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The Founders' Declaration of War: The Declare War Clause and the Constitutionality of Undeclared War

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ABSTRACT

The Constitution grants Congress the power to declare war. Although a plain reading of the Declare War Clause suggests that Congress has the exclusive power to initiate armed conflict, historical practice indicates otherwise. Congress has only declared war five times in American history and every American armed conflict since World War II was waged without a declaration of war. Opposition to the Vietnam War and the 2003 Iraq War raised concerns about unconstitutional wars.

This Note examines whether the Founders would have considered it constitutional for the President to initiate military action absent a congressional declaration of war. Analyzing the theoretical and political foundations of the declaration of war reveals that the Founders believed war powers are shared between the executive and legislature. Yet, the geopolitical reality of the early United States influenced how the President exercised war power in practice. The Quasi-War with France set a precedent that the First Barbary War reinforced: the President can initiate armed conflict without a formal congressional declaration of war if force is used defensively, the conflict is limited, and Congress provides partial authorization.

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I. INTRODUCTION

Every American armed conflict since World War II was waged without Congress declaring war. Throughout the second half of the twentieth century, presidential critics began to worry that each administration was growing more comfortable with unilaterally initiating military operations. In that time, much of the American public began to perceive the declaration of war as an anachronism. Popular opposition to the Vietnam War from the late 1960s to the mid 1970s perpetuated the view that the President could arbitrarily mobilize the country's armed forces.[1] The public echoed those concerns after the 2003 invasion of Iraq, during the U.S. Military's protracted engagement in the Second Iraq War.[2]

Critics of American involvement in conflicts such as Vietnam and Iraq accuse the executive branch of waging "unconstitutional" wars.[3] According to that theory, the President may not initiate armed conflict unless Congress formally declares war because the U.S. Constitution gives only Congress the power to declare war. This criticism is reasonable at first glance. The Declare War Clause, art. I, § 8, cl. 11, is one of the best known passages of the Constitution among the general public. The text reads: "The Congress shall have Power . . . To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."[4]

Indeed, a plain reading of the text suggests that Congress has the exclusive power to initiate armed conflict. However, historical practice flies in the face of that reading. Congress has only declared war five times throughout history: in the War of 1812, the Mexican-American War in 1848, the Spanish-American War in

1. *See* Arthur Schlesinger, Jr., *Congress and the Making of American Foreign Policy*, FOREIGN AFFS. (Oct. 1 1972), https://www.foreignaffairs.com/united-states/congress-and-making-american-foreign-policy [https://perma.cc/4NGC-HA2U] ("[Concerns about] foreign policy becom[ing] the property of the executive [have] acquired special urgency . . . because of the Indochina War, with its aimless persistence and savagery.").

2. *See* SARAH BURNS, THE POLITICS OF WAR POWERS: THE THEORY AND HISTORY OF PRESIDENTIAL UNILATERALISM 18 (2019) ("Presidents George W. Bush, Obama, and Trump asserted breathtaking interpretations of what the executive can do unilaterally.").

3. *See* John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 171 (1996) ("Critics of the current war powers landscape accuse Presidents from Harry Truman to George Bush of waging 'unconstitutional' wars.").

4. U.S. CONST. art. I, § 8, cl. 11.

1898, World War I in 1914, and World War II in 1941.[5] An investigation into the Founders reveals that the original understanding of the Declare War Clause is more consistent with historical practice than with modern criticism.

This Note addresses the question of whether the Founders would have considered it constitutional for the President to initiate military action without a declaration of war. The paper is divided into two sections.

Part 1 traces the theoretical and political foundations of the declaration of war, from the British model in the eighteenth-century, through the Articles of Confederation and the Constitutional Convention, and to the period during the Proclamation of Neutrality and Pacificus-Helvidius debate.

Part 2 illustrates how the President's ability to initiate armed conflict unfolded in practice in the Adams and Jefferson administrations. First, the section analyzes the Quasi-War with France from 1798–1800. This paper argues that the Quasi-War set a political and legal precedent that gives the President the power to commence armed conflict absent a Congressional declaration of war under three conditions: for limited wars, for defensive wars, and when Congress provides some degree of authorization short of a declaration of war. The Supreme Court confirmed this in three cases arising out of the Quasi-War: *Bas v. Tingy*, *Little v. Barreme*, and *Talbot v. Seeman*.[6] Second, the section analyzes the First Barbary War during Thomas Jefferson's presidency, in which Jefferson largely adhered to the Quasi-War precedent.

The conclusion proposes an answer to the question guiding this inquiry and imagines how the Founders would have thought about the constitutionality of the Vietnam War and the Second Iraq War. The prevailing consensus among the Founders was that the President could initiate military action without a declaration of war under the conditions that the Quasi-War established and the First Barbary War reinforced.

II. THE THEORY AND POLITICS BEHIND THE DECLARATION OF WAR

A. The British Backdrop

First, it is useful to understand how the eighteenth-century British government treated war powers to understand the context in which the American Founders designed and implemented the power to declare war in the U.S. Constitution. The king had the exclusive power to declare and wage war in eighteenth-century Britain. This power influenced the Founders in three ways. First, the Founders understood the political theory supporting the British system: under the British social contract, the people surrendered their individual capability to wage war to the king as their sovereign. Consequently, this social contract restricted the British subjects' liberty regarding matters of war. Second, the fact that war

5. Yoo, *supra* note 3, at 177.

6. Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800); Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801); Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804).

powers were a royal prerogative meant that the power to declare war was an executive, rather than parliamentary function, in Great Britain. Therefore, by shifting the power to declare war to Congress in the United States, the Founders needed to determine whether they considered war powers an inherently legislative function or merely an executive function that the Constitution granted to Congress as an exception. Third, the Founders recognized that a monarch could easily abuse the power to make war and sought to mitigate the ability of the American President to exploit his authority as Commander in Chief.

The consensus among eighteenth-century political theorists was that war powers properly belonged to the king as the agent of the people.[7] According to John Locke, men voluntarily give up their absolute, but unsecure, freedom in the state of nature and unite in a Commonwealth for mutual protection and preservation of property.[8] Once the Commonwealth is formed, the whole community operates as "one Body in the State of Nature, in respect of all other States or Persons out of its Community."[9] In other words, the people are subsumed into the state internally, but the state still operates in an anarchic international system externally. Thus, Locke further explains that the king had the power to conduct foreign relations. Locke called the foreign relations powers "federative" powers, which "contain[] the Power of War and Peace, Leagues and Alliances, and all the Transactions, with all Persons and Communities without the Commonwealth."[10] In short, the king has absolute power to act on behalf of the people within the international system. Locke's theory of government is also consistent with Blackstone's analysis of the king's constitutional powers.

In his *Commentaries on the Laws of England*, Blackstone stated that the king "has the sole prerogative of making war and peace."[11] In Blackstone's view, this power was based in natural rights that the people granted to the king:

> "[T]he right of making war, which by nature subsisted in every individual, is given up by all private persons that enter society, and is vested in the sovereign power: and this right is given up not only by individuals, but even by the intire [sic] body of people, that are under the dominion of a sovereign."[12]

In other words, although every individual has the right to make war in a state of nature, individuals must give up that right to the king as a precondition for entering society. Locke described how the people relinquish their freedom in

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7. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 245 (University of Chicago Press ed., 1979) (1765) (explaining that the King served as the "delegate or representative of his people.").

8. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 411 (Peter Laslett ed., Mentor Books 1963) (1689).

9. *Id.*

10. *Id.* § 146.

11. BLACKSTONE, *supra* note 7, at 249–51.

12. *Id.*

exchange for the king's protection and Blackstone specified that this included the freedom to decide whether or not to engage in war at all.

Furthermore, Blackstone believed that the declaration of war was necessary because citizens forgo the right to make war without the sovereign's authorization.[13] Private citizens who use violence without authorization are considered robbers or pirates.[14] In contrast, a declaration of war functions to distinguish military hostilities from private, violent crime. Here, Blackstone draws on the seventeenth-century Dutch writer Hugo Grotius, known as the founder of modern international law,[15] to establish how the declaration of war fit within the prevailing norms of international law: "[A]ccording to the law of nations, a denunciation of war ought always to precede the actual commencement of hostilities . . . that it may be certainly clear that the war is not undertaken by private persons, but by the will of the whole community."[16]

Blackstone's reference to Grotius has two important implications. One, Blackstone's citation of international law seems to indicate that the concept of declaring war was important to the practice of warfare at the time and somewhat limited the king's power. Although the king possessed the sole power to initiate armed conflict, the phrase "ought always to precede" suggests that under international law, the king was obligated to issue a declaration of war as a precondition to the lawful exercise of his war power. Two, the declaration channeled the will of the people. Since the declaration made clear that war invokes *the will of the whole community*, it functioned as a way for the king to implement the natural right to make war that the people sacrificed to him.

Taken together, Blackstone's and Locke's views of British war powers help illuminate the political theory that influenced how the Founders allocated war powers in the Constitution. On a practical level, both Locke and Blackstone agree that the king had broad authority over foreign relations, including the exclusive power to declare and wage war. On a theoretical level, both authors also admit that the king's war powers derived from natural rights the people sacrificed to the sovereign. The Founders were keenly aware of both points. For example, in his *Letters of Helvidius*, James Madison criticizes Locke's view that the king should have full control of foreign affairs.[17] Madison suggests that Locke would have changed his opinion had he lived through the events exposing the king's avarice leading up to the American Revolution.[18]

However, the Founders didn't uniformly share Madison's critique. Instead, the Founders argued over how much to adhere to the British model. Political scientist

13. *Id.*

14. *Id.*

15. *See* Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1570 (2002) (referring to Grotius as "the founder of modern international law").

16. BLACKSTONE, *supra* note 7, at 248.

17. James Madison, Letters of Helvidius, nos. 1–4, *in* 6 THE WRITINGS OF JAMES MADISON 138–77 (Gaillard Hunt ed., 1910) [hereinafter 6 MADISON].

18. *Id.*

Harvey Mansfield explains the situation succinctly in his claim that the Constitution reflected a "struggle between two conceptions of executive power that are identified with two points of view: a weak executive resulting from the notion that the people are *represented* in the legislature and a strong executive from the notion that the people are *embodied* in the executive."[19] Ultimately, although the Founders generally agreed that it was dangerous to give the executive the sole power to declare war, they were still divided about whether war was an inherently executive or legislative function because of the influence of the British model. Analyzing the Articles of Confederation and the Constitutional Convention helps shed light on the debate.

B. The Articles of Confederation

The Articles of Confederation are instructive because they demonstrated the colonies' reaction to the British system and because they set the backdrop for the reforms implemented in the Constitution. Under the Articles, the Continental Congress was the sole branch of government.[20] Therefore, the legislature had the full power over matters of war and peace: "The united states in congress assembled, shall have the sole and exclusive right and power of determining on peace and war . . . ."[21] By limiting questions of war to Congress, the Articles also prohibited any one of the individual states from going to war unilaterally.[22] On one hand, that was a significant centralization of power compared to the colonial era. And since there was only one branch of government, it is unlikely that the Founders considered war powers to be a legislative—rather than executive—function merely because the power was granted to Congress. Former Deputy Assistant Attorney General and law professor John Yoo even suggests that under the Articles, "when the Congress exercised its war powers, it acted as an executive branch, rather than as a legislature."[23]

Yet on the other hand, the decision to engage in war had the most legislative protections that the Articles provided to any power. Specifically, Congress could appoint a "Committee of the States" that consisted of one delegate from each state and that could make certain decisions during recess.[24] However, the Committee of the States did not have the power to make decisions related to war.[25] Instead, war required the vote of nine states and could only be initiated when Congress was assembled.[26] In fact, the provision that set these strict

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19. HARVEY MANSFIELD, TAMING THE PRINCE 5–6 (1989).

20. *See* Yoo, *supra* note 3, at 236 ("[T]he Articles vested all national powers in the Continental Congress . . . .").

21. ARTICLES OF CONFDERATION of 1781, art. IX, para. 1.

22. *See id.* art. VI ("No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies. . .").

23. Yoo, *supra* note 3, at 238.

24. ARTICLES OF CONFEDERATION of 1781, art. IX, para. 5.

25. *Id.*

26. *See id.* ("The United States in Congress assembled shall never engage in a war . . . unless by the votes of a majority of the United States in Congress assembled."). Additionally, Article X reiterated that

requirements for engaging in war was in first sentence of the paragraph immediately following the provision that established the Committee of the States.[27] This textual proximity suggests that the drafters of the Articles prioritized the preservation of full legislative input regarding matters of war.

