ABSTRACT

Title of Dissertation: RECONSTITUTING THE WAR POWERS: TOWARDS A DELIBERATIVE CONSTITUTIONAL SYSTEM FOR WAR

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This study of American constitutional theory and practice offers a distinctive perspective on the interminable war powers debate, a view away from formal constitutional settlement and towards a deliberative constitutional politics for war. Contemporary war powers scholarship centers on the question of how the rise of discretionary executive power and receding legislative influence over the use of military force should be constitutionally evaluated and addressed. This dissertation shows that underlying the conventional divide between congressionalist and presidentialist interpretations of the Constitution are competing theories about how such a balance of powers is to be politically constituted that have important implications for the interbranch politics of warmaking. The predominate framing of the war powers debate has been from the vantage point of legal constitutionalism—centering on constitutional interpretation, statutory clarification, and ultimately judicial review to clearly establish the authority over the use of military force. After

describing the theoretical promises of the formal entrenchment of the separation of powers, an examination of constitutional practice reveals this approach to be a contemporary construction that has tended to undermine the purposes to which it aspires. The dissertation then turns to consider a more fully political constitutionalism, a conception with roots in the American founding and which has seen a revival in recent scholarly discussions. Political constitutionalism accommodates continual discord over the proper boundaries of institutional authority in war and the inevitability of some executive discretion as inherent and potentially salutary elements of the political order. The analysis shows that the warmaking order that emerges from such a constitutional politics should not entail anything goes, but instead can be judged by the extent the branches engage in recurring interactions that amount to systemic deliberation, a standard drawn from the political form of the constitution itself. This study concludes with a sketch of how processes of legal constitutionalism might be integrated into the deliberative interbranch warmaking politics aspired to by political constitutionalism and a view towards the broader political foundations of a deliberative constitutional system for war.

RECONSTITUTING THE WAR POWERS: TOWARDS A DELIBERATIVE CONSTITUTIONAL SYSTEM FOR WAR

by

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Dissertation submitted to the Faculty of the Graduate School of the University of Maryland, College Park in partial fulfillment of the requirements for the degree of
Doctor of Philosophy
2014

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Dedication

I dedicate this work to my loving and supportive family.

Acknowledgements

The completion of this project would not have been possible without the support, encouragement, guidance, and patience of many people. Their acknowledgement here is only a small sign of the gratitude I feel, and that I hope to more fully express and repay in time to come.

Thanks to my many teachers, who instilled in me a love for learning and helped to develop my capacities for the pursuit of knowledge. I am particularly grateful to the core members of my committee, who each in his own way has taught me valuable lessons about politics and its study. My mentor, Stephen Elkin, spurred my interest in constitutional theory as an undergraduate, was as an essential guide throughout my graduate education, and served as a key personal and scholarly foundation for the completion of this dissertation. Karol Soltan instilled in me the value of comparative and citizen-centered inquiry that I hope to pursue in my future endeavors, maintained an unwavering interest in my progress and success, and modeled the co-creative potential of a career as an engaged scholar. Mark Graber continually demonstrated what top-notch public law research and the active participation in a community of scholars could be. Christopher Morris's clarifying attention to detail and consistent kindness of heart were of great benefit to me.

Thanks to the Department of Government & Politics, The Good Society, and the Office of Letters and Sciences, who provided the financial support that has sustained my graduate education and enabled the achievement of my doctoral degree. I owe a special debt of gratitude to Greg Shaffer, whose understanding and acts of friendship made a long road much less difficult to travel than it might have otherwise been.

Thanks to friends, housemates, and colleagues who stuck by my side, guided me when I was lost, lifted me when I faltered, helped me celebrate progress and successes, and provided welcome distractions when I needed them most. I have too many people to thank to do so by name here, but I am especially grateful to Benli Shechter, Alex Otruba, Marie Fritz, Greg McBrayer, Sung-Wook Paik, Ursula Miller, John McTague, Jennie Wallace, Anette Rosenzweig, Matt Chick, and Darragh McNally.

