

FOUR WRONGS DON'T MAKE A RIGHT: FRAMING, RATIFYING, AND HISTORICAL EVIDENCE SHOWS CONGRESSIONAL ABDICATION UNDER THE WAR POWERS RESOLUTION TO BE UNCONSTITUTIONAL

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ABSTRACT: *The War Powers Resolution (“WPR”) was motivated, at least in part, by a desire to assert Congress’ authority to check the president’s ability to commit the United States to war. But the WPR was as unnecessary as it has been ineffectual. Instead, the WPR is an unconstitutional answer to a long history of unconstitutional wars.*

The framers and ratifiers intended the Declare War Clause of Article I of the Constitution to be all Congress needed to check executive power when it came to engaging the nation in war. However, due to perceived ambiguities in the Declare War Clause, and a history of presidents pushing the constitutional bounds of executive power related to war making, Congress passed the WPR to reclaim its constitutional powers over war.

This paper argues that the framers and ratifiers of the founding generation were clear that the Declare War Clause was intended to act as a check on the executive branch against rushing the nation into war. And, to the extent any ambiguity needs to be cleared up, especially in the face of a long history of presidential usurpations of Congress’ power to commence war, an Article V amendment is the proper vehicle—not the WPR.

“No nation could preserve its freedom in the midst of continual warfare.”

- James Madison

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I. INTRODUCTION

On December 13, 2018, the Senate, via joint resolution S.J. Res. 54, relied on the War Powers Resolution (“WPR”) “to direct the removal of United States Armed Forces from hostilities in the Republic of Yemen that have not been authorized by Congress.”¹ This joint resolution marked the first time since passage of the WPR that Congress had sought to limit the authority of the president using the WPR.² Although this was a welcomed development, it had come far too late. Article I, Section 8 granted Congress, alone, the power to check the executive’s authority over war by providing that only Congress may declare war. This power was never intended to be contingent upon any other Act of Congress. Instead of strengthening the exercise of Congress’ constitutional prerogative under Article I, Section 8, the WPR has only muddied separation of powers waters and created constitutional problems that the framers and ratifiers³ intended to avoid. Simply put, the WPR unconstitutionally alters the balance of power between the legislative and executive branches.

First, the WPR, codified under title 50 of the U.S. Code, authorizes the president to “make war”⁴ without the commencement of war.⁵ Under the

¹ S.J. Res. 54, 115th Cong. (2018).

² *Senate Flexes Congress’ War Powers Authority, For First Time Ever*, ROLL CALL (Dec. 13, 2018, 3:49 PM), <https://www.rollcall.com/news/politics/senate-flexes-war-powers-for-first-time-ever>.

³ The terms “framers” and “ratifiers” are used throughout the paper. Generally, the term “framer” refers to

delegates to the Constitutional Convention who took part in drafting the proposed U.S. Constitution, while “ratifiers” is used as a proxy for those who ratified the Constitution—specifically relating to the state conventions themselves. These terms are often used in the context of interpreting the “original public meaning” of the text of the Constitution as understood by the founding generation, who ratified the document at the various state conventions.

⁴ This term is used throughout to refer to commencement of war by hostile act as opposed to a formal declaration.

Constitution, only the legislative branch has authority to declare, and by extension, undertake war—not the president.⁶ Neither the text nor the original meaning of the “Declare War” Clause of Article I, Section 8 grants the president the authority to enter a state of war without a declaration.⁷ Additionally, the WPR cannot be properly understood as a standing declaration of war for the president to act on at his discretion, lest the statutory tail wag the constitutional dog.

Second, under 50 U.S.C. 1541(c), the WPR unconstitutionally expands the definition of the president’s power to conduct war as Commander-in-Chief. The president’s power now includes “a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.”⁸ This is not to say that the president cannot act to protect the nation under attack, but this section unconstitutionally expands when the president can undertake a defensive war, wholly circumventing the Declare War Clause⁹ via strategic posturing of troops around the world.¹⁰ Setting aside attacks on the homeland, territories, and possessions (as it is undisputed that the President can act defensively without a congressional declaration of war), all a president need do, to legally justify an act of war, is place the armed forces in a provocative position and await a likely attack.¹¹ After the attack comes, all the president need do is invoke section 1541(c), assert that any subsequent acts of war on his part are purely “defensive,” and continue his war indefinitely, claiming constitutionality all the way. This is a perversion of the text and intent of the Constitution, which is unlikely to have been condoned by anyone in the founding generation.

Finally, once war has been constitutionally undertaken, the WPR unconstitutionally impedes the president’s Commander-in-Chief powers by requiring him to report to Congress before receiving additional approval.¹² If everything before the commencement of war under the WPR is supported by the Constitution, of which there is some doubt, once war has commenced, finally, proponents of expansive executive authority over war making have a leg to stand on.¹³ Once war is underway, there is no constitutional limit placed on the president’s Commander-in-Chief powers. He enjoys all executive authority in the conduct of war that was not explicitly taken from his office and vested in the

⁵ 50 U.S.C. §§ 1543–1544 (1973).

⁶ U.S. Const. art. I, §8, cl. 11.

⁷ Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 699–700 (1972).

⁸ 50 U.S.C. § 1541(c) (1973).

⁹ For example, the United States has U.S. military personnel in nearly 150 countries. *U.S. Military Personnel by Country*, CNN, <http://edition.cnn.com/interactive/2012/04/us/table.military.troops/> (last visited Mar. 20, 2019). If an attack on any one service member or military installation creates a “national emergency,” legally justifying the president going to war, then the expansion of authority under 50 U.S.C. § 1541(c) virtually renders the Declare War Clause a nullity.

¹⁰ Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1546 (2002).

¹¹ Jules Dufour, *The Worldwide Network of US Military Bases: The Global Deployment of US Military Personnel*, CENTRE FOR RESEARCH ON GLOBALIZATION (July 1, 2007), <https://www.globalresearch.ca/the-worldwide-network-of-us-military-bases/5564> (as of 2007, the U.S. operated or controlled between 700 and 800 bases globally, in 63 countries, with a total troop deployment of 255,065).

¹² 50 U.S.C. §§ 1543(c), 1544(a)–(b) (1973).

¹³ John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 181 n. 64 (1996).

legislative branch.¹⁴ Whether by commencement or conduct of war, the WPR violates the separation of powers at every turn.

Part II of this article addresses the debate surrounding the passage and application of the WPR. It first addresses the historical and constitutional support for the WPR. It then briefly addresses the various objections of presidents and their defenders to the constitutionality of the WPR, ending in some practical problems that have arisen as presidents have sought to circumvent the WPR and congress has struggled to enforce it.

Part III begins where all constitutional interpretation must: with the text. Because the power to declare war, vested in the legislature under Article I, carries some ambiguity, an 18th century and founding generation understanding of the phrase “Declare War” is considered in order to reach a 21st century understanding of that clause. Once the parameters of what the Declare War Clause means is clearly defined, the article’s focus shifts to the alleged justifications of the WPR and whether historical support for it actually exists. Part III ends with the concession that reasonable minds may differ as to the exact power granted to the legislature under the Declare War Clause, but that, in their infinite wisdom, the founding generation left us with a constitutional mechanism to resolve any ambiguities, Article V.

Part IV concludes that the Declare War Clause is the only constitutional provision necessary to check executive overreach in the context of war because that clause, viewed through its textual and original prism, is decidedly not ambiguous. Instead, the Declare War Clause is clear—it vests the legislature with the authority to commence war and the president is left with the power to conduct an already commenced war as Commander-in-Chief. However, to the extent there is disagreement on the clarity of the Declare War Clause, Article V is the proper remedy to solve that disagreement; not the WPR—which makes up its own authority almost out of whole cloth.

II. BACKGROUND

A. HISTORY OF DEBATE AND PASSAGE OF THE WAR POWERS RESOLUTION

The WPR asserts the Necessary and Proper Clause as its constitutional authority.¹⁵ This immediately demonstrates Congress’ misunderstanding as to what its power is in the realm of war pursuant to the Declare War Clause. Although Congress explained that the purpose of the WPR was to “fulfill the intent of the framers of the Constitution,” the Necessary and Proper Clause was never intended to be used this way.¹⁶ There are two problems with this approach, and the use of the Necessary and Proper Clause to achieve it.

First, use of the Necessary and Proper Clause is neither necessary nor proper. The contours of the Necessary and Proper Clause are best understood by looking at the debate between the proponents and opponents of the clause itself. In *Antifederalist 17*,¹⁷ Brutus was concerned that the Necessary and Proper

¹⁴ Ramsey, *supra* note 10, at 1562.

¹⁵ 50 U.S.C. § 1541(b) (1973).

¹⁶ 50 U.S.C. § 1541(a) (1973).