In practice, the Articles of Confederation kept decisions about war as close to the people as possible by requiring the input of all representatives and minimizing the potential for a small group to usurp the process. This was a 180-degree shift from the unilateral power of the British king. Nonetheless, the weak national government under the Articles proved problematic and the states ultimately decided to reform the government by way of the Constitutional Convention in 1787. The Constitution created the executive branch and reallocated war powers by making the President Commander in Chief with the power to make treaties under Article 2, Section II.[28] This represented a pendulum swing regarding how war power was allocated during the transition from British monarchy to the American people under the Articles of Confederation, and finally under the U.S. Constitution. The pendulum swung away from total executive control of war powers in the British system on one end, to total legislative control of war powers under the Articles of Confederation, and finally came to rest in between, with the President and Congress sharing war powers under the Constitution.

C. The Constitutional Convention

The debate during the Constitutional Convention indicates that there was a loose consensus among the Founders recognizing the risk that the President would abuse his position if the executive branch were given the power to declare war. Ironically, this belief was brought to light in 1787 when the delegates in Philadelphia briefly considered empowering the President with the ability to declare war.[29] Given their frustration with the Articles of Confederation, the delegates initially focused on the defects of allocating all war powers to the legislature. South Carolina's Charles Pinckney noted that the full Congress would proceed too slowly, and instead suggested giving the power only to the Senate.[30] South Carolina's Pierce Butler first suggested vesting the power in the President, because he thought the Senate would be just as problematic as the

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The Committee of States was prohibited from any powers that required the vote of nine state assembled in Congress. *See id*., art. X ("The committee of the States, or any nine of them, shall be authorized to execute in the recess of Congress, such of the powers of Congress as the United States in Congress assembled, by the consent of nine States, shall from time to time think expedient to vest them with; provided that no power be delegated to the said committee, for the exercise of which, by the articles of confederation, the voice of nine States in the Congress of the United States assembled is requisite.").

27. ARTICLES OF CONFEDERATION of 1781, art. IX, paras. 5–6.

28. U.S. CONST. art. II, § 2, cl. 1–2.

29. 1 RECORDS OF THE FEDERAL CONVENTION 19 (Max Farrand ed., 1937); 2 RECORDS OF THE FEDERAL CONVENTION 318 (Max Farrand ed., 1937).

30. *See supra* note 29.

whole Congress and the President had all "the requisite qualities" for war.[31] Elbridge Gerry of Massachusetts and George Mason of Virginia opposed the proposal.[32] Gerry believed that empowering the executive with the power to declare war was contrary to the principle of a republic and Mason thought the President could "not safely be trusted" with the power.[33]

When Butler returned to South Carolina to recommend ratifying the proposed Constitution, he recounted the debate in a different light: "Some gentlemen were inclined to give this power to the President; but it was objected to, as throwing into his hands the influence of a monarch, having an opportunity of involving his country in a war whenever he wished to promote her destruction."[34] Butler's use of the phrase "throwing into his hands the influence of a monarch" conveyed that the Founders—due to their experience with the British monarchy—were apprehensive about empowering the executive branch to declare war. Moreover, the fact that Buter so quickly reversed his position and embraced Gerry's and Mason's skepticism suggests that there was likely overwhelming aversion to executive authority among the delegates in Philadelphia.

The works of legal scholars who analyzed the Constitution in the decades immediately following ratification also confirm that the Founders' decision to grant the war-declaring power to Congress was largely due to a fear of executive overreach. For example, the early-nineteenth-century jurist St. George Tucker reflected on the king's unchecked war power in his revised edition of Blackstone's Commentaries.[35] In his analysis of the Declare War Clause, Tucker described the history of war as the people suffering at the whim of those in power:

> The personal claims of the sovereign are confounded with the interests of the nation over which he presides, and his private grievances or complaints are transferred to the people; who are thus made the victims of a quarrel in which they have no part, until they become principals in it, by their sufferings.[36]

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31. *Id.*

32. *Id.*

33. *Id.*

34. JONATHAN ELLIOT, 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 263 (Burt Franklin 1888).

35. *See* 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES 269–72 (Rothman Reprints 1969) (1803) ("The power of declaring war, with all its train of consequences, direct and indirect, forms the next branch of the powers confided to congress; and happy it is for the people of America that it is so vested."). Tucker was a law professor at The College of William and Mary and supplemented his teaching of Blackstone with lectures analyzing how American law departed from English law. *See also* Davison M. Douglas, *Foreword: The Legacy of St. George Tucker*, 47 WM. & MARY L. REV. 1111, 1113 (2006). He published his lectures in an edited volume of Blackstone's Commentaries, known as "America's Blackstone" in 1803. *Id.* at 1114.

36. TUCKER, *supra* note 35, at 269–72.

Coupled with the two concepts Blackstone described above—that the sovereign derives his power to engage in war from the people's natural right to conduct violence and the declaration of war channels the will of the whole nation—Tucker's commentary reveals the disadvantage of the British system. That is, when the people sacrifice their liberty to declare war, the king is apt to use military force without considering the people's well-being. William Rawle, another prominent nineteenth-century jurist, seemed to agree with this view.

In 1825, Rawle published an early analysis of American law, *A View of the Constitution of the United States of America*.[37] Rawle echoed Tucker's perspective that kings use war to pursue personal interests: "In monarchies, the king generally possesses this power, and it is as often exercised for his own aggrandizement as for the good of the nation."[38] Rawle published *A View of the Constitution* more than two decades after Tucker published *America's Blackstone*, which indicates that Tucker's ideas withstood the test of time in the early independence period.

Additionally, both jurists agreed that, by granting the war-declaring power to Congress, the Constitution created a safeguard against the executive's impulse to wage war for personal benefit. Tucker celebrated how the Constitution restored the people's right to decide on matters of war by announcing, "[h]appy the nation where the people are the arbiters of their own interest and their own conduct!"[39] Similarly, Rawle made the practical point that the country is less likely to go to war when voters contribute to the decision-making process: "Republics, though they cannot be wholly exonerated from the imputation of ambition, jealousies, causeless irritations, and other personal passions, enter into war more deliberately and reluctantly."[40]

D. The Proclamation of Neutrality Debate

Despite the broad consensus that the executive might abuse the power to declare war, the Founders disagreed about how far constitutional protections should extend. This debate played out after France and England went to war in 1793 and President George Washington issued a Proclamation of Neutrality that generated a polarized response from his contemporaries. Whereas Washington and Hamilton believed that all war powers inherently belonged to the executive and the Constitution merely made a practical exception for the role of *declaring* war, Madison and Jefferson believed that war powers inherently belonged to the legislature. At first, this disagreement may seem semantic, since both sides concluded that it was the right decision to grant the declaration power to Congress. Yet, the difference in the two beliefs had larger implications on whether the

37. Charles E. Shields III, *Chancellor Kent's Abridgment of Emerigon's Maritime Insurance*, 108 PENN ST. L. REV. 1123, 1152 n.222 (2004). Rawle's analysis was "one of the most discussed works" on the Constitution; both George Washington and Alexander Hamilton were acquainted with the book. *Id.*

38. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES 109–11 (2d ed. 1970).

39. TUCKER, *supra* note 35, at 269–72.

40. RAWLE, *supra* note 38, at 109–11.

President would be allowed to initiate hostilities at all without a Congressional declaration—as discussed further in the next section.

When France declared war on Great Britain in early 1793, the United States was a formal ally of France under the 1778 Treaty of Alliance.[41] According to the Treaty, in the event of war between France and Great Britain, the United States would be obligated to defend the French West Indies from Great Britain, France would have the right to use American ports to transport seized property, and France's enemies could not use American ports for wartime activity.[42] If the United States were to take an active role in the conflict under these provisions, Britain may have waged war against the United States in response. But a formal declaration of neutrality would constitute a breach of the Treaty. Washington conferred with his cabinet, which unanimously decided to proclaim neutrality and not to call Congress into session.[43] Washington issued the Proclamation of Neutrality on April 22, 1793.[44] And the Proclamation sparked an intense debate about the nature of war powers.

Washington's views about the President's war powers set the foundation for this debate. Overall, Washington favored a strong executive. He believed that the President had some ability to make decisions about initiating armed hostilities within the confines of constitutional limitations.[45] For example, many Americans were averse to a powerful executive branch in the years before the Constitution was drafted, but Washington demonstrated that he welcomed executive power by advocating for a standing army with mandatory conscription: "It may be laid down as a primary position, and the basis of our system, that every Citizen who enjoys the protection of a free Government, owes not only a proportion of his property, but even of his personal services to the defence of it."[46] In contrast, Brutus epitomized the anti-Federalist view that "[k]eeping up a standing army, would be in the highest degree dangerous to the liberty and happiness of the community[.]"[47] Washington's conclusion that citizens owe the government—in spite of the widespread concern that a standing army inhibits liberty—evokes the British model of a strong executive that *embodies* the people.[48]

Given Washington's preference for a strong executive role in military affairs, the Proclamation of Neutrality caused the other Founders to debate whether the Constitution granted the President the power to declare neutrality. If the President

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41. Treaty of Alliance between the United States and France (Feb. 6, 1778), *in* TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 1–40 (Hunter Miller ed., 1931).

42. BURNS, *supra* note 2, at 258 n.9.

43. *Id*. at 82–83.

44. The Proclamation of Neutrality 1793, *in* A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS (1897).

45. BURNS, *supra* note 2, at 80.

46. George Washington, Sentiments on a Peace Establishment, *in* 26 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745–1799, at 374–76, 388–91 (John C. Fitzpatrick ed., 1944).

47. Brutus, no. 8, *in* 2.9 THE COMPLETE ANTI-FEDERALIST 96–101 (Herbert J. Storing ed., 1981).

48. *See* MANSFIELD, *supra* note 19, at 6.

could declare neutrality, did this imply that he believed he could also declare war? And by declaring neutrality, was the President preventing Congress from exercising its right to declare war?

Alexander Hamilton defended Washington's view by arguing that the Constitution granted the President broad authority over war and peace. Writing under the title Pacificus, Hamilton was the leading proponent of the position that war powers were inherently executive in nature. Accordingly, Hamilton's position aligned with Locke's and Blackstone's understanding of government. In Hamilton's outlook, the Constitution was part of this tradition regardless of the formal distribution of powers:

> It deserves to be remarked, that as the participation of the senate in the making of Treaties and the power of the Legislature to declare war are exceptions out of the general "Executive Power" vested in the President, they are to be construed strictly—and ought to be extended no further than is essential to their execution.[49]

Thus, Hamilton considered the Declare War Clause to be an *exception* to what would otherwise be the President's executive prerogative. In *Pacificus no. 1*, Hamilton argued that the President had constitutional authority to issue a neutrality proclamation because the executive branch was empowered to perform any foreign affairs function that was not explicitly delegated to Congress.[50] But this argument also has implications for the President's war powers beyond the Proclamation of Neutrality.

Hamilton believed the Vesting Clause, art. II, § 1, cl. 1, gave the President a "general grant" of power because he interpreted the Constitution with a Lockean conception of executive power—which includes "federative" power over foreign affairs.[51] Under this view, the President has free reign over foreign affairs short of the powers enumerated to Congress. But this raises the question of how to define the specific powers retained by the President when the text enumerating Congress's powers is ambiguous. By claiming that the Declare War Clause means that "the Legislature can alone declare war, can alone actually transfer the nation from a state of Peace to a state of War,"[52] Hamilton leaves open the possibility that defensive military operations fall outside the scope of the declaration. As explained in the next section, Hamilton will later reach for that possibility to

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49. Alexander Hamilton, Pacificus, no. 1, *in* 15 THE PAPERS OF ALEXANDER HAMILTON 33–43 (Harold C. Syrett ed., 1793) [hereinafter 15 HAMILTON].

50. *See id.* at 42 ("[I]t belongs to the 'Executive Power,' to do whatever else the laws of Nations cooperating with the Treaties of the Country enjoin, in the intercourse of the UStates [sic] with foreign Powers.").

51. *See id.* at 39. (Explaining that after the President's enumerated powers, the Constitution leaves "the rest to flow from the general grant of that power, interpreted in conformity to other parts of the constitution and to the principles of free government."); *see also* U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

52. *See* Hamilton, Pacificus, *in* 15 HAMILTON, *supra* note 49, at 52.

explain the President's unilateral right to decide to engage in armed conflict in retaliation to an attack. In any case, Pacificus was influential because it used the Proclamation of Neutrality debate to assert that the President at least has a place at the table in the decision to initiate hostilities.

James Madison entered the debate largely to refute Hamilton. In his Letters of Helvidius, Madison championed the position that the power to declare war is legislative by nature.[53] In that respect, Madison criticized the Lockean model of a powerful executive as distorted by the experience of living under monarchical governments. Finally, Madison argued that the Constitution's delegation of the power exclusively to Congress was a virtuous and practical innovation.