Thanks most of all to my extraordinary family. It is difficult to properly express my gratitude for their enduring love, support, encouragement, faith, and understanding throughout too many years in pursuit of a doctorate. To my mother Renée Janow, my brothers Josh Janow and Jon Janow, my sisters-in-law Avery Straw and Allison Janow, and my extended family: thank you, thank you, thank you. I love you and hope to be able to give back some small portion of everything you have given to me. Lastly, a special word of thankfulness for my father Herbert Janow, whose life lessons and loving memory has been a constant wellspring of strength.

Table of Contents

Introduction

Reconstituting the War Powers Debate

> *The evaluation of political practice is, at bottom, the evaluation of the constitution of the political order*.[1]

How should the United States decide for war? This question lies at the root of ongoing discord and concern about the constitutional distribution, balance, and exercise of the war powers, focused in particular on the rise of discretionary executive power and receding legislative influence over decisions to use military force.[2] One indication of the unease is the voluminous scholarship on the war powers that has appeared in the previous few decades,[3] to which a new wave of analysis has just recently begun to respond.[4] A great deal of the former effort has been legal in nature, written by lawyers and those who study law, including law school professors,[5] former

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[1] Elkin, *Reconstructing the Commercial Republic*, 79.

[2] As Mark Brandon describes it, "the story of American constitutional politics…in the context of military conflict has been one of steady erosion of Congress's power to prevent, confine, or even direct military action and of steady accretion of executive discretion and control." Mark E. Brandon, "War and the American Constitutional Order," 23.

[3] A small, but representative sample of prominent scholarly book-length treatments includes: Ely, *War and Responsibility*; Fisher, *Presidential War Power*; Koh, *The National Security Constitution*; Powell, *The President's Authority over Foreign Affairs*; Yoo, *The Powers of War and Peace*. A similar representative sample of scholarly articles and chapters in edited volumes would not do justice to their numbers.

[4] Griffin, *Long Wars and the Constitution*; Zeisberg, "The Relational Concept of War Powers"; Zeisberg, *War Powers: The Politics of Constitutional Authority*; Thorpe, *The American Warfare State*.

[5] Ely, *War and Responsibility*; Koh, *The National Security Constitution*; Tushnet, *The Constitution in Wartime*.

government lawyers,[6] and legal researchers,[7] while the latter scholarship has emerged from other academic traditions.[8] The debate on the proper ordering of warmaking is not new but has persisted since the very birth the republic,[9] and the focus on war powers as a matter of constitutionalism has always been a primary aspect of the discussion.[10] Despite the wide variety of contemporary interpretations of how the use of military force is to be conducted under the U.S. Constitution, a broad consensus has emerged that in practice executive power has been ascendant on matters of war since the last half of the Twentieth century in ways unseen throughout most of United States history. Sharp disagreements have emerged out of this consensus in the scholarly discussion, however, on how best to evaluate and address this development.

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[6] Goldsmith, *The Terror Presidency*; Yoo, *The Powers of War and Peace*; Powell, *The President's Authority over Foreign Affairs*. It should be noted that there is a regular exchange between the legal academy and the government.

[7] Fisher, *Presidential War Power*.

[8] Zeisberg, "The Relational Concept of War Powers"; Kleinerman, *The Discretionary President*; Thorpe, *The American Warfare State*.

[9] As we will see, political arguments over the proper boundaries of institutional power in war occurred during the drafting and ratification of the U.S. Constitution and have persisted in varying degrees through to the present. Edward Corwin argues that the term "war power" was popularized, if not coined, by President Lincoln, who derived it from combination of the "Commander-in-Chief" and "take care" clauses of the Constitution. Corwin, *Total War and the Constitution*, 16.