¹⁷ The *Antifederalist Papers* were a series of essays arguing against a stronger and more energetic union as embodied in the new Constitution. Gordon Lloyd, *Federalist – Antifederalist Debates*, TEACHINGAMERICANHISTORY.ORG, <http://teachingamericanhistory.org/fed-antifed/antifederalist/> (last visited Mar. 20, 2019). They helped form the counterarguments to the

Clause gave the federal government unchecked power in the realm of taxes which, as he pointed out, “connects with it (the power to tax) almost all other powers, or at least will in process of time draw all others after it.”¹⁸ In response to this fear, Alexander Hamilton, one of the chief proponents of a vigorous federal government under the Constitution, stated in Federalist 33:

[I]t may be affirmed with perfect confidence that the constitutional operation of the intended government would be precisely the same, if these clauses were entirely obliterated, as if they were repeated in every article. They are only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government, and vesting it with certain specified powers.¹⁹

Essentially, Hamilton was saying that there was no need to fear the reach of the Necessary and Proper Clause as granting to the federal government too much power under the Constitution because it was merely a truism which did not grant extra, implicit powers to the federal government that were not already explicitly granted.²⁰ Although Hamilton, in Federalist 33, was responding to fears of the use of the Necessary and Proper Clause to excessively tax,²¹ his rationale is equally applicable to the Declare War Clause.

Second, the Declare War Clause is not nearly as ill-defined as Congress believed while drafting the WPR. The Declare War Clause grants to Congress the power to make both formal declarations of war as well as declare war by hostile act.²² This understanding of the Declare War Clause, which will be explained more in the sections to follow, establishes that the Declare War Clause alone is all Congress needs to check executive war ambitions. If there is any power source in the Constitution for the WPR it is in the Declare War Clause itself, not the Necessary and Proper Clause to explain what “Declare War” means. Therefore, Congress cannot use the Necessary and Proper Clause to change the meaning of an affirmative grant of power to one branch in order to allow that branch to violate that grant of authority for the benefit of another branch. In other words, Congress need not (and in fact, cannot, without violating the Constitution) look to the Necessary and Proper Clause to justify an act (the WPR) that is already provided for under the Declare War Clause—namely to control the entry of American forces into hostilities by choosing whether or not to declare war.

Congress drafted the WPR as a response to the Vietnam War and to capitalize on the weakness of the executive branch as President Nixon was embroiled in Watergate.²³ In the midst of, arguably, America’s most unpopular war, Congress passed 10 laws to try and curb President Nixon’s repeated

arguments presented in the Federalist Papers and played an important role in shaping the early American understanding of the new Constitution. *Id.*

¹⁸ THE ANTIFEDERALIST PAPER No. 17 (Brutus).

¹⁹ THE FEDERALIST No. 33 (Alexander Hamilton).

²⁰ Michael Greibrok, *Necessary and Proper Clause: A Declaratory Truth*, FREEDOMWORKS (2015), <http://www.freedomworks.org/content/necessary-and-proper-clause-declaratory-truth>.

²¹ THE FEDERALIST, *supra* note 19.

²² Ramsey, *supra* note 10, at 1560, 1604.

²³ Louis Fisher & David Gray Adler, *The War Powers Resolution: Time to Say Goodbye*, POL. SCI. Q. 1, 4 (1998).

unilateral escalations of the war.²⁴ As public support for the war continued to wane and confidence in the executive eroded as a result of the Watergate scandal, Congress seized the opportunity to reclaim some of its constitutional authority, passing the WPR over President Nixon's veto.²⁵

From the beginning, U.S. presidents have almost universally opposed the WPR as an unconstitutional encroachment on their Commander-in-Chief powers under Article II.²⁶ President Nixon opposed the WPR on two grounds. First, that it imposed impractical statutory burdens on the shared Constitutional responsibility for war between the legislative and executive branches.²⁷ And, second, for the previously stated reason that it impeded his Commander-in-Chief obligations.²⁸ As will be discussed below, this second position does hold some force. Yet, despite these challenges, over the years, presidents have submitted over 120 reports invoking the WPR.²⁹ In fact, the closest any president ever came to filing a report pursuant to section 4(a)(1) was President Ford's letter to Congress regarding recovery of the SS Mayaguez in 1975.³⁰ Most presidents, however, in order to escape applicability of the 60-day time clock, issued their reports "consistent with" rather than "pursuant to" section 4(a)(1).³¹ This clever distinction allows presidents to maintain their objections to the WPR's constitutionality while simultaneously avoiding its provisions altogether. Some of these instances include the largest commitments of the American military since WWII, including by President Reagan in Lebanon from 1982–83; by President Clinton in Yugoslavia, Bosnia, and Kosovo in 1995; by President George W. Bush in Iraq and Afghanistan from 2001–present; and by President Obama in Libya, Syria, and Yemen from 2012–present.³² In other words, every presidential invocation of the WPR since its passage has been all form and no function. Presidents continue to do as they did before the WPR, initiate hostilities without congressional input.

B. SUPPORTERS OF EXECUTIVE AUTHORITY OVER WAR-MAKING APPEAL TO HISTORY

Those who support the broad conception of executive authority over war, which either renders the WPR ineffectual or wholly unconstitutional, make numerous appeals to history to support their case. In short, they contend that history is on their side because presidents have sent troops into battle numerous times without congressional approval.³³ Which, the most cursory begging of the

²⁴ Michael Ratner & David Cole, *The Force of Law: Judicial Enforcement of the War Powers Resolution*, LOY. L.A. REV. 715, 729 (1984).

²⁵ Fisher & Adler, *supra* note 23, at 4.

²⁶ *War Powers*, LIBRARY OF CONGRESS (2007), <https://www.loc.gov/law/help/war-powers.php>.

²⁷ Fisher & Adler, *supra* note 23, at 4.

²⁸ *Id.*

²⁹ *War Powers*, *supra* note 26.

³⁰ Yoo, *supra* note 13, at 181.

³¹ Tom Woods, *The War Powers Resolution Fraud*, LEWROCKWELL.COM (Feb. 4, 2006), <https://www.lewrockwell.com/2006/02/thomas-woods/the-war-powers-resolution-fraud/>.

³² *Id.*; see also Richard F. Grimmett, CONG. RESEARCH SERV., RL33532, WAR POWERS RESOLUTION: PRESIDENTIAL COMPLIANCE 2 (2012); Letter to Congress from Barack Obama, President, to John Boehner, Speaker of the House of Representatives, and Patrick Leahy, President Pro Tempore of the Senate (Sept. 23, 2014) (letter regarding Syria) <https://obamawhitehouse.archives.gov/the-press-office/2014/09/23/letter-president-war-powers-resolution-regarding-syria>.

³³ Tom Woods, *Presidential War Powers*, LEWROCKWELL.COM (2005), <https://www.lewrockwell.com/2005/07/thomas-woods/presidential-dictatorship-in-war/>.

question to such a proposition would be, were those uses also unconstitutional? An argument that constitutional violations in the past validate those in the present is hardly an argument for constitutionality at all. But, setting that aside for the moment, let us address a few of these examples to see just how much, if any, support they provide executive advocates assuming they were constitutional.

First, there is the much appealed to Quasi-War with France.³⁴ The Quasi-War was an almost entirely naval conflict between the United States and France between 1798 and 1800.³⁵ Anxious to strain relations between the United States and Britain, France began to seize and raid American vessels of commerce that carried British goods on board.³⁶ After peace talks in Paris failed, President John Adams appealed to Congress to ready the United States Navy and coastal land defenses for war with France.³⁷ Congress appropriated the funds for President Adams' numerous military build-up requests.³⁸ Yet, despite appropriating the funds, Congress never brought a vote for a declaration of war with France.³⁹ Proponents of broad executive authority begin and end their inquiry there.⁴⁰ As Professor John Yoo puts it, "in terms of an authorization of combat, there was no need for a declaration because Congress had already played a significant role in raising and funding the military and in setting rules for the capture of French ships."⁴¹

Another early example of alleged support for broad executive power over war is President Jefferson's dealings with the Barbary powers.⁴² In 1801 the Barbary power of Tripoli began attacking American ships and eventually declared war on the United States.⁴³ In response, President Jefferson sent American naval vessels to the Mediterranean without consulting Congress.⁴⁴ The support, or lack thereof, that these incidents provide to the argument for expansive executive power over war-making will be addressed below.

C. HOW THE WPR WORKS

At the outset, the WPR makes its intent clear. The WPR seeks to "insure that the collective judgment 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 . . ." ⁴⁵ To effectuate this intent:

The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed

³⁴ Yoo, *supra* note 13, at 292.