Unlike Hamilton, Madison was less focused on persuading the reader about whether Washington had the constitutional authority to issue a neutrality proclamation. Instead, the primary purpose of the Letters of Helvidius was to refute Hamilton's Pacificus argument for broad executive powers. In fact, Madison only drafted the letters after Jefferson implored him to rebut Hamilton's argument.[54] Madison accepted Jefferson's request and seized the opportunity to explain how the Pacificus argument had implications beyond the Proclamation of Neutrality "[that] strike[d] at the vitals of its constitution, as well as at its honor and true interest."[55]

Madison begins by explaining why the power to declare war is a legislative function by nature.[56] Since the executive branch executes laws and the legislature makes laws, Madison asserted that the President's powers "must presuppose the existence of the laws to be executed."[57] Yet, a declaration of war does not involve executing preexisting laws.[58] Instead, Madison considered that declaring war more accurately resembled making new laws because it "has the effect of *repealing* all the *laws* operating in a state of peace, so far as they are inconsistent with a state of war: and of *enacting*, as a *rule for the executive*, *a new code* adapted to the relation between the society and its foreign enemy."[59]

Consequently, Madison believed that the Constitution represented a break with the traditional British view of executive prerogative over war power.[60] This was the fundamental disagreement between Hamilton and Madison. Where Hamilton thought the Declare War clause was an exception to executive prerogative, Madison thought it was a repudiation of the underlying theory. As explained

53. MADISON, *supra* note 17, at 148.

54. Letter from Thomas Jefferson to James Madison (July 7, 1793), *in* 26 THE PAPERS OF THOMAS JEFFERSON 443–44 (John Catanzariti ed., Princeton Univ. Press 1995) [hereinafter 26 JEFFERSON] ("For god's sake, my dear Sir, take up your pen, select the most striking heresies, and cut him to peices [*sic*] in the face of the public.").

55. Madison, Letters of Helvidius, *in* 6 MADISON, *supra* note 17, at 142.

56. *Id*. at 148 (describing the power to make war and the treaty-making power as "being substantially of a legislative, not an executive nature").

57. *Id*. at 145.

58. *Id*.

59. *Id*.

60. BURNS, *supra* note 2, at 87.

above, Madison criticized Locke's conception of "federative" powers.[61] On this point, Madison claimed that Locke was "warped by a regard to the particular government of England" and his "chapter on prerogative shows, how much the reason of the philosopher was clouded by the royalism of the Englishman."[62] Put differently, it took secession from the British monarchy to reveal the flaws in the traditional approach to war powers under the British system.

Moreover, Madison disputed Hamilton's complicated legal arguments in favor of a simple reading of the constitutional text. Hamilton pointed to the President's "general grant" of power under the Vesting Clause to infer that the executive branch had a role in declaring war. But Madison attacked this logic as unnecessarily complex, when the text of Article 1 squarely gave the declare war power to Congress:

> The power of the legislature to declare war and judge of the causes for declaring it, is one of the most express and explicit parts of the Constitution. To endeavour to abridge or affect it by strained inferences, and by hypothetical or singular occurrences, naturally warns the reader of some lurking fallacy.[63]

In short, Madison preferred a textualist interpretive approach. As the principal author of the Constitution, Madison arguably had more authority to determine which mode of construction was more suitable to the document.

Finally, Madison defended the Declare War Clause as virtuous and practical because it facilitated peace. Like a modern lawyer making a policy argument to support his legal analysis, Madison warned that the executive branch is more inclined to wage war than are the people. "[I]t has grown into an axiom that the executive is the department of power most distinguished by its propensity to war: hence it is the practice of all states, in proportion as they are free, to disarm this propensity of its influence."[64] This appeal to history aligns with how Tucker and Rawle criticized the British king for abusing the power to make war. Likewise, Madison also agreed with Tucker's and Rawle's assessment that the Constitution created a safeguard against unnecessary wars by shifting the power to declare war to Congress.[65]

Thomas Jefferson was not a public participant in the Proclamation of Neutrality debate, but he supported Madison's position from the background. Jefferson was Washington's Secretary of State at the time and took a deferential stance in the matter out of political prudence.[66] On one hand, Jefferson privately

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61. Madison, Letters of Helvidius, *in* 6 MADISON, *supra* note 17, at 144.
62. *Id.*
63. *Id.* at 161.
64. *Id.* at 174.
65. *See id.*
66. Letter from Thomas Jefferson to James Madison (July 7, 1793), *in* 26 JEFFERSON, *supra* note 54, at 403 ("My objections to the impolicy of a premature declaration were answered by such arguments as timidity would readily suggest.").

doubted the President's power to declare neutrality and suggested replacing "neutrality" with "disposition."[67] On the other hand, Jefferson never went as far as requesting that President Washington call Congress into session.[68]

Regarding the declaration of war, Jefferson only went as far as to tell Washington that the President "was bound to preserve" a state of peace until Congress returned to session.[69] This suggests that Jefferson agreed with Madison's legislative conception of the Declare War Clause in theory, but that Jefferson had minimal conviction to defend that position in the context of a debate over neutrality. Nonetheless, we know from his comments several years earlier that Jefferson agreed with the Hamilton–Tucker–Wilson view that the executive was the branch most likely to wage war and that transferring the power to Congress was a useful safeguard. In a 1789 letter to Madison, Jefferson remarked, "[w]e 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."[70] Jefferson adhered to this view in his written communication to Madison during the Pacificus–Helvidius debate by adamantly objecting to Hamilton's Pacificus arguments.[71] Taken together, it is likely that Jefferson was more opposed to the implications of Hamilton's interpretation of broad Presidential war powers than to the immediate issue of neutrality.[72]

This interpretation seems plausible given that Jefferson had also disagreed with Hamilton's interpretation of the Treaty Power. For example, when Hamilton suggested at a cabinet meeting that the President and Senate could use a treaty to circumvent Congress's power to declare war, Jefferson objected with a plain-meaning argument. Jefferson recalled that "[i]n every event I would rather construe so narrowly as to oblige the nation to amend and thus declare what powers they would agree to yield, than too broadly & indeed so broadly as to enable the Executive and Senate to do things which the constn [*sic*] forbids."[73] This statement gives way to two inferences. First, Jefferson agreed with Madison's plain meaning approach to analyzing the Constitution. Second, Jefferson was also wary of interpreting the Constitution in a way that would favor the executive branch over the legislative branch.

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67. *Id.*

68. BURNS, *supra* note 2, at 83.

69. Thomas Jefferson, The Anas, *in* 1 THE WORKS OF THOMAS JEFFERSON 325–30 (Leicester Ford ed., 1905) [hereinafter 1 JEFFERSON].

70. Letter from Thomas Jefferson to James Madison (Sept. 6, 1793), *in* 12 THE PAPERS OF JAMES MADISON 382–88 (Charles F. Hobson & Robert A. Rutland eds., 1979).

71. 26 JEFFERSON, *supra* note 54.

72. BURNS, *supra* note 2, at 83.

73. Thomas Jefferson, The Anas, *in* 1 JEFFERSON, *supra* note 69, at 330.

III. PRESIDENTIAL WAR POWERS IN PRACTICE

A. The Quasi-War with France

The Founders finally tested their interpretations of the Declare War Clause during John Adams' presidency in an armed conflict with France now known as the Quasi-War.[74] France escalated its naval activity in the war with Britain after the American Proclamation of Neutrality. When the French navy began targeting American merchant ships, the United States responded with naval warfare even though Congress never declared war.[75] In this context, the constitutional theories that the Founders had developed in the years between the Articles of Confederation and the Pacificus–Helvidius debate confronted the geopolitical reality of the late eighteenth century. The result did not neatly fit within either Hamilton's, Madison's, or Jefferson's preferred model. Rather, Adams seemed to implement aspects of each interpretation to balance the country's national-security interests with the separation of executive and legislative war powers. In the process, the Quasi-War established a political and legal precedent for the President's ability to commence military operations in the absence of a Congressional declaration of war.

The Quasi-War defined the conditions under which the President may initiate armed conflict without a formal declaration of war. Specifically, three attributes of the Quasi-War justified the use of force: first, the war was fought for defensive purposes; second, the war was a "limited war" in its scale and objective; and third, Congress authorized hostilities even though it never went as far as to declare war. Contemporaneous legal analysis determined that, because of these three attributes, the conflict did not require a full-scale declaration of war. Moreover, the Supreme Court confirmed this position in a series of cases arising out of the conflict.[76] Nonetheless, Madison and Jefferson disputed the legality of the Quasi-War. Overall, the Quasi-War transformed the founding conceptions of war powers into the first judicial interpretation of the Declare War Clause.

The Quasi-War unfolded during the French Revolutionary wars. As explained above, France and the United States had signed a peace treaty in 1778.[77] But bilateral relations changed in 1793, when the French people overthrew the monarchy.[78] Although France was a decisive American ally when the United States achieved independence from Great Britain, the French government had adopted a different

74. Historians adopted the name "Quasi-War" because the 1798–1800 naval conflict with France was undeclared, defensive, and limited in scope. This designation itself indicates the ambiguity of whether the conflict was an official or unofficial war. This paper uses the title "Quasi-War" to be consistent with the approach of most historians, not to qualify whether the word "war" is constitutionally appropriate.

75. Gregory Fehlings, *America's First Limited War*, 53 NAVAL WAR C. REV. 101, 110 (2000).

76. Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800); Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801); Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804).

77. Treaty of Alliance between the United States and France, *in* TREATIES AND OTHER INTERNATIONAL ACTS, *supra* note 41.

78. Fehlings, *supra* note 75, at 106.

posture by the time President Washington issued the Proclamation of Neutrality in 1793. France had declared war against Great Britain, Austria, Prussia, and the Netherlands, and Washington did not want to be drawn into a war with Britain resulting from the 1778 alliance.[79] Accordingly, the United States refused to perform its treaty obligation to defend French possessions in the Caribbean from British capture.[80] Then, in 1794, Washington signed a commercial treaty with Britain known as the Jay Treaty.[81] Under the Jay Treaty, the United States agreed not to ship the property of Britain's enemies and granted Britain the exclusive use of American ports.[82] France believed the Jay Treaty was a British–American military alliance opposed to France and the French navy retaliated by attacking American merchant ships in a campaign that lasted until John Adams was elected in 1797.

By July 1797, France had captured over 300 American merchant ships.[83] Despite the losses, the United States was unable to defend its commercial shipping because it had no warships.[84] A full-scale war with France would devastate the United States. So, in October 1797, Adams sent a diplomatic delegation to Paris—including future Supreme Court Chief Justice John Marshall—to negotiate an agreement that would safeguard American trade routes.[85] French Foreign Minister Tallyrand refused to deal with the delegation in an infamous episode now known as the XYZ Affair.[86]

Adams proceeded to initiate naval operations against France to protect American merchant ships. In March 1798, Adams requested that Congress enact naval defense measures and unilaterally announced that merchant ships could arm themselves.[87] However, Adams did not request an all-out declaration of war. In July of 1798, Congress finally assented to Adams' requests with two pieces of legislation. First, Congress passed an act that voided all American treaties with France.[88] Second, Congress passed an act authorizing the President to "instruct the commanders of the public armed vessels which are, or which shall be employed in the service of the United States, to subdue, seize and take any armed French vessel . . . ."[89] Between April and July of 1798, Congress also established the Department of the Navy and the Marine Corps at Adams' request.[90]

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79. *Id*. at 107.

80. *Id*.

81. Yoo, *supra* note 3, at 292.

82. Fehlings, *supra* note 75, at 108.

83. This figure increased to over 2,000 American merchant ships seized by the French navy by the end of 1800. *Id*.

84. *Id*.

85. *Id*. at 109.

86. *See id*. The name "X, Y, Z Affair" was based on the code names of Talleyrand's three agents.

87. *Id*. at 110; Letter from John Adams, President of the U.S., to the U.S. Cong. (Mar. 19, 1798)), available at https://Founders.archives.gov/documents/Adams/99-02-02-2382 [https://perma.cc/RW88-A2QF] (urging Congress to adopt measures "for the protection of our Seafaring and commercial Citizens").

88. An Act to Declare the Treaties Heretofore Concluded with France, no Longer Obligatory on the United States, ch. 67, 1 Stat. 578 (1798).

89. An Act Further to Protect the Commerce of the United States, ch. 68, 1 Stat. 578 (1798).

90. Fehlings, *supra* note 75, at 111.

Over the course of these events, Adams set a political precedent for the legitimacy of an undeclared war. This paper argues that an undeclared war is constitutional when it meets the following three conditions that describe Adams' conduct during the Quasi-War: first, the naval conflict with France was a defensive action because France had attacked American civilians at sea and then refused to consider American attempts to negotiate a diplomatic resolution during the XYZ Affair; second, Adams proposed a limited war in its objective (protecting American merchant ships), forces (just the Navy), and target (armed French vessels); third, Congress authorized the conflict by nearly all means possible short of declaring war. Congress voided the alliance with France, established naval forces, and authorized the President to direct the naval forces against French ships.