[10] Constitutionalism is an "essentially contested concept," whose predominant contours have varied widely throughout the history of political thought and continue to be a matter of scholarly debate. Differing approaches to American constitutionalism are at issue, and will be explicated, throughout the analysis of the war powers that follows, but constitutionalism can be generally understood as: "a distinctive form of government…[wherein] constitutions structure ordinary politics in ways that framers and their progeny hope will promote justice, stability, and prosperity." A constitution can thus be roughly understood as that which orders—structures reliable patterns of—ordinary politics towards certain broad purposes. While "sometimes constitutions promote goals directly….more often, constitutions structure governing institutions in ways thought to privilege desirable outcomes." Gallie, "Essentially Contested Concepts"; Graber, *A New Introduction to American Constitutionalism*, 12–13.

Broad questions remain under dispute: Is this development constitutionally sound—is there a gap between constitutional theory and practice for war? What accounts for it? What is to be done about it? How are we to understand the American constitutional model for warmaking? Answering these expansive concerns requires attention to critical sub-questions: What is the constitutionally permitted extent of executive discretion over the use of military force? What is Congress' proper constitutional role in warmaking? When is congressional authorization required and in what form should such authorization consist? Is there a Constitutional standard for the decision to initiate force? While the common frame for such inquiries treats them as legal matters, the practicability of the answers to them reside upon a more complex political substrate: How is the balance of powers of the warmaking order to be determined—set, judged, and maintained—over time? What role should legal processes play in ordering a deliberative and effective warmaking process? What role should other political mechanisms play in its ordering? In short, how should discretionary executive power to initiate military force be reliably constrained—subject to principle—in a constitutional republic? These last questions bring into view the critical point that while the debate over the war powers often centers on constitutional interpretation and legal analysis, at its core it is a question of constitutional design and constitutional politics.

At the most general level, there exits a persistent divide between congressional and presidential partisans regarding the power to go to war.[11] While there is widespread acceptance of an executive power to repel sudden attacks on the

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[11] Zeisberg, "The Relational Concept of War Powers," 168.

United States, the longstanding debate on whether and to what extent a president may initiate hostilities absent congressional authorization remains a heated one. Congressional partisans hold that active legislative participation in warmaking is a Constitutional necessity, and argue for a requirement of explicit legislative authorization for the use of military force save for a small set of specific and exigent circumstances.[12] Under this view, presidents may order military action to protect citizens and American military forces at home and abroad from imminent harm, but any military actions beyond a defensive response to an immediate threat should involve consultation with, and the positive assent of, Congress. In all but the direst circumstances, Congress' proper role is to deliberate and decide on any use of force, a role predicated on its ultimate authority to unleash the dogs of war that will then be commanded in the field by the executive. In short, Congress is to be the gatekeeper to war. In those rare situations where a threat is so immediate that legislative authorization cannot be secured prior to a response, it must be retroactively obtained at the earliest possible instance.

In contrast, executive partisans insist that presidents have greater latitude to initiate aggressive military action under the Constitution. While they acknowledge an essential constitutional role for Congress in warmaking, executive partisans argue that the Constitution establishes the president as the lead actor in the realm of foreign affairs generally, and in the initiation of military force in particular.[13] Under this

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[12] Adler, "The Constitution and Presidential Warmaking;" Ely, *War and Responsibility*.
[13] Yoo, *The Powers of War and Peace*; Powell, *The President's Authority over Foreign Affairs*; Turner, *Repealing the War Powers Resolution*.

view, Congress' proper place in the process for use of martial force lies in its authority to provide the means for war, in particular its power to raise an army and navy and appropriate funds for their maintenance and continued use. Though these powers provide Congress with a capacity to influence national security and warmaking, the decision to use aggressive military force is to reside largely, if not solely, with the executive.[14]

Leaving the analysis of approaches to the war powers as a simplistic dichotomy of partisanship for one of the political branches can make participants in the debate bristle,[15] and a strict institutionally instrumental approach to the topic obscures more than it enlightens. While the practical effect of instantiating the variety of scholarly treatments of the war powers may rightly be categorized in terms of institutional partisanship—the overarching result being a justification for and encouragement of either a greater legislative or executive role in the initiation of

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[14] As Philip Bobbitt puts it, Congress has the "first and last word" when it comes to warmaking: it can decide to create and fund the military and it subsequently decide to decommission it or specifically prohibit its use in a particular instance, but in general the decision to use the existing military lies with the executive. See Philip Bobbitt, "Review: War Powers: An Essay on John Hart Ely's 'War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath,'" *Michigan Law Review* 92, no. 6 (May 1, 1994): 1390.