³⁵ Katie Uva, *Quasi War*, GEORGE WASHINGTON'S MOUNT VERNON: DIGITAL ENCYCLOPEDIA (2018), <http://www.mountvernon.org/digital-encyclopedia/article/quasi-war/>.

³⁶ Yoo, *supra* note 13, at 292.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Ramsey, *supra* note 10, at 1629.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ 50 U.S.C. § 1541(a) (1973).

Forces are no longer engaged in hostilities or have been removed from such situations.⁴⁶

This framework seems to be a clear and straightforward method to give force and effect to the power allocation over war under the Constitution. But this framework is not as helpful as it seems.

For starters, the reporting requirements leave a hole large enough for any president to drive an M1 Abrams tank through. Section 4(a)(1) of the WPR requires a written report “in the absence of a declaration of war, 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”⁴⁷ The president must submit this report within 48 hours to the Speaker of the House of Representatives and to the president pro tempore of the Senate.⁴⁸ The report must outline why United States Armed Forces are required, the constitutional or legislative authority that allows for the deployment, and an estimation of the scope and duration of the involvement.⁴⁹ Any ongoing hostilities undertaken pursuant to subsection (a) are to be reported on by the president to Congress at least once every 6 months.⁵⁰ Reports “pursuant to” section 4(a)(1) trigger a 60-day clock under which the president must conclude his military action unless Congress has declared war or enacted other authorization, has extended the president’s window by 30 days, or has been rendered unable to meet as a result of an attack on the United States.⁵¹ The extension by Congress can only be for an additional 30 days if the president certifies to Congress that the 30 days is necessary to bring about resolution of the action and safely remove United States Armed Forces from hostilities.⁵² Therefore, if a report is not submitted “pursuant to” section 4(a)(1), the clock never starts, and the WPR has no force or effect.

D. PRESIDENTIAL OBJECTIONS TO AND WAYS AROUND THE WPR.

No president has submitted a report to Congress “pursuant to” section 4(a)(1), as such an action triggers the 60-day clock on their military operations without congressional approval.⁵³ President Ford came the closest with his May 15, 1975 letter to Congress concerning the *SS Mayaguez* incident.⁵⁴ On May 12, 1975, Cambodian gunboats seized the *SS Mayaguez*, a U.S. merchant ship, off the Cambodian coast in international waters.⁵⁵ President Ford authorized a small force of Marines to reacquire the *Mayaguez*.⁵⁶ The mission was a success, and as a result the 60-day clock of the WPR was never an issue.⁵⁷ In that letter he merely “[took] note” of section 4(a)(1) of the WPR, being careful not to

⁴⁶ 50 U.S.C. § 1542 (1973).

⁴⁷ 50 U.S.C. § 1543(a)(1) (1973).

⁴⁸ *Id.* at § 1543(a)(3) (1973).

⁴⁹ *Id.* at § 1543(a)(3)(a)–(c) (1973).

⁵⁰ *Id.* at § 1543(c) (1973).

⁵¹ 50 U.S.C. § 1544(b) (1973).

⁵² *Id.* at § 1544(c) (1973).

⁵³ Yoo, *supra* note 13, at 181.

⁵⁴ *Id.*

⁵⁵ *Mayaguez Incident*, U.S. HIST., <http://www.u-s-history.com/pages/h1949.html>.

⁵⁶ *Id.*

⁵⁷ Gerald R. Ford, *Letter to the Speaker of the House and the President Pro Tempore of the Senate Reporting on United States Actions in the Recovery of the SS Mayaguez*, AM. PRESIDENCY PROJECT (May 15, 1975), <http://www.presidency.ucsb.edu/ws/index.php?pid=4913>.

submit his report “pursuant to” 4(a)(1).⁵⁸ In doing so he kept with his predecessor’s position that the WPR really had no force or effect over the executive branch because it was unconstitutional, but he was happy to give Congress recognition.

A litany of other incidents have been carried out unilaterally by presidents since the passage of the WPR. Some have given lip service to the WPR and others have simply disregarded it. Throughout President Reagan’s two terms he sent military personnel, equipment, or both into El Salvador, Libya, Egypt, Lebanon, Honduras, Chad, Grenada, the Persian Gulf, Bolivia, and Panama.⁵⁹ Sometimes military forces were introduced directly into conflict with opposing forces, and other times they were there to provide training and logistical support for U.S. allied or supported regimes.⁶⁰ In any case, 4(a)(1) was not invoked to trigger the 60-day clock, or Congress was simply not told about the operation at all.⁶¹

President Reagan’s successor, George H. W. Bush’s administration was no different when intervening in Panama, Columbia, and Philippines.⁶² In the largest military operation of President H. W. Bush’s term, the Gulf War, he did not believe he needed congressional “authority” to carry out the United Nations resolutions.⁶³ The resolutions authorized member states to use “all necessary means” to eject Iraq from Kuwait.⁶⁴ In the buildup of troops to accomplish that task during Operation Desert Shield, President H. W. Bush submitted reports to Congress but never invoked 4(a)(1) or the WPR.⁶⁵ However, he did ask for congressional “support,” and Congress passed Public Law 102-1 authorizing the president to use force against Iraq if the president reported that diplomatic efforts had failed.⁶⁶

With a change of administration and party, was President Bill Clinton’s administration any different? No. President Clinton introduced United States Armed Forces into hostilities in various operations, including air strikes and deployment of peacekeeping forces in Bosnia and Kosovo.⁶⁷ Just like the Gulf War of his predecessor, these operations were pursuant to United Nations Security Council resolutions and were conducted in conjunction with the North Atlantic Treaty Organization (“NATO”).⁶⁸ Regarding the use of U.S. forces, President Clinton reported to Congress several times “consistent with the War Powers Resolution,” but never cited Section 4(a)(1)—consistent with his predecessors.⁶⁹ However, unable to pass legislation challenging President Clinton’s actions, Congress filed suit in the Federal District Court for the District of Columbia alleging violation of the WPR.⁷⁰ The President argued that the Congress Members lacked standing to bring the suit, the question was a non-

⁵⁸ *Id.*

⁵⁹ *The Use of Military Forces Around the World: 1981-1990*, HIST. GUY, https://www.historyguy.com/use_of_american_military_forces_1981_to_1990.htm.

⁶⁰ *Id.*

⁶¹ *Id.*; see also *War Powers*, *supra* note 26.

⁶² *The Use of Military Forces Around the World*, *supra* note 59.

⁶³ *War Powers*, *supra* note 26.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Campbell v. Clinton*, 52 F. Supp. 2d 34, 39 (D.D.C. 1999).

justiciable political question, and the case was not ripe for review at that time notwithstanding the running of the 60-day clock.⁷¹ The court agreed with the President and ruled that the Members of Congress who brought the suit lacked standing.⁷² The decision was affirmed by the U.S. Court of Appeals for the District of Columbia.⁷³

Returning to a republican president, the administration of George W. Bush maintained the same position regarding the WPR, but the relationship between Congress and the President was less strained following the tragic events of 9/11.⁷⁴ In the wake of those attacks, Congress passed Public Law 107-40 (hereinafter “AUMF”), which authorized the use of “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.”⁷⁵ However, section 2(a) of the AUMF did something unique, which has profound implications for the allocation of war powers between the legislative and executive branches moving forward. For the first time, “organizations or persons” were identified as proper subjects for the use of force under the WPR, rather than exclusively nations.⁷⁶

President Barack Obama claimed authority to continue war-like operations all over the world under both the 2001 AUMF as well as another AUMF passed in 2003.⁷⁷ Whether it was continuing the war in Afghanistan,⁷⁸ conducting military operations to overthrow Muammar Gaddafi in Libya,⁷⁹ fighting ISIS in Iraq,⁸⁰ participating in the Saudi-manipulated Yemeni civil war,⁸¹ or arming and training “moderate rebels” in the Syrian civil war,⁸² President Obama’s Administration took the position that the AUMFs of 2001 and 2003 gave him authority to conduct military operations when and where he pleased.

In the two years that President Donald Trump has been in office, he has picked up where Presidents George W. Bush and Barack Obama left off.

⁷¹ *Id.*

⁷² *Id.* at 45.

⁷³ *Campbell v. Clinton*, 203 F.3d 19, 19 (D.C. Cir. 2000).

⁷⁴ *War Powers*, *supra* note 26.

⁷⁵ Public Law 107–40, 107TH CONGRESS, *Joint Resolution: To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States*, § 2(a), <https://www.gpo.gov/fdsys/pkg/PLAW-107publ40/pdf/PLAW-107publ40.pdf>.

⁷⁶ *War Powers*, *supra* note 26.