American legal experts writing during the Quasi-War and shortly afterward agreed that the conflict amounted to a genuine and lawful war. Adams' Attorney General, Charles Lee, determined that the United States and France were legally in a state of war shortly after the conflict began. Lee referenced both the defensive nature of the conflict and Congressional authorization in a 1798 Attorney General opinion:

> Having taken into consideration the acts of the French republic relative to the United States, and the laws of Congress passed at the last session, it is my opinion that there exists not only an *actual* maritime war between France and the United States, but a maritime war *authorized* by both nations.[91]

The purpose of the opinion was to announce that a French national, who was in the United States acting on behalf of France, was liable for treason under the law of war. That determination showed that classifying the conflict as a *war* was not a formality but had important legal implications.

Additionally, William Rawle cited the Quasi-War in the section of his 1825 Constitutional analysis that addressed the war powers.[92] Recall that Rawle's perspective was that the Constitution sought to check the executive's proclivity to unilaterally wage war.[93] Still, Rawle conceded that the Quasi-War demonstrated that in the United States, "we may be involved in a war without a formal declaration of it."[94] Reflecting on the conflict three decades later, Rawle emphasized the fact that the conflict was defensive and limited. It was defensive because "[i]t was founded on the hostile measures authorized by congress [sic] against France, by reason of her unjust aggressions on our commerce—yet there was no declaration of war."[95] And it was limited "because it was only waged on the high seas."[96]

On the other hand, James Madison and Thomas Jefferson evaluated the Quasi-War from the perspective they had articulated during the Proclamation of

91. Treason, 1 Op. Att'y Gen. 84 (1798) (emphasis in original).
92. RAWLE, *supra* note 38, at 109.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*

Neutrality debate. In an April 1798 letter to then-Vice President Jefferson, Madison criticized the steps President Adams was taking that eventually led to the war.[97] Madison believed that Adams's announcement permitting merchant vessels to arm themselves was "a virtual change of the law, & consequently a usurpation by the Ex. of a legislative power."[98] In this way, Madison adhered to the position he developed in Helvidius No. I, that the power to declare war is legislative in nature because it involves making laws rather than executing laws.[99]

Jefferson seemed to agree with Madison in principle. However, the Vice President also acknowledged that President Adams had enough political support to commence hostilities even if Congress did not declare war. In his reply to Madison's April letter, Jefferson expressed agreement by admitting that, "[i]t is a pretty strong declaration that a neutral & pacific conduct on our part is no longer the existing state of things."[100] Nonetheless, Jefferson conceded that after Adams made the announcement, "[t]he vibraters [sic] in the H. of R. have chiefly gone over to the war party."[101]

Again, Jefferson characteristically prioritized political considerations over constitutional theory. Just as Jefferson privately agreed with Madison regarding the Proclamation of Neutrality but refused to criticize President Washington publicly, Jefferson also agreed with Madison ahead of the Quasi-War but refused to criticize President Adams publicly. Once more, Jefferson calculated wisely. Although Madison remained committed to a strict textual reading of the Constitution, Adams won the political battle when Congress acquiesced by authorizing naval operations in July 1798. In effect, geopolitical reality got in the way of Madison's principled constitutional interpretation.

B. The Quasi-War Cases

The Quasi-War also gave rise to the Supreme Court's first judicial interpretation of the Declare War Clause. Three cases arose from property disputes by American commanders who had seized ships during the conflict: *Bas v. Tingy*, *Talbot v. Seeman*, and *Little v. Barreme* (the Quasi-War Cases).[102] Where *Bas* and *Talbot* established that the Quasi-War was an actual war because Congress could authorize a limited war, *Little* restricted the President's discretion during limited wars.[103]

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97. Letter from James Madison to Thomas Jefferson (Apr. 2, 1798), *in* 6 THE WRITINGS OF JAMES MADISON, 312–14 (Gaillard Hunt ed., 1910) (1798).

98. *Id.* at 313; *see also* Letter from John Adams to the U.S. Cong., *supra* note 87 (rescinding instructions that merchant vessels were prohibited from "[s]ailing in an armed condition").

99. Madison, Letters of Helvidius, *in* 6 MADISON, *supra* note 17, at 146.

100. Letter from Thomas Jefferson to James Madison (Apr. 19, 1798), *in* 8 THE WORKS OF THOMAS JEFFERSON 409 (1905).

101. *Id.*

102. Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800); Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801); Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804).

103. *See Bas*, 4 U.S. (4 Dall.) at 37; *Talbot*, 5 U.S. (1 Cranch) at 1; *Little*, 6 U.S. (2 Cranch) at 170.

In the progression of the Quasi-War Cases, the Supreme Court confirmed that it considered the naval conflict with France to be a lawful war even though Congress never formally declared war. In doing so, the Court expounded on the Declare War Clause. The Court's analysis of Congressional war powers suggests that the Court approved the three conditions that President Adams set at the outset of the Quasi-War. Specifically, an undeclared war may be constitutional if it is defensive, limited, and nominally authorized by Congress. In the Quasi-War Cases, the Court explicitly acknowledged that the latter two conditions—limited war and Congressional authorization—influenced the conclusions of the cases. Further, although the Court did not assert that the defensive nature of the conflict influenced the holdings, the context of the cases indicates that it was an implicit consideration in the Court's analysis.

In *Bas v. Tingy*, the owner of an American merchant ship seized by a French privateer disputed the salvage value with the commander of an American warship that had recaptured the merchant vessel.[104] Commanders who recaptured seized ships were entitled to compensation from the original owner, but two statutes assigned different salvage values based on the circumstances. A 1798 statute assigned a salvage value of one-eighth the value of the ship whenever a ship was recaptured "by any public armed vessel of the United States."[105] But a 1799 statute assigned a more generous one-half salvage value when a ship was specifically recaptured "from *the enemy*."[106] The case turned on whether France was officially an "enemy" of the United States during the Quasi-War. The owner argued that the term "enemy" only applies when Congress declares war.[107] The commander argued that France and the United States were enemies because they were lawfully at war.[108] The Court ultimately sided with the commander.[109] The justices unanimously agreed that the United States and France had been in a state of war.[110]

Bas established two points that impact the meaning of the Declare War Clause. First, the Court considered the Quasi-War to be an actual war—even though Congress had not declared war.[111] This implies that a declaration is *not* a necessary precondition of a state of war. Second, Congress has the power to authorize

104. *Bas*, 4 U.S. (4 Dall.) at 37.

105. *Id.*

106. *Id.*

107. *Id.* at 38.

108. *Id.* at 38. The defendant, Commander Tingy, was represented by counsel "Rawle, and W. Tilghman." *Id.* It is possible that Tingy's counsel Rawle was the same William Rawle discussed above, author of *A View of the Constitution of the United States of America*. Rawle served as U.S. District Attorney for Pennsylvania under President George Washington until 1799, in which capacity Rawle prosecuted the Whiskey Rebellion trial. Univ. of Pa. Archives & Records Ctr., *William Rawle 1759–1836*, https://archives.upenn.edu/exhibits/penn-people/biography/william-rawle [https://perma.cc/KB9X-AKQK]. Nonetheless, the identity of Tingy's counsel Rawle remains unclear after a review of the public historical record.

109. *Bas*, 4 U.S. (4 Dall.) at 43.

110. *Id.*

111. *Id.*

either a general war or a limited war.[112] A Congressional declaration of war establishes a general war while lesser forms of Congressional authorization establish a limited war, such as the Quasi-War.

The justices highlighted the distinction between general and limited war in seriatim opinions. Justice Washington defined the two categories:

> 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 . . . . 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 authorised to commit hostilities, act under special authority, and can go no farther than to the extent of their commission.[113]

Thus, in a general war every member of the nation is authorized to commit hostilities against the enemy nation "in every place, and under every circumstance."[114] In contrast, combatants in a limited war cannot exceed the narrow scope of the conflict.[115] This distinction makes sense in light of Blackstone's assertion that a declaration of war invokes the will of the whole community.[116] It seems that Justice Washington understood the traditional purpose of a declaration but still acknowledged that the Constitution did not prohibit military action on a smaller scale.

Justice Chase concurred more concisely: "Congress is empowered to declare a general war, or [C]ongress may wage a limited war; limited in place, in objects, and in time."[117] He concluded that the Quasi-War was a limited war because Congress only sanctioned naval hostilities and only permitted soldiers or citizens acting in self-defense to fight.[118] This suggests that the exclusively defensive nature of the conflict was part of what made the Quasi-War limited.

Talbot v. Seeman reaffirmed the two *Bas* conclusions.[119] In *Talbot*, an American warship recaptured a neutral Hamburg ship that had been seized and armed by the French navy.[120] The American captain sued the Hamburg owner for salvage, arguing that Congress had authorized the capture of any armed vessel under French control, not merely French naval warships or seized American

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112. *Id.*
113. *Id.* at 40.
114. *Id.*
115. *Id.*
116. BLACKSTONE, *supra* note 7, at 249–51.
117. *Bas*, 4 U.S. (4 Dall.) at 43.
118. *See id.* ("There is no authority given to commit hostilities on land; to capture unarmed *French* vessels, nor even to capture *French* armed vessels lying in a *French* port; and the authority is not given, indiscriminately, to every citizen of *America*, against every citizen of *France*; but only to citizens appointed by commissions, or exposed to immediate outrage and violence.").
119. *See Talbot*, 5 U.S. (1 Cranch) at 28 (explaining that Congress may authorize general or partial hostilities).
120. *Id.* at 2.

ships.[121] The ship's owner argued that the Acts of Congress did not apply to neutral vessels and that therefore salvage was not warranted.[122] As in *Bas*, the Court again sided with the American captain.[123]

Chief Justice John Marshall wrote the *Talbot* opinion.[124] Marshall based his analysis on the precedent the Court set in *Bas* by explaining, "Congress have the power of declaring war. They may declare a general war, or a partial war . . . . This court, in the case of Bass and Tingey, have decided that the situation of this country with regard to France, was that of a partial and limited war."[125] Once Marshall established that the conflict was a lawful war, he then addressed the recapture question.

Even though the statutes authorizing the Quasi-War did not address neutral vessels,[126] the Chief Justice determined that recapture was lawful since the Hamburg ship "was an armed vessel under French authority, and in a condition to annoy the American commerce."[127] Marshall even suggested that recapture was a necessary defensive measure, adding that "it was [the captain's] duty to render her incapable of mischief."[128]

Recall that Marshall participated in the events that encouraged President Adams to launch the Quasi-War because Marshall was part of the American delegation that French Foreign Minister Talleyrand scorned during the XYZ Affair in 1797.[129] Consequently, it would be reasonable to infer that Marshall had a strong sense of the defensive importance of the Quasi-War and was biased towards finding it constitutional for defensive purposes.

Finally, *Little v. Barreme* closed out the Quasi-War cases by confining the President's power to direct military operations during a limited war to only those operations that Congress had expressly authorized.[130] In *Little*, the commander of an American warship captured a Danish ship, which he suspected was actually American, when it was returning from a French port.[131] Congress passed a statute in February 1799 that authorized the President to instruct naval commanders to search American ships suspected to be "engaged in any traffic or commerce" with France and to seize those "bound or sailing *to* any port or place within the territory of the French republic."[132] The Secretary of the Navy then implemented the act by ordering commanders to prevent trade with France "where the vessels *are apparently as well as really American* . . . and bound *to* or *from French*

121. *Id.* at 7–8.
122. *Id.* at 11.
123. *Id.* at 32.
124. *Id.* at 26.
125. *Id.* at 8–9.
126. *Id.* at 31.
127. *Id.* at 32.
128. *Id.*
129. Fehlings, *supra* note 75 at 109.
130. *Little,* 6 U.S. (2 Cranch) at 170.
131. *Id.* at 178–79.
132. *Id.* at 176–77.

ports."[133] The question was whether the American commander was liable for complying with an executive order that conflicted with the statute. This time, the Court ruled against the commander.

Chief Justice Marshall again wrote the opinion in *Little*.[134] Marshall acknowledged that "[i]t is by no means clear" that the President's authority as Commander in Chief does not contain the power to order more effective means to achieve a military objective.[135] However, in this case "the legislature seem to have prescribed that the manner in which this law shall be carried into execution, was to exclude a seizure of any vessel not bound to a *French* port."[136] Thus, the Supreme Court affirmed the circuit court's holding that the commander was liable for damages.[137] Overall, *Little* established that the President may not supersede the restrictions that Congress sets on a limited war. Nonetheless, Justice Marshall's opinion left the door open to the possibility that the President retains the authority to take unilateral action absent unambiguous Congressional parameters.[138]

C. Jefferson's Barbary War

President Thomas Jefferson led the United States into its second undeclared war in a naval conflict in the Mediterranean known as the First Barbary War. Like the Quasi-War, the First Barbary War was fought for defensive purposes, was limited in scale and objective, and was authorized by Congress to a lesser degree than a full-scale declaration of war. In that respect, President Jefferson affirmed that the Quasi-War set sufficient political and legal precedent for the President to initiate armed hostilities without a Congressional declaration of war. But the First Barbary War differed from the Quasi-War because Tripoli unilaterally declared war on the United States.[139] The Mediterranean conflict, therefore, paints a more comprehensive picture of the Founders' debate over the President's power to commence hostilities when another country declares war first.