[15] For example, Louis Fisher and David Adler argue that they are constitutionalists and that it is the U.S. Constitution that is a Congressional partisan when in comes to the power to initiate war: "On matters of war, the Constitution Sides with Congress." Fisher and Adler, "The War Powers Resolution," 18; See also Fisher, "A Constitutional Structure for Foreign Affairs," 1060–1061; Adler, "Constitution, Foreign Affairs and Presidential War-Making," 948–949. Of course many commentators on all sides of what has been characterized as institutionally partisan divide make claims to constitutional fidelity. In many ways this interpretive disagreement over constitutional meaning *is* the war powers debate, or at least it is how it has been commonly conceived. The implications of the ongoing institutional partisanship, and the primacy of a legalistic approach for understanding and addressing the war powers, are discussed below.

military hostilities—breaking down the constitutional arguments and models of each camp to a more refined granularity and a greater theoretical depth reveals important differences relevant to the prospects for constituting—establishing and maintaining—such differing visions for the American way of warmaking. Upon closer inspection the common categories of institutional partisanship not only split over *what* the broad balance of authority to initiate hostilities is supposed to be,[16] but they also splinter over *how* their models for the use of military force are to be constituted in practice. In short, underlying the common war powers debate over the institutional balance of power are competing theories about how such a balance of power is to be politically constituted. These distinctions have important implications for the viability of the competing models for warmaking and for their political evaluation and prospective reconstitution.

The predominate framing of the war powers debate has been from the vantage point of legal constitutionalism—centering on constitutional interpretation, statutory clarification, and ultimately judicial review to clearly establish the authority over, and the powers related to, the use of military force. This viewpoint holds the rule of law as a preeminent value for republican government: public power must be precisely authorized and governed by law.[17] Clearly delineating in law "who can do what, and

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[16] That is, whether they might be categorized as partisan towards congressional or executive authority over warmaking.

[17] Judith Shklar termed the worldview that rule following is a distinct moral good "legalism," and criticized it as inapt to, and distorting of, many aspects of politics. See Shklar, *Legalism*. For related critiques of legalism in the American constitutional order see Elkin, *Reconstructing the Commercial Republic*, 97–98; Silverstein, *Law's Allure*, 3. The promise and perils of legal constitutionalism for the war powers is taken up in detail in chapter 3.

how" is to guard against arbitrary, factional, or tyrannical government and ensure predictability, fairness, and propriety—aspiring to a government of laws and not of men.[18] Of particular concern is the constraint of executive power, deemed the "most dangerous branch"[19] because of its direct control over the organized means of violent force. Under a primary version of this legalistic approach, formally settling foundational questions, such as who has the authority to begin offensive military force, is one of the primary functions of a written constitution and constitutionalism.[20] Accordingly, the Constitution's precepts in regards to warmaking should be clearly established and then upheld and implemented by all parties in accordance with the rule of law: abided by the political branches, reaffirmed by judiciary in any dispute, and entrenched in the public's understanding of their constitutional order. From this perspective, the unsettled state of the war powers—constitutional ambiguity and the seemingly interminable competing claims to constitutional propriety, sometimes called a stalemate,[21] with each institutionally partisan camp asserting its view of the

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[18] This last phrasing mirrors John Adams' adaptation of the longstanding aspiration of the republican political tradition. Harrington, following Machiavelli and Cicero before him, looked towards establishing a political system that is "an empire of laws and not of men."

[19] See for example, "The Most Dangerous Branch? Mayors, Governors, Presidents, and the Rule of Law: A Symposium on Executive Power"; Flaherty, "The Most Dangerous Branch."