⁷⁷ Russell Berman, *The War Against ISIS Will Go Undeclared*, ATLANTIC (Apr. 15, 2015), <https://www.theatlantic.com/politics/archive/2015/04/the-war-against-isis-will-go-undeclared/390618/>.

⁷⁸ Mark Perry, *Afghanistan 15 Years On: Obama’s Sorriest Legacy*, POLITICO MAGAZINE (Oct. 5, 2016), <https://www.politico.com/magazine/story/2016/10/afghanistan-longest-war-next-president-214324>.

⁷⁹ Bruce Ackerman, *Legal Acrobatics, Illegal War*, N.Y. TIMES (June 20, 2011), <https://www.nytimes.com/2011/06/21/opinion/21Ackerman.html>.

⁸⁰ Russell Berman, *supra* note 77.

⁸¹ Bonnie Kristian, *Lawless Entanglement in Yemen: U.S. Military Intervention in Yemen is Unconstitutional and Very Unwise*, U.S. NEWS AND WORLD REPORT (Oct. 19, 2016), <https://www.usnews.com/opinion/world-report/articles/2016-10-19/obama-yemen-attacks-are-unconstitutional-and-unwise>.

⁸² Matt Spetalnick & Jonathan Landay, *Syria’s civil war to mar Obama legacy*, REUTERS (Dec. 13, 2016), <https://www.reuters.com/article/us-mideast-crisis-syria-obama-analysis/syrias-civil-war-to-mar-obama-legacy-idUSKBN14228S>.

Seizing on the 2001 and 2003 AUMFs, President Trump has continued to conduct military operations in Niger, Cameroon, Somalia,⁸³ Afghanistan, Syria, and Yemen,⁸⁴ among others. The 60 words of section 2(a) of the 2001 AUMF have effectively “authorized” (as far as the presidents who have wielded it are concerned) 17 years of war, on multiple continents, at immense costs in terms of dollars and human lives, against enemies not even in existence when it was enacted.⁸⁵

III. ANALYSIS

A. TEXTUALISM AND ORIGINALISM

The WPR is either unconstitutional or unnecessary, and in either case it is unfit to exist. Congress is given the power to “Declare War” under Article I, Section 8, Clause 11 of the Constitution.⁸⁶ The power of the executive to undertake war, or acts of war, with his Commander-in-Chief powers under Article II Section 2⁸⁷ depends upon an action by Congress first to abide by separation of powers under the Constitution. The WPR misses this point entirely. Not only was the grounding of Constitutional authority in the Necessary and Proper Clause to enact the WPR improper, but by doing so and not enacting it pursuant to the Declare War Clause, Congress has backed itself into the corner it has found itself in since the WPR’s enactment.

The WPR has given the president a thin veneer of legitimacy by giving him a 60-day window within which to commit the nation to war absent Congressional action, a 60-day window that does not exist under the Constitution. The president can then make war for up to 60 days without Congressional approval all while submitting reports to Congress on his activities which invoke the WPR or are “consistent with”⁸⁸ the WPR, but never “pursuant to” the WPR. By doing so, the president faints respect for the congressional “attempt” to assert its powers over taking the nation to war, all while maintaining that the WPR is unconstitutional anyway, so the reports are not necessary in the event a dispute between Congress and the president arises over the legitimacy of a particular act of war.

Under the 18th century understanding of what “Declare War” meant to the drafters and ratifiers of the Constitution, it means much more than a formal declaration on a piece of paper.⁸⁹ Congress’s authority to declare war means what it says: to take the country to war, to commit the nation’s people and its resources to conflict with another nation, and all the consequences that such a decision carries with it.⁹⁰ When the president acts without the careful consideration of Congress to commence war, absent an attack on the United

⁸³ Trevor Timm, *Niger is the perfect example of the US state of perma-war*, THE GUARDIAN (Oct. 27, 2017), <https://www.theguardian.com/commentisfree/2017/oct/27/niger-perfect-example-us-permanent-war-posturing>.

⁸⁴ Danny Sjrursen, *There’s One Way That Donald Trump Is No Different From Obama: New President, same old American Wars*, THE NATION (Dec. 19, 2017), <https://www.thenation.com/article/theres-one-way-that-donald-trump-is-no-different-from-obama/>.

⁸⁵ Timm, *supra* note 83.

⁸⁶ U.S. Const. art. 1, § 8 cl. 11.

⁸⁷ U.S. Const. art. 2, § 2.

⁸⁸ *War Powers*, *supra* note 26.

⁸⁹ Ramsey, *supra* note 10.

⁹⁰ *Id.*

States itself, he acts unconstitutionally. The WPR doesn't belong in the discussion.

1. "DECLARE WAR" IS UNCLEAR BASED ON THE TEXT ALONE

Although we start with the text itself when determining where power is allocated under the Constitution, the argument for the power to declare war being vested solely in Congress cannot come from the text alone.⁹¹ This is the case for two reasons. First, the text itself does not shed much light on the question. The power to "Declare War" under Article I says nothing about what that means other than where the framers chose to write it, in Article I.⁹² Second, framer intent, derived from private conversations (whether at the Constitutional Convention itself or in private letters between themselves after the fact), cannot alone explain what the Declare War Clause means.⁹³ To rely solely on the private conversations and letters of the framers would diverge from the principles of originalist interpretation.⁹⁴

Although the text is authoritative, extrinsic evidence is helpful where the text does not provide enough guidance on what the ratifiers actually adopted.⁹⁵ This includes the previously mentioned private letters and conversations, but it also includes the actions of early presidents conducting themselves according to what they thought the text meant.⁹⁶ But, what is perhaps the gold standard of originalist interpretation—the public debates at the state ratifying conventions—is the most instructive as to the meaning of the text that was adopted.⁹⁷ The debates were not just carried out at these state conventions but also in the newspapers and other publications of the day.⁹⁸ Both Federalists and Antifederalists staked out their positions regarding the meanings of the various clauses as they sought to persuade a majority to adopt the Constitution or reject it.⁹⁹ This public debate gives 21st century observers a window into what 18th century actors thought they were adopting. Given that this debate was more robustly discussed regarding some clauses than others, the extrinsic evidence of conversations, letters, and actions helps provide additional context where robust debate was lacking.¹⁰⁰ Such is the case regarding the Declare War Clause of Article I.

2. "DECLARE WAR" MEANS TO MAKE WAR—BY BOTH WORD AND ACTION

As John Locke wrote, and as the framers and ratifiers of the Constitution understood, war may be declared "by Word or Action."¹⁰¹ If, in fact, this definition is correct as applied to Congress's power to declare war

⁹¹ Ramsey, *supra* note 10, at 1553–54.

⁹² *Id.*

⁹³ *Id.* at 1554.

⁹⁴ *Id.*

⁹⁵ *Id.* at 1554–55.

⁹⁶ *Id.* at 1550–51.

⁹⁷ 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 287, 528 (Jonathan Elliot 2d ed., 1836).

⁹⁸ *The Ratification Debate*, BILL OF RIGHTS INSTITUTE, <https://www.docsoffreedom.org/student/readings/the-ratification-debate>.

⁹⁹ Ramsey, *supra* note 10, at 1603.

¹⁰⁰ *Id.* at 1556–57.

¹⁰¹ John Locke, *The Second Treatise of Government*, in John Locke, *Two Treatises of Government* 265, § 16 at 278 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

under the Constitution, then that phrase does not and cannot mean simply that Congress only has the power to issue a formal decree on paper but has no say in acts of war, as proponents of expansive executive authority over war maintain.¹⁰² When we match the words the framers used with the explanations of those words by the ratifiers and the actions of the founding generation abiding by those words, we have a picture of what “Declare War” meant to those who adopted the Constitution.¹⁰³ That “Declare War” meant, and means, something very different than the 20th and 21st century conceptualizations of it.

Framers at the Constitutional Convention struggled to define the allocation of war powers between the legislative and executive branches, but on the other side of their debates, little consensus was reached.¹⁰⁴ Before the Committee on Detail, which translated general resolutions into specific enumerations of power among the different branches, several war powers proposals made the rounds at the Constitutional Convention.¹⁰⁵ After the Committee on Detail finished its work, the legislature had the power “to make War; to raise Armies; to build and equip Fleets,” while the executive had the power of “Commander in Chief of the Army and Navy of the United States, and of the Militia of the Several States.”¹⁰⁶

A couple weeks later, the Convention briefly discussed the “Make War” Clause.¹⁰⁷ After some back and forth about where to vest the power to make war,¹⁰⁸ James Madison and Elbridge Gerry came up with a compromise of sorts, albeit an ill-defined one.¹⁰⁹ The Madison-Gerry amendment changed the language from “Make War” to “Declare War.”¹¹⁰ Proponents of expansive executive authority in the area of war powers assert this is critical evidence of the intent to vest the executive with more expansive authority.¹¹¹ But, based on the breadth (or lack thereof) of debate over the change, and the understanding of the “Declare War” language used by the ratifiers and founding generation leaders, modern-day emphasis on this phrase is misplaced.¹¹²

However, what can be clearly understood from the change at the Convention was that the Madison-Gerry amendment created some confusion among the delegates.¹¹³ For one, Roger Sherman objected to the change, believing it opened the doors for the possibility that the executive could unilaterally go to war.¹¹⁴ But, other delegates, Gerry apparently among them, took Sherman to be objecting because he wanted to protect executive power from unnecessary congressional meddling in the process of going to war.¹¹⁵

¹⁰² Yoo, *supra* note 13, at 254.