The Barbary States—comprised of present-day Morocco, Algeria, Tunisia, and Libya—practiced state-supported piracy.[140] Britain and France paid tribute to the Barbary States in exchange for free passage of merchant vessels in the Mediterranean.[141] After the United States declared independence, Barbary ships

133. *Id.* at 178.
134. *Id.* at 170.
135. *Id.* at 177.
136. *Id.* at 177–78.
137. *Id.* at 179.
138. *See* Stephen I. Vladeck, *Congress, the Commander-in-Chief, and the Separation of Powers After Hamdan*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 933, 943 (2007) ("Marshall plainly suggested that the issue might be different had Congress not interposed any limits on the Navy's authority to capture suspected French ships.").
139. U.S. Dep't of State, Office of the Historian, *Barbary Wars, 1801–1805 and 1815–1816*, https://history.state.gov/milestones/1801-1829/barbary-wars [https://perma.cc/5SP3-BL76].
140. *Id.*
141. *Id.*

began attacking American vessels, which were no longer under British protection.[142] Three months into Jefferson's presidency, the President ordered a small naval squadron to defend American commerce in the Mediterranean.[143] The expedition's initial instruction was to only use defensive force.[144] But then President Jefferson ordered the expedition to respond to aggression "by sinking, burning or destroying their ships & Vessels wherever you shall find them" if one of the Barbary states declared war first.[145] The order was prescient because Tripoli soon declared war against the United States on May 14, 1801.[146]

An instructive debate ensued among Jefferson's cabinet when the President learned about Tripoli's declaration of war. In the President's first annual message to Congress on December 8, 1801, Jefferson stated that he was "unauthorised by the [C]onstitution, without the sanction of Congress, to go beyond the line of defence."[147] This view is consistent with Jefferson's positions during the Proclamation of Neutrality and Quasi-War when the future President favored limited executive power.[148] However, this was at odds with his cabinet's consensus, that the President did not need any statutory authority to fight in a war initiated by another state.[149] In fact, University of Virginia Law Professor Robert Turner surmises that Jefferson intentionally misrepresented the Declare War Clause as a political maneuver to accelerate Congressional action.[150]

In his notes from a May 15, 1801, cabinet meeting, Jefferson recorded that, "if war exists," can the squadron constitutionally "search for [and] destroy the enemy's vessels wherever they can find them?—all except L[incoln]—agree they should; M[adison], G[allatin], [and] S[mith] think they may pursue into the harbours, but M[adison] that they may not *enter* but in pursuit."[151] Jefferson's Treasury Secretary, Albert Gallatin, took the position that the President has equal power to direct military forces, whether Congress declares war on another state or another state declares war on the United States.[152]

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142. *Id.*

143. BURNS, *supra* note 2 at 96.

144. BURNS, *supra* note 2 at 95.

145. Robert F. Turner, *War and the Forgotten Executive Power Clause of the Constitution: A Review Essay of John Hart Ely's War and Responsibility*, 34 VA. J. INT'L. L. 903, 911 (1994) (emphasis omitted).

146. BURNS, *supra* note 2 at 95.

147. Thomas Jefferson, First Annual Message to Congress, *in* 36 THE PAPERS OF THOMAS JEFFERSON 58, 59 (Barbara B. Oberg. ed., 2009).

148. *See supra* notes 73, 100.

149. Robert F. Turner, *State Responsibility and the War on Terror: The Legacy of Thomas Jefferson and the Barbary Pirates*, 4 CHI. J. INT'L. L. 121, 130 (2003).

150. Turner, *supra* note 145, at 912.

151. Thomas Jefferson, Notes on a Cabinet Meeting, *in* 34 THE PAPERS OF THOMAS JEFFERSON 114, 115 (Barbara B. Oberg. ed., 2007) [hereinafter 34 JEFFERSON]; *see also* Turner, *supra* note 145, at 911 (naming the cabinet members based on the initials in Jefferson's notes).

152. Thomas Jefferson, Notes on a Cabinet Meeting, *in* 34 JEFFERSON, *supra* note 151, at 114–15.

Alexander Hamilton, then Jefferson's Secretary of War, disagreed with Jefferson's statement to Congress and used the opportunity to interpret the Declare War Clause in a public paper titled *The Examination, no. 1*:

> [T]he plain meaning of [the Declare War Clause] is that, it is the peculiar and exclusive province of Congress, *when the nation is at peace*, to change that state into a state of war . . . in other words, it belongs to Congress only, *to go to War*. But when a foreign nation declares, or openly and avowedly makes war upon the United States, they are then by the very fact, already *at war*, and any declaration on the part of Congress is nugatory: it is at least unnecessary.[153]

Hamilton concluded that the United States can be brought into a state of war against its will if another country commences hostilities first. That helps to explain why the rest of the cabinet was not apprehensive about the constitutionality of the President's power to direct the military when attacked by a foreign adversary. Under this view, once Tripoli declared war, the United States was at war and a Congressional declaration would have been a redundant formality.

Examination, no. 1 also completes the argument Hamilton began in *Pacificus no. 1*. In Pacificus, Hamilton opened the door to the possibility that the President has the power to initiate defensive military action absent a declaration of war because the Vesting Clause gives the executive broad authority over powers not granted to Congress.[154] In *Examination, no. 1*, Hamilton made that point in explicit terms. The Founders were divided over how far the President's executive authority extends into decisions to make war or peace during the Proclamation of Neutrality debate. But by the First Barbary War, the Founders coalesced behind Hamilton. As Jefferson's notes indicate, even Madison—the chief defender of limited executive war power—agreed that the President could order commanders to pursue Tripolitan ships "in pursuit" of an enemy that struck first.[155]

Whether Jefferson's address to Congress was a sincere interpretation of the Constitution or just political posturing, his plea to Congress succeeded. In February 1802, Congress gave Jefferson statutory authority to seize all Tripolitan ships.[156] Jefferson continued to send additional frigates to the Mediterranean until the two parties concluded a peace treaty in 1805, which did not require the United States to pay Tripoli tribute.[157] Overall, the First Barbary War adhered to the

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153. Alexander Hamilton, The Examination No. 1 (Dec. 7 1801), available at https://founders.archives.gov/documents/Hamilton/01-25-02-0264-0002 [https://perma.cc/2W45-RUSV].

154. *See supra* text accompanying notes 4–51.

155. *See* Thomas Jefferson, Notes on a Cabinet Meeting, *in* 34 JEFFERSON, *supra* note 151 ("M [adison] [thinks] that they may not enter but in pursuit.") (emphasis omitted).

156. Thomas Jefferson, Circular to Naval Commanders, *in* 36 THE PAPERS OF THOMAS JEFFERSON 605 (Barbara B. Oberg ed., 2009).

157. U.S. Dep't of State, *Barbary Wars*, *supra* note 139.

Quasi-War precedent. The Mediterranean conflict was limited to naval actions directed to prevent piracy; it was defensive because the pirates had attacked American ships before Tripoli even declared war; and Jefferson insisted on getting Congressional authorization in the face of resistance from his cabinet.

IV. CONCLUSION

The theoretical and political foundations of the Declare War Clause are rooted in the eighteenth-century British model, where the king had absolute power to make war. Blackstone and Locke illuminated how a powerful executive embodied the will of the people in matters of war and peace. The American Founders designed the Articles of Confederation to reallocate the war-making power to the people by vesting it in Congress. Yet, the Constitutional Convention debates indicated that experience had convinced the Founders to adopt a system where war powers were shared between the executive and legislature. In this way, the allocation of war powers followed a pendulum-like development: absolute executive control under the British model, to total Congressional control under the Articles of Confederation, and finally a shared model under the Constitution.

The Pacificus-Helvidius debate that unfolded after President Washington issued the Proclamation of Neutrality revealed the Founders' impression of the Declare War Clause in the early years of American independence. Washington and Hamilton favored a traditional system with a powerful executive, while Madison and Jefferson believed that the declare war power more naturally belonged to the legislature, so they favored a plain meaning interpretation of the text.

As the United States began to operate as an independent entity within commercial and foreign affairs, geopolitical reality influenced how the President exercised war power in practice. The Quasi-War with France was America's first undeclared war and it set a precedent that the President can initiate armed conflict without a Congressional declaration of war if three conditions are met: force is used defensively, the conflict is limited, and Congress provides a modicum of authorization. The Supreme Court confirmed that war fought under these conditions is constitutional, which set the first legal precedent for undeclared war.

Finally, the First Barbary War demonstrated that the fluid perceptions of undeclared war were beginning to solidify under sustained geopolitical pressure for the President to act pragmatically on the world stage because Jefferson adhered to the Quasi-War precedent. Despite this growing consensus, during the First Barbary War, the Founders did not unanimously agree on the scope of the President's power to commence military operations for defensive purposes.

With the Quasi-War criteria in mind, the Founders likely would not be surprised by the American interventions in Vietnam and Iraq. Both conflicts loosely qualify as defensive, limited, and congressionally authorized. In Vietnam, American military action was limited in scope because the War was essentially

contained to the territory of Vietnam[158] and the objective was to prevent the Communist Vietcong from controlling the country. Foreign policy merits aside, there is a reasonable argument that Vietnam was a limited engagement. Congress also authorized military intervention by passing the Tonkin Gulf Resolution, which approved of "all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Treaty Organization."[159] The most controversial element is whether preventing the spread of communism was sufficient to consider intervention in Vietnam defensive in nature. Madison and Jefferson would almost certainly not accept this argument, although Hamilton may have been amenable to it.

This analysis is similar for the Second Iraq War. American military action was initially limited to toppling the Saddam Hussein regime and was intended to be contained to Iraq. Congress authorized the President "to use the Armed Forces of the United States as he determines to be necessary and appropriate" in the 2002 Authorization for the Use of Military Force.[160] Again, the defensive purpose of the Second Iraq War is more controversial. The initial invasion was predicated on eliminating the threat of Saddam Hussein's weapons of mass destruction, although the U.S. military never uncovered any such weapons. But given the scope of Congressional authorization, the Founders probably would have considered the conflict to be a legitimate limited war.

In any case, the Founders of the Constitution interpreted the Declare War Clause in a way that would surprise most modern critics of unilateral Presidential military action. As the Quasi-War and First Barbary War demonstrate, the Founders were not categorically opposed to military action absent a Congressional declaration of war. Rather, they would have considered it constitutional for the President to initiate military action without a declaration of war under the conditions that President Adams exemplified in the Quasi-War. If military action is defensive, limited in scope and purpose, and authorized by Congress in some form, then it remains consistent with the original understanding of art. I, § 8, cl. 11.

158. Admittedly, this argument does not reflect the full history of the Vietnam War. American military force spilled over into Cambodia and Laos during the Vietnam War, although those incursions purportedly targeted only Vietcong operations across the border. Still, the war was at least limited to the region surrounding Vietnam. This analysis is a rhetorical exercise meant to put the Quasi-War in a modern context, not to make historical judgments.

159. Pub. L. No. 88–408, §2, 78 Stat. 384 (1964).

160. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107–243, §3(a) 116 Stat. 1498 (2002).

SMALL WARS JOURNAL

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NEURO-COGNITIVE WARFARE: INFLICTING STRATEGIC IMPACT VIA NON-KINETIC THREAT

Fri, 09/16/2022 - 5:26pm

Neuro-Cognitive Warfare: Inflicting Strategic Impact via Non-Kinetic Threat

By R. McCreight

What is the strategic value of a covert technology that has consistently displayed a capability to disable and permanently impair basic thought, perception and inflict degrading effects on human neuro-cognitive motor skills? Is it significant but far less than strategic? Non-kinetic yet still strategic in impact? What if an adversary intent on harming US military and civilian leadership could unleash and deploy this technology without fear of detection? What if that adversary knew the US targets had no way to protect themselves from the insidious effects of this covert technology? This is neuro-cognitive warfare which has been taking place during the last decade and which allows an aggressor to attain a degree of strategic leverage and influence literally without firing a shot. US military experts in C4ISR, electronic warfare, Psychological Operations and medical science ought be aware of this and study it assiduously to gauge its genuine threat dynamics. Is that happening? The answer seems patently clear yet the issue has been subterranean in attention and falls regrettably below the threshold for assessing America's strategic risk spectrum as it evaluates the next decade. Does this make sense in terms of emerging Joint All Domain C2 developing doctrine and technology? Likely not too many.