[20] Alexander and Schauer, "On Extrajudicial Constitutional Interpretation"; Zeisberg, "The Relational Concept of War Powers," 168. Zeisberg terms this the 'settlement thesis,' which she rejects in favor of a more politically grounded approach to the constitution of the war powers, discussed in chapter four.

[21] For example, H. Jefferson Powell describes the usual war powers debate as "a shrill, bootless exchange of briefs." Powell, *The President's Authority over Foreign Affairs*, 25; See also Treanor, "Fame the Founding and the Power to Declare War."

proper balance of power under the Constitution while discretionary executive war power[22] continues and expands—is highly problematic[23] and calls for remedy.[24]

The foundational proposition of legal constitutionalism that law is the standard to which government should be held leads directly to a heavy emphasis on the judiciary to resolve this unsettled state of affairs. For law to rule, under this view, there must be a sole authoritative interpreter to which all others defer.[25] And given corresponding views that courts are the proper custodians of the law and legal

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[22] Benjamin Kleinerman offers a succinct definition: "Discretionary executive action claims authority in the absence of [well-established and well promulgated] laws or even in disobedience of them." Kleinerman, *The Discretionary President*, x. For a classic statement, see John Locke, *Second Treatise on Government*, Article 164.

[23] Gordon Silverstein describes legalism as when a political or policy issue gets framed as a struggle between "the rule of law" and "the abuse of power." Silverstein, *Law's Allure*, 8. Discussions of executive discretion in warmaking then are premised on concern over arbitrary control over the state's martial power, where arbitrariness is understood as the exercise of power in the absence of, or contrary to, law.

[24] While a commitment to the rule of law is often the key driver of a view towards settling the constitutional debate, a corresponding rationale is that ending the ongoing dispute can engender more productive disputes over policy—that is, settlement will focus debate on the wisdom of a particular use of force. For the former view, on the priority of the rule of law, see Adler and George, "Introduction," 6. For the latter, see Powell, *The President's Authority over Foreign Affairs*, xv–xvi. Of course, while many Congressional and executive partisans agree that a settlement of the constitutional debate over the war powers would lead to better policy, they disagree on what that settlement should entail. Congressional partisans insist that "collective decision-making"—and thus a settled requirement for Congressional authorization prior to the initiation of warfare—is key to the development of wise policy. Executive partisans counter that the "functional superiority" of presidents in terms of information, expertise, and dispatch make it the proper site for decision-making on the use of force, and thus should be unfettered of legal constraints. Compare Adler, "Constitution, Foreign Affairs and Presidential War-Making," 957 and Powell, 97. Thus it is important to note that the emphasis of settlement is never an argument for *mere* legal settlement, that is, that any settlement of the debate will do, but rather for a particular model of warmaking of which legal settlement is a necessary element, bringing us back to the debate once again. These issues are discussed further in chapters 2 and 3.

[25] Alexander and Schauer, "On Extrajudicial Constitutional Interpretation."

reasoning, and that the Constitution is higher law, it follows that the Supreme Court is to be the ultimate site for resolving the debate regarding institutional authority over the initiation of non-defensive military force.[26] Where the written Constitution is not specific and clear enough to settle, or keep settled, foundational distributions of institutional power, it the Court's role to tie down any open-endedness over time, defining and entrenching the basic structure of government through case law. However, while many scholarly contributions to the war powers debate can be understood at least in part as briefs designed to sway any prospective decision by the Supreme Court on matters relating to war,[27] it has not made a definitive ruling on the authority to initiate force, continuing the constitutional ambiguity and propagating the debate that under the strongest version of legal constitutionalism it ought to clearly resolve.[28]

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[26] A concise summary of this formulation of constitutionalism, from a critical perspective, can be found in Elkin, *Reconstructing the Commercial Republic*, 98.