¹⁰³ Ramsey, *supra* note 10, at 1636.

¹⁰⁴ *Id.* at 1550.

¹⁰⁵ Yoo, *supra* note 13, at 257–60.

¹⁰⁶ *Id.* at 260.

¹⁰⁷ *Id.* at 260–61.

¹⁰⁸ *Id.* at 261 (describing how two colleagues from South Carolina—Charles Pinckney and Pierce Butler—wanted the power to make war vested in different areas for the same political and functional reasons. Pinckney wanted the power vested in the Senate rather than the whole Congress, while Butler wanted the power vested exclusively in the executive).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Ramsey, *supra* note 10, at 1550.

¹¹³ Yoo, *supra* note 13, at 262.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

Perhaps the most telling aspect of the ratifying conventions in the several states is that the allocation of war powers away from the executive was most often articulated by the Constitution's friends, the Federalists, who sought to garner support for the Constitution.¹¹⁶ Antifederalists took issue with numerous provisions the Federalists supported in the Constitution, but the allocation of war powers was not one of them.¹¹⁷ War powers allocation seems to be one of the few areas of agreement between the Federalists and Antifederalists, and supports the interpretation that the Declare War Clause is as constricting on the executive's ability to unilaterally initiate war as modern-day congressional war-making advocates suggest.¹¹⁸ The bill sold to the ratifiers was one of limited executive authority in the area of war powers, and expansive authority pertaining to Congress.¹¹⁹ One such example comes out of the Pennsylvania ratifying convention, where James Wilson said:

This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large: this declaration must be made with the concurrence of the House of Representatives: from this circumstance we may draw a certain conclusion that nothing but our national interest can draw us into a war.¹²⁰

James Iredell, a prominent member of the North Carolina ratifying convention had this to say about the allocation of war powers: "The president has not the power of declaring war by his own authority," instead, such powers "are vested in other hands."¹²¹ Charles Pinckney took his understanding of the Declare War Clause back to the South Carolina ratifying convention and explained to the delegates there that "the president's powers did not permit him to declare war."¹²² Of the two possible understandings of the Declare War Clause, the narrow interpretation—that Congress only has the authority to issue formal declarations of war—is not supported by evidence from the ratifying conventions.¹²³ Instead, it can only mean that the ratifiers understood the Declare War Clause to mean that Congress had broad authority to initiate war "by Word or Action."¹²⁴ Any narrower reading than this renders the debates of the ratifying conventions nonsensical.¹²⁵ The ratifiers were sold the Constitution, in part, on the idea that the nation would not be hurried into war by a single official, but by the deliberate action of its representatives in Congress. This is why "Declare War" requires congressional authority to check the executive's power to go to war to this day.

Furthermore, the Federalists appealed to the states themselves by billing the Declare War Clause as a provision that would prevent the nation from hurrying into war.¹²⁶ The states viewed themselves as sovereign, and only

¹¹⁶ Ramsey, *supra* note 10, at 1603.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Elliot, *supra* note 97, at 528.

¹²¹ *Id.* at 287.

¹²² *Id.*

¹²³ Ramsey, *supra* note 10, at 1604.

¹²⁴ *Id.*; see also Locke, *supra* note 101.

¹²⁵ Ramsey, *supra* note 10, at 1604.

¹²⁶ Elliot, *supra* note 97, at 528.

ratified the Constitution as a compact amongst themselves for practical reasons, including defense. As sovereigns, of course the states would rather have a carefully-considered debate over when to bind their collective fortunes to war with a foreign country, rather than the unilateral decision of one man. It is true that the states gave up some sovereignty to the federal government in certain areas under the Constitution, but it is quite another thing to suggest that they would delegate such an important power as the ability to take them all to war to the executive alone. Congress is where state interests were represented; therefore, it is understandable why the Federalists thought they had to sell the idea that war would be deliberated in that body before it was entered into. No power strongly implicates all the others more than the power to go to war.

Although private letters between leaders of the founding generation are not dispositive of the intent and meaning of “Declare War” under Article I, the nearly unanimous agreement that the power to take the country to war lies within the legislature, not the executive, strongly suggests that Congress had more authority than to simply issue formal declarations. From the Constitution’s most ardent opponents to its most eloquent proponents, “Declare War” meant that Congress must make the first move to commit the country to war, not the executive. In a letter to James Madison, Thomas Jefferson had this to say about the nation’s prospects of war under the Constitution: “We have already given in example one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body . . .”¹²⁷ Madison, writing to Jefferson nine years later, stated: “The [C]onstitution supposes, what the History of all Governments demonstrates, that the Executive is the branch of power most interested in war, and most prone to it. It has accordingly with studied care, vested the question of war in the Legislature.”¹²⁸ Even Alexander Hamilton, one of the most ardent supporters of the vigorous executive in the area of war powers, had this to say in one of his *Pacificus* essays:

[t]he Legislature can alone declare war, can alone actually transfer the nation from a state of peace to a state of hostility . . . [i]t is the province and duty of the executive to preserve to the nation the blessings of peace. The Legislature alone can interrupt them by placing the nation in a state of war.¹²⁹

As the old saying goes, “actions speak louder than words.” The actions of the early executives shed even more light on the founding generation’s understanding of the Declare War Clause. For example, despite being presented with numerous opportunities to unilaterally undertake acts of war, President George Washington deferred to Congress to declare war before he acted as Commander-in-Chief.¹³⁰ Faced with hostilities from Native Americans on the western border of the United States, President Washington steadfastly refused to conduct offensive measures in the absence of a congressional declaration of

¹²⁷ Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in Julian P. Boyd, ed, 15 *The Papers of Thomas Jefferson* 392,397 (Princeton 1958).

¹²⁸ Letter from James Madison to Thomas Jefferson (Apr. 2, 1798), in Gaillard Hunt, ed, 6 *The Writings of James Madison* 311,312 (G.E Putnam's Sons 1906)

¹²⁹ Letters of *Pacificus* No 1, in Henry Cabot Lodge, ed, 4 *The Works of Alexander Hamilton* 432, 443 (G.E Putnam's Sons 1904).

¹³⁰ Ramsey, *supra* note 10, at 1550–51.

war.¹³¹ Instead, he limited his commands to defensive measures and stated: “The Constitution vests the power of declaring war with Congress; therefore no offensive expedition of importance can be undertaken until after they shall have deliberated upon the subject, and authorized such a measure.”¹³² Given the arguments of pro-executive war power authority proponents today, President Washington’s actions appear remarkable. Time and again, executive proponents today argue that unilateral executive action is constitutionally justifiable because threats to far-flung military bases are threats to national security.¹³³ Or, they say that enemies begin the hostilities when they attack U.S. installations or personnel stationed, almost permanently, in their sovereign territory.¹³⁴ Or, that troop buildup or military operations close to U.S. allies or interests are justifications for a preemptive strike.¹³⁵ Yet, with hostile tribes at the U.S. border, regularly conducting raids and incursions into territory claimed by the United States, President Washington thought that, in keeping with the Constitution, he must get congressional approval before acting offensively.¹³⁶

B. WPR HISTORICAL SUPPORT IS ILLUSORY AT BEST

1. THE QUASI-WAR? IT DOES NOT MEAN WHAT PRESIDENTIAL PROPONENTS THINK IT MEANS

With the understanding that the placement of the Declare War Clause in Article I, the public debates at the state ratifying conventions, the private letters and conversations of the framers, and the actions of early presidents all point to a deep involvement of Congress in the decision to go to war, the debate now turns to the presidential war power proponents’ appeals to history for support.

Unable to rely on President Washington’s actions towards the Native Americans on the western border of the United States, presidential proponents often turn to the Quasi-War with France as their earliest historical support.¹³⁷ As the story goes, President John Adams did not receive a declaration of war from Congress before waging essentially a naval war with France over France’s seizure of American ships engaged in commerce with Britain.¹³⁸ But, reliance on this fact about the Quasi-War alone is unsatisfactory. First, the series of acts undertaken by Congress in pursuance of war with France essentially authorized the war.¹³⁹ President Adams did not act as unilaterally as presidential proponents would like to suggest. According to Francis Wormuth, a prominent war powers scholar, President Adams “took absolutely no independent action.

