorization from Congress.

Coalition operations against the Libyan government ultimately contributed to the overthrow of that regime. They also extended well beyond the 60-day limit in the WPR. When Congress appeared unwilling either to authorize or to reject the action, the Obama administration controversially argued that its military operations there did not rise to the threshold of “hostilities” triggering that statutory limit. On the one hand, this shows the challenges inherent in any effort to impose a hard limit on the president’s use of military force, especially using statutory terms that are open to interpretation. On the other hand, that legislative framework probably weighed in the administration’s political calculus and increased the perceived costs of military action.

When the Trump administration launched air strikes against Iranian targets, including killing a top Iranian military figure in January 2020, Americans found themselves searching again for its constitutional basis. The Trump administration cited the president’s inherent Article II powers as well as a 2002 AUMF for Iraq that remains on the books even though the original justifications for the 2003 Iraq invasion have long passed. When Congress responded with a joint resolution purporting to terminate the use of military forces in hostilities with Iran absent new and specific congressional authorization, the president vetoed it and Congress lacked the votes to override. Those events show again the difficulties of checking presidential military action with formal legislation, though congressional opposition still likely exerted political constraints. In any event, fixating on which branch controls initiating conflict may distract from Congress’s other critical roles, including overseeing how wars are waged.¹⁴

Ultimately, what is most relevant is the respective roles the Constitution specifies for both the president and Congress in foreign affairs. On the basis of the power delegated to them by Congress, the military establishment created over time, and historical practice, presidents reasonably believe that they have appropriate legal authorities to advance the foreign policy and defend the national security of the United States. Modern presidents all knew that they would be held responsible by the people for any failures in this regard. Presidents will continue to take such unilateral actions until the people and Congress reverse the process accelerated in many respects after World War II.¹⁵

¹⁴ See Matthew Waxman, *War Powers Oversight, Not Reform*, TEXAS NATIONAL SECURITY REVIEW, Nov. 14, 2019.

¹⁵ For a relevant discussion, see STEPHEN M. GRIFFIN, LONG WARS AND THE CONSTITUTION (2013).