[27] That is to say they are pitched at the level of constitutional interpretation. While many contributions to the ongoing debate can arguably be characterized as being directed at a broader audience in addition to the Court—including members of Congress, presidents, political advisors, the commentariat, as well as towards swaying the constitutional sense of the citizenry—they still aim to replace the contemporary contestation over the war powers with formally entrenched settlement. That is, they not only seek to bring about a political consensus on the proper constitutional process for the initiation of military force, a necessarily contingent ordering, but they also seek to end the dispute—and thus bind future political actors—through legal means. The ideal is to unify constitutional meaning and practice, for the foreseeable future if not in perpetuity, in order to return the focus of political actors solely to the particular policy choice at hand. The logic of formal settlement points towards the Court as ultimate constitutional interpreter, and thus the focal point for such efforts. While pragmatic considerations have spurred a broader approach, the view towards legal settlement—and the Court as its steward—remains pivotal.

[28] Though the commonly held view that the Court has largely abstained from a definitive ruling on the constitutional allocation of authority to initiate force, as well as from interventions in foreign policy generally, is generally correct, its role in the

A second track of legal constitutionalism follows from concerns over the relationship between persistent legal ambiguity and executive discretion, as it aims to establish a formal settlement of the war powers debate through the use of statutory framework legislation. Such devices, recently dubbed "super-statutes"[29] or "mini-constitutions,"[30] are efforts at constitutional construction[31] that seek to replace the contestation-inducing, discretion-enabling ambiguity of the written constitution with rules designed to regulate the future behavior of the executive branch. In general, framework statutes aim to temper the contemporary tendency towards broad executive discretion within wide zones of legal indeterminacy by establishing clear legal guidelines for policymaking, eliminating ambiguity and narrowing zones of discretion to the extent possible.[32] Statutory clarification and regimentation are to

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construction of the contemporary working constitution of the war powers has hardly been neutral. Through related decisions it has sent signals that have shaped the expectations, available means, and actions of the political branches in their struggles over the power to initiate force. See Silverstein, *Law's Allure*, 209–242; Silverstein, *Imbalance of Powers*. For a discussion, see chapter 3.

[29] William Eskridge Jr. and Ferejohn, *A Republic of Statutes*.

[30] Tulis, "Constitutional Decay and the Politics of Deference"; Or as Mark Tushnet describes: "The constitution outside the Constitution consists of statutes enacted by Congress." Tushnet, *Why the Constitution Matters*.

[31] Whittington, *Constitutional Construction*, 1–19. Both tracks of legal constitutionalism, judicialization and statutory regimentation, can be understood as efforts of constitutional construction. The *form* of any construction, and particularly how it is to be maintained—its boundaries created, monitored, judged, enforced, and revised—is closely connected to an underlying view towards the proper *form* of constitutionalism, a key element of the analysis that follows.

[32] They thus seek to close Constitutional "grey holes" with highly specific statutes. For a description and expression of concern over legal black and grey holes see Dyzenhaus, *The Constitution of Law*; for an argument that they are inevitable, see Posner and Vermeule, *The Executive Unbound*, 89. One way to understand the claims of some executive partisans is as an argument for the legitimacy of Constitutional "black holes," areas of pure executive discretion formally established and entrenched

bring executive power under the rule of law where the constitutional text, and the constitutional practice it has engendered,[33] has failed to do so.

In the area of national security, and particularly for the use of military force, vague clauses of the Constitution—such as those vesting the President with "the executive power" of the United States,[34] as "Commander in Chief" of the armed forces,[35] and that "he shall take Care that the Laws be faithfully executed,"[36] matched with Congress's powers to raise and regulate the military and to "Declare War"[37]—have engendered the ongoing debate described above and have also provided space for the construction of constitutional orders[38] particular to warmaking.[39] Framework

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by the written constitutional document, and thus not properly constrainable through ordinary law.

[33] The proper role of prior practice in the construction of the constitution of the war powers, and thus for the legitimacy of executive constraint or discretion in warmaking, is a persistent point of debate in the scholarly literature. Of primary import is whether, and what contours of, past practice should be understood as precedent, legitimating a construction. But how a precedent is viewed depends on whether one looks through the lens of legal or political constitutionalism. The tendency here again is towards legalism, with past practice held to properly influence how the judiciary—as proper custodian of the Constitution and legitimator of any construction—will rule. From the vantage point of political constitutionalism, the nature and import of precedent differs depending on the perspective of the branch of government. The topic of past political practice and its relationship to legal and political entrenchment—that is, to constitutionalism rightly understood—is taken up in more detail in chapters 3 and 4.