¹³¹ *Id.* at 1551.

¹³² *Id.*

¹³³ Daniel L. Byman, *Testimony Before the House Committee on Foreign Affairs’ Subcommittee on the Middle East and North Africa: Hezbollah’s Growing Threat Against U.S. National Security Interests in the Middle East*, BROOKINGS (Mar. 22, 2016), <https://www.brookings.edu/testimonies/hezbollahs-growing-threat-against-u-s-national-security-interests-in-the-middle-east/>.

¹³⁴ *Id.*

¹³⁵ Victor Vladimirov, *Russian Troop Buildup Along Ukraine Border Raises War Fears*, VOA NEWS (Aug. 4, 2016), <https://www.voanews.com/a/russia-troop-buildup-ukraine-border-raises-war-fears/3450445.html>.

¹³⁶ Ramsey, *supra* note 10, at 1551.

¹³⁷ Yoo, *supra* note 13, at 292.

¹³⁸ *Id.*

¹³⁹ Tom Woods, *Presidential War Powers*, LEWROCKWELL.COM (July 7, 2005), <https://www.lewrockwell.com/2005/07/thomas-woods/presidential-dictatorship-in-war/>.

Congress passed a series of acts that amounted, so the Supreme Court said, to a declaration of imperfect war; and Adams complied with these statutes.”¹⁴⁰ The Supreme Court case *Wormuth* is referring to is *Little v. Barreme*.¹⁴¹ In that case, the Court held that Congress could either declare war or approve hostilities by means of statutes.¹⁴² The Court ruled that the latter was applicable to the Quasi-War.¹⁴³

There is an interesting fact about *Barreme* that casts more doubt on presidential proponents’ use of the Quasi-War for support. Two U.S. frigates, the *Boston* and the *General Greene*, captured a Danish vessel, the *Flying Fish*, by order of President John Adams.¹⁴⁴ But, Congress authorized the seizure of vessels only for the purpose of “intercept[ing] any suspected American ship sailing to a French port.”¹⁴⁵ Attempting to prevent American vessels from transporting goods to France, Congress authorized the Navy to seize “vessels or cargoes [that] are apparently, as well as really, American” and “bound or sailing to any [French] port.”¹⁴⁶ But, the *Flying Fish* was sailing *from* and not *to* a French port.¹⁴⁷ Therefore, the captain of the U.S. frigates, Captain Little, was declared liable for executing a command that was illegal and was held liable for damages.¹⁴⁸ Even with congressional statutes authorizing acts of war, the president was not free to circumvent or expand the scope of those authorizations.

This ruling is instructive for two very important reasons. First, the Court found the congressional statutes regarding hostilities with France to have placed the United States in an “imperfect war” with France.¹⁴⁹ The Court did not find these statutes to have been a declaration of war. This distinction is important because had the Court found a declaration of war, rather than statutes amounting to an “imperfect war,” it is hard to imagine how the Court could have justified constraining the president’s war powers as Commander-in-Chief in an all-out war. Second, the Court apparently took the position that because an all-out war was not declared, one did not exist, and therefore, Congress could constrain the president’s actions as Commander-in-Chief in “imperfect wars” (in other words, when there was no declaration of war). This view of the distinction between an all-out war and an “imperfect war” speaks volumes about what the early Court thought about the president’s powers in relation to acts of war without a declaration. This analysis leads only to the conclusion that the president, as Commander-in-Chief, plays second fiddle to Congress when it comes to undertaking a war. The president can wage war once it has been declared or the United States has been attacked, but he cannot unilaterally make war by his own acts absent a pre-existing state of war. Unless Congress has declared war pursuant to its power under Article I, the president is not at liberty to wage it in any way he sees fit as Commander-in-Chief under Article II. This conception of the president’s war powers is very different from what modern-

¹⁴⁰ *Id.*

¹⁴¹ *Little v. Barreme*, 6 U.S. 170 (1804).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

day presidential proponents argue and what they claim President Adams's actions in the Quasi-War allegedly stand for.

2. THE BARBARY WARS? THAT DOES NOT WORK EITHER

Another often cited instance of unilateral acts of war by the president without congressional declaration involved President Thomas Jefferson and the Barbary Powers. The Barbary Powers demanded a fee from foreign nations for their ships to sail the Mediterranean unimpeded.¹⁵⁰ When the pasha of Tripoli declared war on the United States in 1801, President Jefferson sent a few naval ships to the Mediterranean to protect American citizens and ships.¹⁵¹ However, when President Jefferson's force met hostilities with the Barbary Powers, he was quick to notify Congress of the incidents and make it clear that U.S. ships were there defensively.¹⁵² In his reports to Congress, President Jefferson stated that he was "unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense."¹⁵³ He also told Congress: "I communicate [to you] all material information on this subject, that in the exercise of this important function confided by the Constitution to the Legislature exclusively their judgment may form itself on a knowledge and consideration of every circumstance of weight."¹⁵⁴ President Jefferson was of the firm belief that despite the Barbary Powers' declaration of war on the United States, his conduct in the Mediterranean could only be defensive unless Congress authorized otherwise.¹⁵⁵ He held this belief despite Congress's statement that the purpose for commissioning six frigates just before President Jefferson's inauguration was to "protect our commerce & chastise their [the Barbary Powers] insolence—by sinking, burning or destroying their ships & Vessels wherever you shall find them."¹⁵⁶

President Jefferson's Cabinet and Alexander Hamilton disagreed with President Jefferson's position regarding the defensive posture.¹⁵⁷ Hamilton, and to a large extent President Jefferson's Cabinet, argued that once the Barbary Powers had declared war, the president was authorized to use all available force in response.¹⁵⁸ And, according to the eighteenth-century understanding that war could be commenced by word or deed, Hamilton and President Jefferson's Cabinet appear to have been correct.¹⁵⁹ The state of war was established when the Barbary Powers declared war on the United States.¹⁶⁰

But, what is instructive about this event is President Jefferson's interpretation of his authority under the Constitution. Although he could have conducted an offensive war against the Barbary Powers, according to what it meant to be at war among his eighteenth-century contemporaries, he felt his authority was so restrained by the Constitution that he erred on the side of caution. He acted in the exact opposite way that twentieth and twenty-first-

¹⁵⁰ Woods, *supra* note 139.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Ramsey, *supra* note 10, at 1629.

¹⁵⁶ Woods, *supra* note 139.

¹⁵⁷ Ramsey, *supra* note 10, at 1629.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 1629–30.

century presidents have. Modern presidents see any sliver of grey area in their authority to go to war unilaterally as license to do so. For that matter, even when no grey area exists at all, modern presidents see no constitutional impediment to going to war. President Jefferson's steady hand serves as an example of executive restraint to be emulated today, when and where practicable—not an example of unrestricted authority to wage war when and where the executive sees fit.

3. HOW DID WE REALLY GET HERE?

Regardless of how the framers, the ratifiers, and early presidents understood war powers, today's conventional opinion is that the president has almost unchecked authority in the realm of war making, and the WPR does little or nothing to restrict this authority.

Professor Walter LaFeber traces the explosion of presidential war powers to a change in international and domestic circumstances in the United States after the civil war.¹⁶¹ Professor LaFeber notes that in the decades immediately following the Civil War, America quickly became an economic power as a result of its industrial and agricultural buildup.¹⁶² Seeking foreign trade partners to profit off America's newly increased productivity, the United States developed international interests in Asia, Latin American, and African markets.¹⁶³ In this climate, calls for military power grew to protect the United States' developing interests overseas.¹⁶⁴

This new global environment led to the United States' involvement in a little known 1899-1901 incident in China. An anti-foreign, anti-colonial, and anti-Christian rebellion broke out in Northern China led by a group popularly known in the West as the "Boxers."¹⁶⁵ The Boxers were upset over foreign exploitation and extraterritorial privileges in their country, and were supported by the Chinese government.¹⁶⁶ After a German minister was killed in 1900, the United States, among other nations, sent 5,000 American troops to quell the violence.¹⁶⁷ President McKinley's actions were historic. For the first time, a president sent troops to fight a group supported by a foreign government, on their own soil, without consulting Congress, let alone obtaining a declaration of war.¹⁶⁸ Although presidents had previously used such force against non-governmental groups that threatened U.S. interests and citizens, this was the first time such actions were taken against a foreign sovereign without obeying the Constitution's provisions about who was to declare war.¹⁶⁹