We do know that the US government has officially devoted serious high level attention to the issue based on recent statements and testimony by senior Biden administration officials [1][2]. What is far less clear is what they actually intend to do about it including how to characterize it, detect it and defend against it let alone the idea of devising effective neutralizing countermeasures. Now the threat issue has expanded beyond its origins several years ago and it manifests itself closer to home with reported instances occurring up until the present day.

Cognitive Warfare Context

NATO members have been wrestling with the scope, scale and definition of cognitive warfare for a while, yet the issue still takes a backseat when compared with advanced weapons and the urgent calamity of the war in Ukraine. In a similar vein the US military suffers a degree of strategic distraction away from cognitive warfare instead lately transfixed on hypersonics, UAS threats, and all manner or variety of cutting edge kinetic weaponry. Surely there often are arguable differences among allies on what is a paramount threat at any given time but the key

question is whether an overarching regime threat of equivalent strategic importance is being ignored, overlooked or discounted. However, cognitive warfare appears somewhat alien and out of step when compared to the panoply of more dire cosmic threats which dominate the daily exchange and discursive analysis over national security priorities. This is despite overwhelming evidence that a sixth domain of warfare itself—the human body and brain—is being overlooked, ignored and eliminated as a strategic imperative worthy of, and equal to, any other domain. [4]

We know far less than we should about our brain, its biochemistry, its internal reciprocal systems embedded in the CNS [Central Nervous System], its plasticity, its biophysical governance of the body, our autonomic system and its overall neurobiological vulnerability. As a distinct domain of warfare deserving greater sustained attention for devising innovative doctrine and operational analysis the brain appears to be a regrettable area of strategic neglect. We already know from the voluminous combat experience of PSYOP, Intelligence, information Ops and EW that certain narratives, psychological messages and sustained influence campaigns in social media and propaganda can exert significant impact on human thought, behavior and beliefs. Cognitive warfare is best seen as a genuine covert blitzkrieg on the mind and all its associated systems.

Text drawn from the NATO study said, "The brain will be the battlefield of the 21st century, and "humans are the contested domain." The report also said "future conflicts will likely occur amongst the people digitally first and physically thereafter in proximity to hubs of political and economic power." What must be understood, standing in the midst of genuine cognitive warfare era where evidence of prior attacks can be readily found and examined, is the exact dimensions, innate structure and character of cognitive warfare itself. Without that any gesture to define the term will fall short of accuracy and reliability absent a deeper dive to discern the crucial and fundamental factors ingredients and dynamics involved. [5] By contrast US emphasis on this threat differs with some NATO nations who see more significant urgency should be assigned. .

Havana Syndrome: Context Matters

Going back for a moment to 2016 we can begin to decode some of the recent mystery behind what the media terms "Havana Syndrome" and gauge for ourselves what it means. Back in 2016 US persons posted to embassy Havana reported a variety of neuro-cognitve ailments and brain injury which began in the summer of 2016 and continued through the Spring of 2018. Initial press reports of neurological and cognitive ill effects by US persons posted to American embassy Havana began appearing in various media outlets as soon as March 2018 and was followed by multiple news reports which captured some major elements of the incident. For example, numerous reports were published essentially containing the same basic facts such as these…

"The health incidents — which took place between November 2016 and August 2017 at homes and two Havana hotels — were initially blamed on "sonic attacks." The cause has perplexed the Department of State, the FBI and other U.S. agencies that have been trying to figure out just what made 24 intelligence officers, diplomats and relatives based in Havana ill. Many reported a variety of symptoms such as hearing loss, headaches, cognitive problems and other ailments that doctors said correlate with concussions. University of Miami Dr. Michael Hoffer, who led the initial team of physicians who examined the victims said: "We still do not have a cause or source of the attacks. The investigation is ongoing." [5]

Initial reports from Embassy Havana placed its victims in the awkward limbo state of being disbelieved or treated as emotional/mental cases. Few doctors evaluating the victims could

ascertain what led to the variety of neuro cognitive degradation symptoms observed. This additional press item reflects the same degree of reporting on the issue a year later….

*The State Department has said the employees developed what became known as "**Havana Syndrome**" – headaches, dizziness, nausea and other symptoms that arose when they heard penetrating, high-pitched sounds. MRI scans from the 23 men and 17 women showed changes in brain structure and functional connectivity between different parts of the organ compared with 48 other adults, according to the study by the University of Pennsylvania. The difference in the brains between the two groups "is pretty jaw-dropping at the moment," lead researcher Dr. Ragini Verma, a professor of radiology at Penn, told Reuters. "Most of these patients had a particular type of symptoms and there is a clinical abnormality that is being reflected in an imaging anomaly," she said. However, in findings published by the Journal of the American Medical Association, Verma and her team said it was unclear if the brain patterns directly translate into significant health problems. "None of these patients we have seen suffered any type of blunt head trauma, yet the symptoms they describe and evaluations demonstrate are remarkably similar to those found in persistent concussion syndrome," said the study's senior author, **Douglas H. Smith, MD,** the Robert A. Groff Professor and vice chair of Research and Education in the department of Neurosurgery and director of Penn's Center for Brain Injury and Repair. "It appears that we have identified a new syndrome that may have important public health implications."* [6] [7]

Apart from frequent claims of hallucinations, stress and malingering these were authentic cognitive injuries. A report completed by the National Academy of Sciences [NAS] in 2020 considered the expert views and testimony of neuroscience experts reviewing Havana neuro-cognitive victims and reached conclusions independently about them. The NAS report reached a conclusion similar to that of University of Pennsylvania doctors which indicates…

"*The cases of the Department of State (DOS) employees in Cuba and China have attracted much attention. Among the reasons and ramifications, the clinical features were unusual; the circumstances have led to rampant speculation about the cause(s); and numerous studies, along with the charged political setting, have had consequences for international relations. First, the committee found a constellation of acute clinical signs and symptoms with directional and location-specific features that was distinctive; to its knowledge, this constellation of clinical features is unlike any disorder in the neurological or general medical literature. From a neurologic standpoint, this combination of distinctive, acute, audio-vestibular symptoms and signs suggests localization of a disturbance to the labyrinth or the vestibule-cochlear nerve or its brainstem connections. Second, after considering the information available to it and a set of possible mechanisms, the committee felt that many of the distinctive and acute signs, symptoms, and observations reported by DOS employees are consistent with the effects of directed, pulsed radio frequency (RF) energy. Some also reported sudden onset of tinnitus, hearing loss, dizziness, unsteady gait, and visual disturbance. Chronic symptoms suffered by many of those affected suggested problems with vestibular processing and cognition, as well as insomnia and headache; these manifestations are more consistent with diffuse involvement of forebrain structures and function, such as cerebral cortex or limbic structures. Our committee felt that many of the distinctive and acute signs, symptoms, and observations reported by DOS employees are consistent with the effects of directed, pulsed radio frequency (RF) energy*.[8]

If these episodes weren't enough, and given Congressional interest in supporting medical claims made by victims of these alleged attacks, we find in 2021 the claim of additional attacks at other locations continues with no sign they will soon cease. In 2021 reported attacks of a similar nature were reported in Vienna and Berlin at several other US embassy sites and other media have claimed well over 300 diplomats, intelligence officers and some active duty military personnel are among the victims. For example a recent media report illustrates these unique events

Austrian authorities said they are investigating reports that US diplomats in Vienna have experienced symptoms of a mystery illness known as Havana Syndrome. "We take these reports very seriously and, according to our role as the host state, are working with the US authorities on a joint solution," the Federal Ministry of European and International Affairs said Sunday. "The security of diplomats dispatched to Austria and their families is of utmost priority for us," the ministry added. A US State Department spokesperson said Saturday: "In coordination with our partners across the US Government, we are vigorously investigating reports of possible unexplained health incidents among the US Embassy Vienna community or wherever they are reported." [9] [10] [11] [12]

As a consequence, we must recognize the itemized cases of genuine neurological injury inflicted on diplomatic, intelligence and military personnel for a span of several years are symbolizing the initial skirmishes of cognitive warfare however we may eventually define it. What remains is the challenge of recognizing and calibrating the operational and strategic dimensions of cognitive warfare in terms of offensive options and technologies along with defensive countermeasures. It will also require robust and comprehensive attribution technologies to nullify future threats.

Non Kinetic Yet Strategic?

What is the strategic effect of a stealth weapon which debilitates or permanently impairs the minds of military and civilian leadership? If that technology is largely covert, undetectable and pervasive even if its targets are limited in number does that pose an incipient threat deserving of serious attention as geopolitical weapons leverage is considered? Symptoms of its victims cannot be readily evaluated by physicians as no case definition or peer reviewed research exists to verify its authenticity. The technology is insidious and consistently defies detection, prevention, medical verification and scientific confirmation aside from episodic reports that an anomaly has occurred and impaired the neurological and cognitive wellbeing of its intended targets. Absent a consensus medical case definition and serious causative technology research, these attacks as reported could easily be discounted as psychotic or delusional events where the complaining individuals were shunted aside as emotionally unstable. We must discern what the exact offending technology is and take steps to reduce and mitigate its continued used in future cases elsewhere. Current cases continue to wreak neurological havoc among its victims perplexing both medial and military experts with its long lasting cognitive impact and negative effects? If this technology exists but we cannot easily identify it in operational use nor detect and deflect its harmful beams, emanations and pulse waves can we assume it will get worse?

This is the central dilemma of this novel neuro-cogntive nonkinetic weapon with indirect strategic effects in the 21st century I term it as '**NeuroStrike**". It so far has eluded the best efforts of military, medical and intelligence experts to explain. We already know from expert medical professionals who have seen the various victims that they found acute clinical signs and symptoms with directional and location-specific features that was distinctive and unlike any

disorder in the neurological or general medical literature. As such it suggests the very nature of the Joint All Domain combat environment has changed drastically. It also provides a strategic signal warning of what lies ahead. Familiar notions such as C4ISR, situational awareness and the OODA loop are all in collective jeopardy as human thought, decision-making, judgement, analysis and perception are at risk in an unrestricted cognitive warfare environment.

The basic principle of a suggested **neurostrike weapon** is a fairly simple proposition. It entails a hand held, or platform mounted, mixture of an RF, directed energy pulse or **neurocognitive disrupter, combined with acoustic wave dynamics** which is designed to harm, disable or permanently damage a human brain. It may also adversely affect the brains of several in close proximity to the attack. Unlike future forecasts of likely, suspected or even probably designable future kinetic weapons systems which can significantly alter the battle domain and strategic calculus cognitive warfare remains speculative and theoretical despite evidence that its subtle and dynamic technology inflicts permanent or long lasting brain injury. One conclusion indicates that after 2020 all prior theories of combat or the use of non-lethal force on both civilian and military targets must now be rethought and reconsidered. Victims of **NeuroStrike** attacks have experienced sustained and persistent neuro-cognitive disruptive effects which can be medically confirmed and which vary among its victims. Under existing procedures, these casualties of cognitive warfare defy facile medical definition and categorization by persons unfamiliar with the diagnostic mechanisms experts at Penn Medicine, University of Miami and the National Academy of Sciences can confirm. If you have never seen it before you don't recognize it.

So, it is of utmost importance to assess the net strategic value of such weapons in future conflict scenarios short of an actual shooting war. We can visualize the use of **NeuroStrike** as a program or phenomenon which merits no serious sustained strategic attention regardless of its undeniable grey zone, counter insurgency, regime destabilization, regional guerilla conflict and domestic suppression value to corrupt regimes. It seems fair to assert that we are in the midst of a new era which I depict as the nebulous domain of **Perpetual NeuroCognitive Conflict [PNCC**]. As such it exists outside normal discussions of electronic warfare or exists beyond the boundaries of serious speculation about exploiting the electromagnetic spectrum for military purposes. Nevertheless it has appeal to repressive and dictatorial regimes owing to its elusive and near stealth array of qualities. It clearly lies outside the threshold of arms control discussions or agreement, and it sneers at hapless medical attempts to define or understand it. Further serious military leaders must weigh the truly unlimited offensive and defensive dimensions. Knowing that deployable and covert PNCC systems can pose a wider threat is grounded on the belief that if progressively enhanced and upgraded their wider non-kinetic effects are thereby maximized.

The potential for neurocognitive disruption and disablement of human brains via remotely positioned platforms alters our ordinary sense of strategic warning, risk, nonkinetic threats and modified information operations. The era of genuine cognitive warfare requires wholesale review of operational doctrine and military training. In a joint multi-domain conflict environment neurostrike technologies held by adversaries are game changers owing to their covert non-detectible nature resulting in zero defensive and deterrent capabilities among targeted persons. As such NeuroStrike issues add complexity and heft to gauging the nature, extent and focus of future defense threats and securing the geopolitical interests of the United States. Detection, defense, deterrence and defeat of future **Neurostrike** systems must become one of our highest defense priorities if we are to retain a competitive global strategic edge.

Whether future armed conflict at any level of complexity, from limited interventions involving SOF personnel to the more difficult array of issues associated with theatre warfare, massive logistics and complex strategy include consideration of the nuanced threat posed by PNCC is anyone's guess. Certainly the technology has demonstrated its effectiveness against largely civilian targets in embassies and elsewhere. Considered an 'unconventional electronic attack' the technology has certain appeal due to its non-lethal effects but effective defensive measures erected against PNCC forms of attack are lacking today. The scope and scale of **neurostrike** weaponry should be a matter of grave concern because evidence shows it tends to target military, diplomatic and intelligence personnel indiscriminately. Urgently the threat will likely grow and the challenge is to assess how prepared the United States and its allies are for covert, subtle and undetected instances of **NeuroStrike** PNCC technology use. Formulating better defensive, deterrent and quicker warning devices which alert potential targets to the detection of such technology nearby are essential. Efforts to identify and characterize the PNCC threat for the United States, its allies inside the NATO alliance, are a justifiable priority. Moreover we need to conduct research to establish validated protective schemes and countermeasures against wider use of this technology in the decade ahead. We also require the best forensic mechanism for pinpointing its sources and origins enabling deflection of covert PNCC activities to maximize our security in this decade or risk confronting novel non-kinetic forms of strategic surprise.

Coming to grips with the reality of a nonkinetic disabling technology which aims to specifically degrade neurological and cognitive functions requires the suspension of disbelief among those who reside in the comfortable confidence that no such weapon exists. Instead a serious inquiry among scientists, doctors and military threat experts is needed to examine the credibility and authenticity of **NeuroStrike** weaponry concluding that such technology poses a real threat. This is especially true of the urgent need to conduct collaborative military medical, electronic warfare, special operations and C4ISR experts in focused research on the threat immediately.

Without comprehensive research by medical and military experts to discern, categorize and confirm the existence of non-lethal technologies whose sole purpose is to damage and degrade targeted human brains we surely risk having no warning mechanism against future attacks. In fact those hapless victims already well known among US diplomats posted to Cuba, China and elsewhere since 2016 may never get authentic neurological confirmation of their infirmity because a common and unified treatment protocol is lacking and we still need metrics to help medical experts validate authentic attack victims. If **NeuoStrike** incidents actually occurred in the past –especially prior to 2016---how would they be proven real? Absent baseline neurological data on each victim it remains a daunting puzzle. What about the future and the shifting global threat environment featuring non-kinetic technologies? What practical and effective defensive technologies or threat detection systems are required? Should we expect the degrading Neurostrike technology to mature and widen its effectiveness to disable large groups?

If and when a **NeuroStrik**e incident actually occurs the burden will always be on the victim to explain and eventually confirm that permanent loss of memory, unending headaches, diminished cognitive functions and speech impairment resulted from a stealthy technology rather than a random psychological or imaginary episode. Few doctors and medical experts have even seen actual victims and confirmed actual attacks. As long as the unwitting public and media believes this is purely science fiction the possessors of this disabling technology can escape without risk of discovery. It poses a security dilemma of the first order. Until or unless we devise a system to

identify and detect when **NeuroStrike** technologies are being used –or have been recently used--we will struggle to find a plausible explanation for victim complaints. Eventually serious security and medical experts will have to face the truth and examine the threat it symbolizes. Worse, if subsequent attacks continue eluding serious scrutiny we must assume there will be many more.

So we are left with an unpleasant dilemma where something seen as non-kinetic and thereby less harmful than nuclear weapons, hypersonics and space based platforms can still inflict targeted harm on military and civilian leadership of an indirectly strategic nature. Tolerating the presence and periodic effects of cognitive warfare until or unless remedial and deterrent technologies are devised is pathetic and undesirable. Recognizing and affirming the net degradation effects of cognitive warfare technologies is a paramount security objective for this decade and its insidious destructive effects must be acknowledged and confirmed. This is especially worrisome if insufficient defensive and deterrent measures cannot be immediately invoked or developed to halt its pernicious effects. Yet it seems that is just where we are barring new evidence of a detection and protection technology deployable against any future cognitive warfare threats. Cognitive warfare draws its essence from the innate neurobiological vulnerability of the human brain found within the CNS, the otolithic and vestibular systems, and vestiges of exploitable neural networks and synapses embedded in our bodies. This is the new non-lethal battlefield in our midst and it defines the terrain of today's continuing conflict and ushers in tomorrow's wider more sophisticated non-kinetic warfare. It begs the question of what must be done in both the classified and unclassified worlds to deconstruct and dissect the offensive cognitive targeting technology and nullify its insidious stealthy effects before more victims are affected and the threats emanating from this technology are expanded and diversified.

Doing so requires more concrete research, diagnostic and comprehensive neuroscience, smarter technology, attribution mechanisms and a recognition that the era of cognitive warfare is hear and real, It is here today and no longer the stuff of speculative science fiction and fantasy.

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[2] US intelligence community convenes new panel to probe 'Havana syndrome' causes amid new cases in Austria

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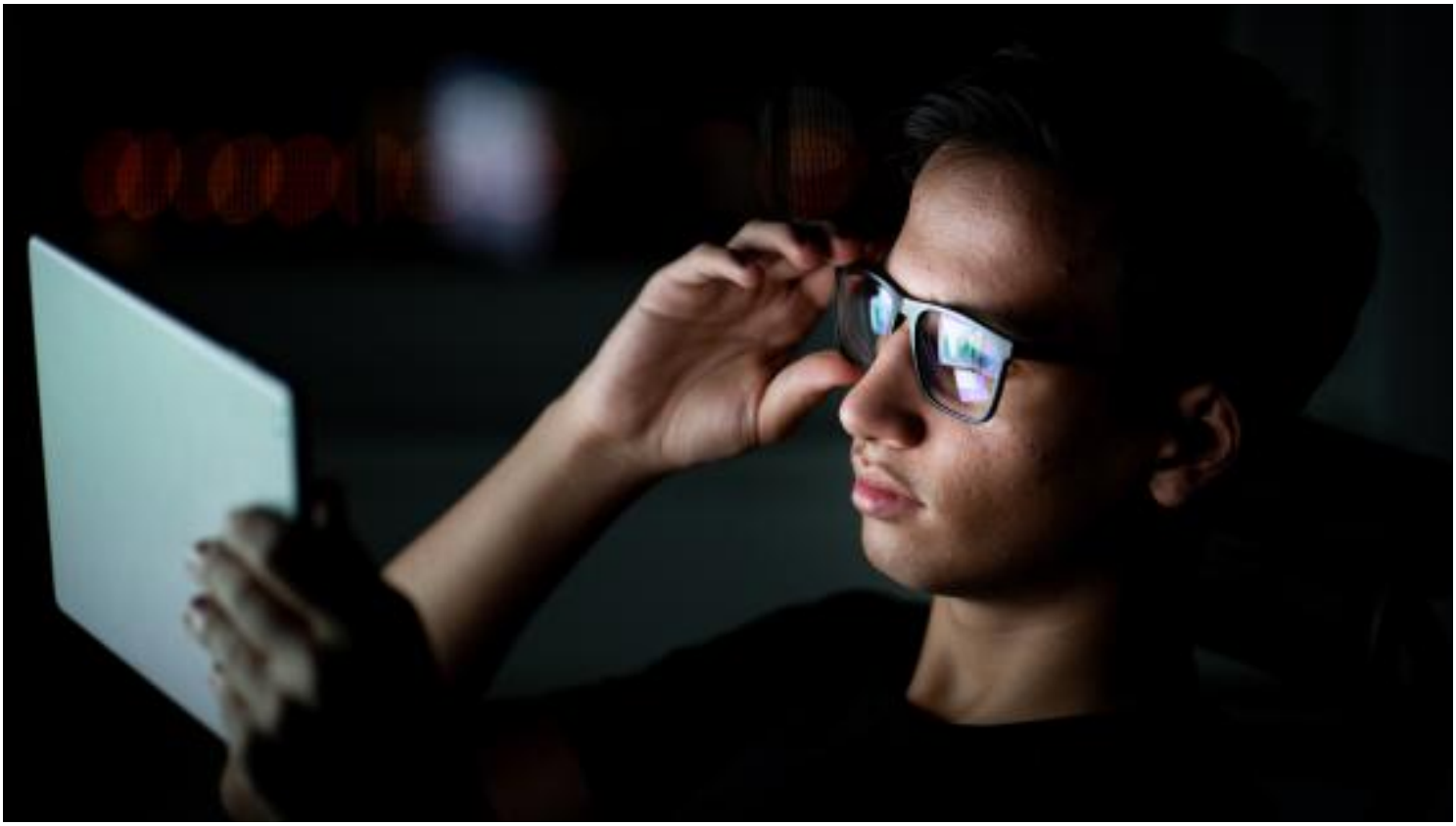

Center for Health and Biosciences | Policy Brief

From Neuroweapons to 'Neuroshields': Safeguarding Brain Capital for National Security

August 10, 2023 | Harris A. Eyre, William Hynes, Geoffrey F. L. Ling, Jo-An Occhipinti, Rym Ayadi, Michael D. Matthews, Ryan Abbott, Patrick Love

Introduction

Economic security has become a top priority for the West following the disruptions caused by COVID-19, the Ukraine War, and the growing threat of near-peer competitors. In a recent report, "From Markets to Minds: The Role of Brain Capital in Economic Security," we explained how investing in brain capital (i.e., an individual's cognitive, emotional, and social brain resources) could help build more resilient economies. In this paper, we emphasize the importance of brain capital in optimizing national security. Specifically, we explore the dangerous potential of neuroweapons, the need for a "Neuroshield" to protect democracies from the risks of mis- and disinformation, the implications of neural enhancement via brain-computer interfaces, and other innovative research agendas related to national security and brain health. We argue that it is critical for policymakers to develop clear guidelines and policies to protect brain capital and

recognize how it can be utilized to enhance national security. In order to develop novel data and solutions in this area, we also propose the creation of an action group on brain capital for national security, hosted by the Brain Capital Alliance and the Baker Institute for Public Policy.

Protecting Brain Capital Against the Use of Neuroweapons

One key national security concern is the potential use of neuroweapons by hostile actors. Neuroweapons encompass biological agents, chemical weapons, and even directed energy targeted at the brains and central nervous systems of enemy combatants. According to some observers, neuroweapons have the potential to disrupt everything — from individual cells in a body to societies and geopolitics.[1]

Neuroweapons aren't a new phenomenon. In the 1980s, the U.S. Army explored alpha-2 adrenergic receptor antagonists as incapacitating agents; these same drugs are now prescribed in lower doses to treat Tourette's Syndrome. In 2002, Russian special forces used an unidentified gas (later named a derivative of the anesthetic fentanyl) to end a hostage crisis in a Moscow theater. And some medical doctors suggest that Havana Syndrome — a set of unexplained medical symptoms first experienced by U.S. State Department personnel stationed in Cuba in 2016 — may have been the product of a neuroweapon.[2] Even now, calmatives — agents that render individuals calm and compliant — are seen as potentially useful for riot control and counterinsurgencies.[3]

Understandably, there are serious ethical concerns about the use of neuroweapons and what could happen if they got into the wrong hands. For example, in 2021, U.S. officials accused China of using emerging biotechnologies to try to develop "brain-control technologies" through military applications that included gene editing, human performance enhancement, and brain-machine interfaces.[4]

Even the U.S. Brain Research Through Advancing Innovative Neurotechnologies (BRAIN) Project,[5] launched in 2013, has gone in some questionable directions. The BRAIN Project was initially presented to the public as having the potential to produce research with vast beneficial health implications. However, much of the funding went through the Defense Advanced Research Projects Agency — a military organization. When science and military are mixed through dual-use research, the priorities of the latter often dominate the trajectory of the former.[6] In 2013, the U.S. National Institutes of Health reported that the BRAIN Project was looking to develop electromagnetic modulation as a new technology for brain circuit manipulation, heralding a shift in research from drug research to brain circuit research. Specifically, the project intended to explore optogenetics, which involves injecting neurons with a benign virus that contains genetic information for light-sensitive proteins.[7] The brain cells then become light sensitive themselves, and their activity can be controlled with millisecond flashes of light sent through embedded fiber optic cables. This kind of research has alarming implications, and the development of these kinds of technologies should be heavily regulated.

To advance brain science and ensure neuroweapons of this type are not developed or used, it is essential that major players in the Americas, Asia, and Europe collaborate as they each have comparative advantages and have focused their research in a coordinated and coherent way in the past. The recently launched China Brain Project (CBP) could offer opportunities for international cooperation with researchers at the U.S.

Brain Initiative and the EU Human Brain Project.[8] The CBP seeks to understand the neural basis of cognitive functions, diagnose and treat brain disorders, and conduct brain-inspired computing — research that could complement the work being done in the U.S. and EU.