The foreign policy that came to dominate the 20th century was built on the precedent of President McKinley's unconstitutional actions in China. Starting in the 20th century, and continuing up to today, "[i]mperial presidencies, weak congresses, and cautious courts" have become "endemic to

¹⁶¹ Walter LaFeber, *The Constitution and United States Foreign Policy: An Interpretation*, 74 J. AMER. HIST. 695, 702-03 (1987).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Tom Woods, *supra* note 139.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

modern United States foreign policy.”¹⁷⁰ The final act that led the United States down its never-ending war path was the Truman Administration’s 1950 National Security Council (NSC) document NSC 68. In NSC 68, the Administration argued that “the integrity of our system will not be jeopardized by any measures, covert or overt, violent or non-violent, which serve the purposes of frustrating the Kremlin design.”¹⁷¹ This prophecy, that the “integrity of our system” (i.e. the delicate balance between power and respect for liberty that the Constitution intended to strike) would not be adversely affected by attacking the perceived greater threat of the day—Communism—was proven incorrect almost immediately.¹⁷² Instead, from that statement forward the “national debate over the relationship between foreign policy, on the one hand, and accountable power and the preservation of constitutional rights, on the other” has devolved into endless rationalizations that “foreign policy ends justify the means.”¹⁷³ The Truman Administration’s proclamation served as the foundation for all U.S. intervention around the world through the end of the Cold War and beyond.¹⁷⁴

Both of these incidents, and all that followed, get at the core of the problem that is apparent when presidential proponents appeal to history for support. It is clear that relying on Presidents Adams and Jefferson is misplaced, as is relying on unconstitutional acts by Presidents McKinley, Truman, and the like. Unconstitutional precedents do not lend constitutional support for similar unconstitutional actions today.

C. THE WPR EITHER PERMITS UNCONSTITUTIONALLY COMMENCED WAR OR UNCONSTITUTIONALLY INTERVENES IF ITS OTHER PROVISIONS ARE VALID

1. THE WPR UNCONSTITUTIONALLY ALLOWS THE PRESIDENT TO COMMENCE WAR WITHOUT CONGRESSIONAL APPROVAL

If a president submits a report to Congress pursuant to section 4(a)(1) of the WPR at all, rather than submitting it merely “consistent with” the WPR, such report gives him license to conduct war for up to 60 days without congressional approval.¹⁷⁵ This 60-day window, which comes from 50 U.S.C. 1544(b), amounts to unconstitutional acquiescence by Congress to an unconstitutional act of the president based on a misinterpretation of the Constitution and unsupported by inaccurate interpretations of historical events. Four wrongs do not make a right.

Only Congress has the authority under Article I to declare war by “Word or Act.”¹⁷⁶ This is because the Declare War Clause of Article I was understood by the drafters, ratifiers, and early leaders to include much more than a formal declaration of war written on a piece of paper.¹⁷⁷ We know this because in the 18th century, entering a state of war from a state of peace was done by both formal declaration, on a piece of paper, and informal declaration,

¹⁷⁰ LaFeber, *supra* note 161, at 696.

¹⁷¹ *Id.* at 695–96.

¹⁷² *Id.*

¹⁷³ *Id.* at 696.

¹⁷⁴ *Id.*

¹⁷⁵ 50 U.S.C. § 1544(b) (1973).

¹⁷⁶ See John Locke, *The Second Treatise of Government, Two Treatises of Government* 265, § 16 at 278 (Peter Laslett ed., Cambridge 1988) (1960).

¹⁷⁷ Ramsey, *supra* note 10, at 1604.

an act of hostility toward a foreign sovereign and/or its citizens.¹⁷⁸ It is true that commencing war by act rather than writing was the more prevalent option taken by sovereigns in the 18th century, and contemporaries at the time of drafting and ratification knew this to be the case.¹⁷⁹ So, given that the power to declare war lies in Article I, not Article II, and that there is no documentary or historical evidence that the drafters, ratifiers, or early leaders intended to bifurcate the two ways to initiate war, leaving only the formal declaration to Congress and all others to the president, there is no reason to assume that is what the Constitution does.

With this distinction understood by both the drafters and ratifiers, no one made it a point of contention where the Declare War Clause resided in the Constitution or that placing that clause under Article I conveyed any separation over who was permitted to initiate war by formal or informal declaration. In fact, before the Constitution, and the radical notion that the sovereign was the people not a king, the ability to go to war unilaterally was vested in the king himself.¹⁸⁰ In effect, the ability to commence war was a unitary power that could be exercised in two different ways. When the language was changed at the Constitutional Convention from “Make War” to “Declare War” debate over the change was sparse and there is little indication that the change carried any substantive effect, but only an effect of the form.¹⁸¹ There were advocates at the Convention who thought the power to go to war should vest solely in the executive, again conceiving of the ability to formally or informally commence war unitarily, but that position was not adopted.¹⁸² If that position carried more weight perhaps “Declare War” would have appeared in Article II not Article I. Or, during the debates there would have been argument about dividing the power, giving Congress power over formal declaration (word) and the President power over informal declaration (act).

All of this evidence supports the scope of the Declare War Clause as being broad, not narrow.¹⁸³ The framers framed, the ratifiers ratified, and the early presidents abided by, a Constitution that vested the Congress, and only the Congress, with the ability to commence war.

Authorizing a 60-day undertaking of war without congressional action so long as it is concluded within that 60 days is a simultaneous abdication by Congress and usurpation by the president of constitutional authority. The president as Commander-in-Chief has the authority to conduct war as he sees fit once it has already commenced. He does not have authority as Commander-in-Chief to make a war on his own. If Congress commences war or if the United States is attacked, the president’s authority is at its zenith. Before either of those occur, however, presidential acts of war are unlawful.

2. ONCE A STATE OF WAR IS ENTERED, THE WPR
UNCONSTITUTIONALLY REQUIRES THE PRESIDENT TO CONSULT
CONGRESS IN ITS CONDUCT

¹⁷⁸ *Id.* at 1558–60, 1566–67, 1599, 1600, 1602.

¹⁷⁹ *Id.* at 1558.

¹⁸⁰ *Id.* at 1561–62.

¹⁸¹ *Id.* at 1550.

¹⁸² Woods, *supra* note 139.

¹⁸³ Ramsey, *supra* note 10, at 1560, 1604.

The WPR is either unconstitutional because it abdicates Congressional authority over the declaring of war to the president, or if it does not, it unconstitutionally restrains the president as Commander-in-Chief. If the 60-day window of 50 U.S.C. section 1544(b) is a constitutional Congressional standing consent to war, then 50 U.S.C. section 1544(c) asserts that Congress can impermissibly intervene in how the president conducts that war. Specifically, 1544(c) provides:

Notwithstanding subsection (b), at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possession and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.¹⁸⁴

On this point, the presidential critics of the WPR have got it right.

If the “be everywhere, do all things,” executive can have military bases in every corner of the globe, and conduct military operations (peaceful or belligerent) in hostile regions all over the world, then Congress cannot command the president to remove forces from those regions.¹⁸⁵ If any threat or attack on those outposts is an act of war or an “attack on the United States,” then the president as Commander-in-Chief can carry out hostilities wherever they may lead until the threat is eliminated.¹⁸⁶ If Congress’s view of the executive’s war powers under 1544(b) is that he can go where he wants and do what he wants as long as it is concluded in less than 60 days, then Congress has no authority to restrain the president’s operations under 1544(c). If 1544(b) is a standing authorization to go to war, then expansive presidential war power proponents are right that the WPR is unconstitutional.¹⁸⁷

D. AMBIGUITY? THERE’S A CONSTITUTIONAL SOLUTION FOR THAT: ARTICLE V

One thing is for certain about the debate over the allocation of war powers under the Constitution; neither side has a dispositive position based on the text alone.¹⁸⁸ Both sides must appeal to extrinsic evidence outside of the text to support their respective interpretations.¹⁸⁹ If we are to concede that on originalist grounds this problem is impassable, we must look elsewhere for a solution to this problem.

Congress attempted to do so with the WPR. But, because of the intractability of the pro-executive position, the WPR has proven completely useless. And, even if the WPR were successful at curbing the executive penchant for war, if our constitutional republic means anything, it must stand for the principle that unconstitutional means do not justify apparent constitutional ends. Because the WPR is unconstitutional in its attempt to exercise Congress’s constitutional prerogatives over taking the nation to war, the alternative solution to the impasse is to more clearly define “Declare War” with an Article V amendment.

¹⁸⁴ 50 U.S.C. § 1544(c) (1973).

¹⁸⁵ See Ramsey, *supra* note 10, at 1562–63, 1589.

¹⁸⁶ See *id.* at 1610 n. 244, 1629–30.

¹⁸⁷ See *id.*

¹⁸⁸ *Id.* at 1567–68.