Above all, it is crucial that brain science is used to improve brain health and is not used for harmful purposes. International treaties banning the development and use of neuroweapons should be strictly adhered to.

Designing a 'Neuroshield' to Safeguard Brain Capital From Mis- and Disinformation

Beyond banning the use of neuroweapons, defending our intellectual resources from the dangers of social media — where mis- and dis-information can spread rapidly — will be crucial to protect the national security interests of Western nations.

The term "brainwashing," loosely defined, emerged in 1950. It captured various concerns about the future uses of psychology in warfare and domestic life, and the potential for new technologies to control and manipulate human minds. The phrase "battle for men's minds" was reportedly first used by one of the founding members of the CIA, and popularized by President Dwight Eisenhower. Killen (2023) outlines some of the ingenious and sometimes transgressive experimental methods for studying and proposing countermeasures against Soviet efforts at mind-control.[9] He details how these procedures took on a strange life of their own, escaping the confines of the research lab to become part of the 1960s counterculture. Much later, in the early 2000s, they resurfaced in the war on terror.

Now, however, there is a much more frightening and pervasive tool that could be used for a form of mind control: social media. The advent of social media has ushered in a transformative era for disinformation, turning various platforms into some of the most powerful propaganda machines in history. With the vast reach and influence of platforms like Facebook, Twitter, and YouTube, disinformation campaigns can now spread rapidly and widely, targeting diverse audiences with tailored narratives and false information. Moreover, emerging artificial intelligence technology allows hostile actors to generate false images, videos, and speech that are virtually indistinguishable from real content.

A recent study conducted by MIT scholars found that false news on Twitter spread faster and more broadly than true stories.[10] The decentralized nature of social media enables the amplification of disinformation through user-generated content, making it increasingly challenging to distinguish between fact and fiction. The ability to manipulate algorithms and exploit echo chambers further compounds the problem, as disinformation can easily reinforce pre-existing biases and beliefs.[11]

The attack on the U.S. Capitol on Jan. 6, 2021, highlights how mis- and disinformation can result in a direct threat to national security. In this case, insurrectionists — fueled by mis- and disinformation about American democratic institutions, processes, and elections — stormed the U.S. Capitol Building in an attempt to overthrow the results of the 2020 presidential election. Their actions directly threatened America's

democracy and rule of law. This alarming event reveals that combating disinformation should be a top national security priority.

Another problem that could harm our democracy and impact the upcoming 2024 U.S. elections is the rise of "deepfakes."[12] Deepfakes are videos of people in which their faces or bodies have been digitally altered so that they appear to be someone else. While deepfakes are not a new phenomenon, the rapidly improving capabilities of artificial intelligence (AI), coupled with AI's growing accessibility, have dramatically increased the risks of deepfakes. Producing convincing deepfakes once required significant resources and technical expertise, but it can now be done easily — at trivial cost by individuals with very little technical sophistication — making it difficult for the public to determine what's real and what's not.

These are complex challenges, requiring concerted efforts from technology companies, governments, and individuals alike. We were buoyed to see the recent Biden-Harris administration's National Cyber Workforce and Education Strategy, a first-of-its-kind comprehensive approach aimed at addressing both immediate and long-term cyber workforce needs.[13] The initiative will include equipping every American with foundational cyber skills — a strong step forward. Aligned to this is a new U.S. Department of Education K-12 cybersecurity resilience effort, which includes the establishment of a Government Coordinating Council (GCC), as well as the release of the Department's three K-12 Digital Infrastructure briefs, including "K-12 Digital Infrastructure Brief: Defensible and Resilient," co-authored by the Cybersecurity and Infrastructure Security Agency (CISA).

Other nations and international organizations are also taking important steps forward on these issues. For example, NATO recently intensified efforts to counter "hybrid challenges," including disinformation campaigns and malicious cyber activities, and is "strengthening [its] ability to prepare for, deter, and defend against hybrid tactics that seek to undermine our security and societies."[14] The European Commission recently announced a €1.2 million project to deepen its understanding of how disinformation about war, elections, and gender emerges and spreads.[15] The United Kingdom also launched a Rapid Response Unit to combat fake news,[16] and Sweden recently set up a Psychological Defense Agency.[17] Counter-influence campaigns in Western countries have begun to "pre-bunk" (or inoculate against) weaponized disinformation, in one case by "tell[ing] the public to anticipate false narratives, but not listen to them."[18] The challenge now is to replicate such programs worldwide — a difficult task given that states themselves are often behind various cyber threats.

Taking a multi-pronged approach and finding novel solutions will be key. Winter et al. (2022) call for a neuroscience-based understanding of mis- and disinformation susceptibility and resilience.[19] This includes promoting initiatives to help people identify, avoid, and repel misinformation. It also involves detecting and preventing the spread of misinformation, fostering information literacy/cognitive immunology, improving fact-checking, and pre- and de-bunking false information. Similarly, Norman et al. (2022) call for investment in research for new solutions (e.g., infodemiology, cognitive immunology).[20]

Along these lines, we propose the creation of an alliance of brain scientists, publishers, and media leaders to define a code of conduct with respect to the notion of objectivity of information. The debate surrounding media independence in our current polarized environment is rife, both in political and media circles, as

reflected in A.G. Sulzberger's influential article "Journalism's Essential Value."[21] However, conclusions drawn on the basis of journalistic ethics need to be enhanced by what we know about the functioning of the brain and its susceptibility to bias. Together, we can produce a "Neuroshield," comprised of a set of regulatory protections, a code of conduct for the media world, and a toolkit empowering citizens to protect themselves and their cognitive freedom against the onslaught of disinformation. The manipulation of information, particularly through social media platforms, has become a powerful tool for propaganda and shaping public opinion — with significant implications for democracy and geopolitics. Creating a Neuroshield that protects cognitive freedom and strengthens regulatory safeguards is essential in the face of the disinformation challenge.

Managing the Emergence of Dual Use Brain-Computer Interfaces

Similar to neuroweapons and mis- and disinformation, brain-computer interfaces (BCIs) could have enormous national security implications. BCIs refer to systems that establish a direct pathway between a brain and an external computer such as a PC, a robotic arm, a speech synthesizer, or a wheelchair. In a military setting, BCIs could, for example, enable service members to operate a drone hands-free on the battlefield or help Air Force pilots learn more efficiently and get into aircraft cockpits faster.[22] Such neurotechnologies have the potential to radically alter future wars.

Although there is still considerable missing knowledge and lack of understanding regarding the biological processes and mechanisms involved in BCIs, several countries are already advancing BCI innovations for both civilian and military usage. As BCI technology progresses, democratic nations will need to make decisions about how to manage their investments in military applications of neuroscience research and emerging neurotechnology.

Recently, Kosal and Putney put forward an analytical ethical framework that "attempts to predict the dissemination of neurotechnologies to both the commercial and military sectors in the United States and China."[23] This framework also articulates important national security implications of BCIs, including the difficulty of setting international ethical and legal norms for BCI use (especially in wartime operating environments), and data privacy risks (e.g., hackers could steal data related to a person's brain signals). As research into BCIs continues, these national security risks must be evaluated and addressed.

Recognizing the National Security Value of Atypical Minds

Despite concerns regarding neuroweapons, disinformation, and the use of BCIs — all of which have potentially alarming implications — there are also positive ways brain capital can benefit national security. Specifically, national security organizations need highly skilled and intellectually creative individuals who are eager to apply their talents to the nation's most pressing challenges. In public and private discussions, officials and experts have addressed the need for *neurodiversity* in the national security community.

A recent report by the RAND Corporation describes missions that are too important and too difficult to be left to those who use their brains only in *typical* ways.[24] The report aims to understand the benefits that people with neurodivergence bring to national security; the challenges in recruiting, working with, and

managing a neurodiverse workforce; and the barriers in national security workplaces that prevent agencies from realizing the full benefits of neurodiversity. Investing in and recognizing the value of a neurodiverse population will therefore be critical for enhancing national security.

Enhancing Brain Health to Promote National Security

Protecting people, particularly former service members, from brain disorders is another way to enhance national security. We were encouraged to see that the recent Senate appropriations bill proposes setting aside funds for geroscience[25] research to study accelerated aging processes associated with military service, including neurodegenerative disorders like Alzheimer's disease and Parkinson's disease.[26] The bill outlines how the Defense Department, the National Institute on Aging (NIA), and the Advanced Research Projects Agency for Health (ARPA-H) could lead the project. Although it still needs to pass the House, the bill is an important step forward in prioritizing the brain capital of service members.

An often-overlooked area is the risk for employees with both security clearances and dementia, a particularly poignant problem given the aging national security workforce.[27] Protecting this population and researching the effects of aging on military service members are critical to enhancing national security.

It is also important to advance civilian-based approaches to understanding, preventing, diagnosing, and treating brain and mental health disorders, as well as stimulating creativity and entrepreneurship. Developing a brain capital industrial strategy could further the development of national security-oriented innovations such as BCIs and other brain capital technologies (See Box 1).[28]

Box 1 — Overview of the Brain Capital Industrial Strategy

Brain capital technologies are neuroscience-inspired technologies addressing the confluence of mental health, neurology, education, future of work, creativity, and brain performance, particularly in late-life and early childhood. We believe there is a need to consider a "brain mission economy" where neuroscience-inspired missions are conceptualized and launched across industries supported through the co-operation of the public and private sectors. A successful brain capital industrial strategy would boost economic resilience by reducing the economic burden of brain and mental disorders, as well as by stimulating creativity and entrepreneurship. Capacity for brain capital technology entrepreneurship will be enhanced by further basic and translational science breakthroughs and by supportive policy settings.

The brain capital industrial strategy could also support initiatives like the VA's $20 million Mission Daybreak challenge, which invites the private sector to find ways to reduce the veteran suicide rate.[29] Protecting the mental health of veterans is an important societal goal that aligns with the concept of a brain capital industrial strategy and a focus on safeguarding national security.

Another similar initiative is the Cohen Veterans Bioscience (CVB), a nonprofit biomedical research organization developing new approaches to researching, diagnosing and treating post-traumatic stress disorder and traumatic brain injuries for millions of veterans, service members, first responders, and civilians.[30] Supporting initiatives like this and reducing the impact of brain disorders on both service members and civilians can aid in advancing national security goals.

Along these same lines, a Department of Defense (DoD)-led public-private consortium is seeking prototype solutions for the role of AI in diagnosing, detecting, and treating traumatic brain injury.[31] The request is intended to inform both the Medical Technology Enterprise Consortium — a nonprofit biomedical technology consortium operating under an Other Transaction Authority[32] with the U.S. Army Medical Research and Development Command (USAMRDC)[33] — and the DoD of available technology and interest ahead of the former's "State of the Technology" meeting, which is slated for early 2024 and will focus on neurotrauma. Following the meeting, an organizing panel will craft a "State of the Technology" report that will offer recommendations for both USAMRDC's neurotrauma group and the Biomedical Advanced Research and Development Authority.

These efforts, and a focus on boosting national brain health, will be key for strengthening democracy.[34] By creating environments that enable each citizen to achieve their full brain health potential, both personal and societal well-being will be enhanced. An educated, well-informed, and mentally resilient population forms the basis of democracy, and gearing policymaking toward equitable and quality brain health may prove essential to combat brain challenges, promote societal cohesion, and bolster national security efforts.[35]

Emerging policy innovations directed at building "pro-democratic brain health" across individual, communal, national, and international levels have previously been outlined. While extensive research is warranted to further validate these approaches, brain health-directed policymaking harbors great potential as a novel concept for democracy strengthening.[36]

Conclusion and Policy Recommendations

Although the connections between brain capital and national security may at first seem distant, they are actually far more related than people realize. To safeguard national security, we propose the following policy recommendations:

1. **Limit the development of neuroweapons** and adhere to international treaties banning their use.
2. **Develop a Neuroshield** comprising a set of regulatory protections, a code of conduct for the media world, and a toolkit empowering citizens to protect themselves against the onslaught of disinformation.
3. **Establish ethical and legal norms** for developing brain-computer interfaces.
4. **Recognize the need for neurodiversity** and brain health in the national security community.
5. **Support innovations and projects** designed to enhance "pro-democratic brain health" and protect the brain health of service members and citizens.
6. **Create an action group on brain capital for national security** — hosted by the Brain Capital Alliance and the Baker Institute for Public Policy — to develop novel data and solutions in this area. This task force

will involve transdisciplinary participants spanning defense, law, economics, neural engineering, neuroscience, information science, ethics, mental health, education, public policy, and AI.

By prioritizing the protection of brain capital, nations can ensure the safety and well-being of their citizens while also maintaining a strong national defense.[37] It is essential that we continue to explore and invest in this field to ensure a secure future for all.

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