¹⁸⁹ *Id.*

Constitutional history is replete with examples of the utility of the Article V amendment process to explain portions of the Constitution or give more clear guidance on its requirements.¹⁹⁰ Starting from the very beginning, many ratifiers did not want to ratify at all until they had a Bill of Rights.¹⁹¹ Antifederalists were not content to rest on the promises of the Federalists that individual rights were not necessary because the Constitution only created a government of limited and enumerated powers.¹⁹² Seeking assurances that specific rights were expressly protected, the Bill of Rights was passed.

Similarly, history has demonstrated that modern scholars who argue that the power to commence war properly lies with Congress cannot rely on the promises of pro-executive scholars or the WPR that unilateral executive war-making power will not result in abuse. Therefore, as the Antifederalists were successful in lobbying for affirmative protections for specific rights, the “anti-executive” scholars should move the discourse toward an amendment that clearly defines the metes and bounds of the Declare War Clause.

Without specifying the exact procedural wording of the amendment, I submit that it should encompass the following tenets. First, recognizing that a move from a state of peace to a state of war is the most monumental decision any government can make for its people, the decision whether to do so properly lies with the people’s representative body—Congress. Second, Congress alone can declare war by word (formal declaration) or action (strictly construed, explicit funding for a specific conflict). Third, that the states themselves are the final arbiters of what is in their best interest regarding the decision to commit to military conflict. Finally, once war has been properly commenced in accordance with this amendment, the course and conduct of the war falls to the president under his authority as Commander-in-Chief. The following language would highlight the importance of these tenets (leaving room for more specific procedural details to follow).

Amendment XXVIII

Section 1. In order to further clarify the Declare War Clause of Article 1, Section 8, and in consideration that to take the nation to war, to commit the nation’s people and its resources to conflict with another nation, and all the consequences that such a decision carries with it, the decision to enter a state of war from a state of peace lies solely with the people’s representative body, Congress.

Section 2. Congress may express its intent to enter into war by a formal declaration or by specific and explicit funding for military action against a narrowly defined enemy of the United States. Such funding decisions may not be for a period longer than two years. The president shall conduct such a declared war only against the enemy specifically defined and only with the resources specifically appropriated by Congress.

¹⁹⁰ *Notes on the Amendments*, U.S. CONST. (2010), <https://www.usconstitution.net/constamnotes.html>. The 15th Amendment was passed in part to clarify any ambiguities in the “privileges or immunities” clause of the 14th Amendment because southern states were seizing on those ambiguities to continue disenfranchising the newly freed slaves. *Id.* After the 14th Amendment failed to provide for clarity on the rights of women to vote, the 19th Amendment was passed to explicitly provide the right. *Id.* The 25th Amendment was passed to clarify the presidential line of succession. *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

Section 3. Recognizing that the Union is a compact between sovereign states, wherein the states surrendered certain sovereign powers for their mutual defense, the several states have authority to reclaim those powers when their interests are not served by an act of war. Therefore, the several states may nullify any act of war declared by the general government via withholding of personnel, financial support, or other resources after a clear statement to Congress outlining why the decision to go to war is not in the best interests of that state and its people.

Section 4. Nothing in this amendment shall be construed to abridge the president's authority to conduct military operations to defend the nation from a sudden attack under his powers as Commander-in-Chief. A sudden attack is narrowly defined as an attack on one of the fifty named states to the Union, or any additional state that shall become a member of the Union after the passage of this amendment.

Section 5. Any action by the president in contravention of the letter or spirit of this amendment shall be an impeachable offense.

The above suggested language is just a start. Many more specifics should be provided for in the final amendment. But, the fundamental principle underlying the amendment, and the entire debate, is that the ability to commit the nation's resources and citizens to war is a monumental decision that should not be taken lightly. Many framers and early American leaders thought they were submitting such a decision to the deliberative function of Congress rather than the president. But, for whatever reason, the framers were not as clear on the allocation of this power as they could have been. Or, perhaps they thought the meaning was crystal clear, and the modern debate is only a product of deliberate or accidental misinterpretation of the Declare War Clause. In any case, if there is equal weight to be given to both sides of the debate (a generous concession to the pro-executive side to say the least) then the resolution to the debate lies in Article V. A Congressional Act to abdicate its authority is not the solution, and a long history of presidential power grabs does not give such an Act more credibility. The WPR stands or falls on its support within the Constitution. Because it does not stand it must fall, and an Article V Amendment should put meat on the bones of the Declare War Clause and clearly define who, when, and how the American people can be taken into war.

IV. CONCLUSION

The Constitution formed a new nation, one where the people, not a king, are sovereign. As sovereign, the people hold the power to bind their collective fortunes to conflict, not a king by another title—president. The framers of the Constitution vested the power to go to war in Article I, where the people's voice was represented. The ratifiers knew how war could be commenced in the 18th century, yet during the public debates neither the Constitution's friends nor its enemies contended that the president could unilaterally go to war.¹⁹³ After the Constitution was ratified its framers repeatedly referenced Congress's supremacy in the sphere of war over the president's. Early presidents understood and appreciated where the power to commit the nation to war resided.

¹⁹³ *Id.* at 1603.

A history of unconstitutional acts does not lend support for the unconstitutional act of the day. Unilateral acts of war by presidents in the past do not lend credence to unilateral acts of war today. Unconstitutional acts of war by presidents past, do not create a need for an unconstitutional act of Congress to license unconstitutional presidential acts today, no matter how short the window.

Yet, this is exactly what the WPR has done. Whether unconvinced of the strength of its position under the Declare War Clause to challenge executive overreach in the area of war powers, or overly convinced of the strength of the pro-executive position on war powers, Congress has violated the Constitution by allegedly attempting to save it. The Declare War Clause is the only power source that Congress needs to put a stop to executive adventurism and wars of foreign aggression.

The WPR has only served to entrench the mistakes of the past. It has done nothing to curb the executive branch's appetite for war and has given Congress an excuse to do nothing every time a president wants to go to war. Today the decision to go to war is not the product of careful deliberation by Congress but the unilateral decision of an overworked executive,¹⁹⁴ pushed into the decision by an unelected and unaccountable intelligence apparatus.¹⁹⁵ In such an environment, not only has Congress been cut out of the war decision-making process but so has some of the president's top advisors.¹⁹⁶

The framers placed the power to declare war in Article I, not Article II. The friends of the Constitution expressed during the ratifying debates that the intent of placing the Declare War Clause in Article I was to not "hurry" the United States into war. The opponents were happy with this rationale. The Declare War Clause was not a point of contention among Federalists and Antifederalists. The actions of early presidents demonstrated that their understanding of the Declare War Clause vested Congress, not their office, with the power to take the country to war. All of this evidence serves to establish that the 18th century understanding of the Declare War Clause was broad, not narrow, and that Congress had the power to initiate war by "Word or Act."

It is somewhat poetic that the 18th century understanding of the power to declare war encompasses both "Word and Act." The words on the paper of the Constitution give Congress the power in that sphere. Yet those words mean nothing unless and until Congress acts to protect its power in that domain. Perhaps pro-executive advocates like Professor Yoo are correct. If Congress truly wants to reign in a president marching down the war path, their most effective tools are funding and impeachment.¹⁹⁷ Those actions do provide the

¹⁹⁴ John Dickerson, *The Hardest Job in the World: What if the problem isn't the president—it's the presidency?*, THE ATLANTIC (May 2018), <https://www.theatlantic.com/magazine/archive/2018/05/a-broken-office/556883/>.

¹⁹⁵ Caroline Mortimer, *CIA officer who interrogated Saddam Hussein says there were clearly no WMDs in Iraq*, THE INDEPENDENT ONLINE (Jan. 4, 2017), <https://www.independent.co.uk/news/world/middle-east/cia-officer-saddam-hussein-interrogate-wmds-iraq-weapons-of-mass-destruction-war-a7509081.html>; Ian Wilkie, *Now Mattis Admits There Was No Evidence Assad Used Poison Gas On His People: Opinion*, NEWSWEEK, (Feb. 8, 2018), <http://www.newsweek.com/now-mattis-admits-there-was-no-evidence-assad-using-poison-gas-his-people-801542>.

¹⁹⁶ See, e.g., Helene Cooper, *Mattis Wanted Congressional Approval Before Striking Syria. He Was Overruled.*, N.Y. TIMES, (Apr. 17, 2018), <https://www.nytimes.com/2018/04/17/us/politics/jim-mattis-trump-syria-attack.html>.

¹⁹⁷ Yoo, *supra* note 13, at 174.

practical teeth for Congress to enforce its prerogatives over war powers, but even if that much is true, it does not render those prerogatives any less valid under the Declare War Clause.