[34] U.S. CONST. art. II, sec. 1, cl. 1.

[35] Art. II, sec. 2, cl. 1

[36] Art. II, sec. 3.

[37] Art. I, sec. 8, cl. 11-16.

[38] It should be noted here that there is a recurring critique of works that utilize the terms constitution and constitutionalism in relation to politics not directly tied to a written constitution. Examples include Adrian Vermeule rejecting as overly broad Eskridge and Ferejohn's discussion of "super-statutes" as constitutional, as well as Jacob Levy's review of Richard Bellamy's *Political Constitutionalism*, where he argues that Bellamy's equation of political constitutionalism with majoritarian political rule renders his notion of constitutionalism virtually meaningless. See

statutes such as the War Powers Resolution of 1973, as well as recent proposals to replace it, aim to construct a new constitutional consensus on the process of warmaking, bolstering the rule of law through law. Where a question such as "how the United States should decide for war" is not convincingly answered by reference to the written constitution, or by a decisive ruling by the Supreme Court, the approach of legal constitutionalism insists that any ambiguity be settled through comprehensive and carefully drafted framework legislation. Such legislation seeks to prospectively delineate the extent of executive discretionary authority in warmaking and specify the requirement of, and procedures for, further legislative authorization for any military action beyond what is sanctioned as a standing matter.

Vermeule, "Review: 'A Republic Of Statutes: The New American Constitution'"; William Eskridge Jr. and Ferejohn, *A Republic of Statutes*; Levy, "Political Constitutionalism." What follows relies upon and explicates a conception of constitutionalism—the ordering of ordinary politics—that is broad enough to include elements of the political order even beyond framework statutes, but not stretched so thin as to include *everything* that might be considered political, and to entail that everything—and anything—goes, particularly pure decisionism. At its most general, the political constitution can be understood as a complex ordering of politics that, expanding on A.V. Dicey's description of constitutionalism, includes not only "rules" but *anything* "which directly or indirectly affect the distribution or the exercise of the sovereign power in the state" *and*, as Mark Tushnet describes, "rests on aspects of the nation's political structure—*some rooted in the Constitution, others not*—that are…recalcitrant to change. Dicey, *Law of the Constitution*; Tushnet, "Political Constitution of Emergency Powers," 1462, emphasis added.

[39] The war powers debate might be best understood as competing efforts at constitutional construction. However, a critical and under-examined element of that struggle is the *form* that such attempts at political ordering and entrenchment commonly take. *How* any constitutional construction is to be enforced and maintained over time is key to the potential for its success, and durability. This is a question of political constitution, of which legal constitutionalism is one kind, with its own inherent tendencies and limitations. Chapter three questions the efficacy—existing and potential—of legalistic constitutional constructions of the war powers, while the subsequent chapters develop a view toward the prospects of more politically grounded constructions.

However, while executive power is to be clearly authorized, and thus constrained, by settled law, this approach to the construction of the war powers runs into recurrent limitations in its capacity to tether presidential discretion to initiate military force. Statutory mechanisms become the subject of interpretive debate to an even greater extant than the written Constitution, as there is often contestation over the constitutionality of their provisions as well as what they are to entail as a matter of ordinary law. Partisans of the executive branch argue that a framework statute such as the War Powers Resolution is an unconstitutional restriction on the presidential power established by the written Constitution,[40] while the slightest ambiguity in the statutory language can be exploited to make a case for greater executive discretion under that same law.[41] The constitutional ambiguity and contestation that the statutory framework was to settle, by constructing a constitutional consensus, is instead replicated on a more distinctly legal plane. Statutory framework legislation can thus create its own legal black and grey holes, constructing a legal scaffolding that, due to the power of unilateral executive action[42] and departmental interpretation,[43] can end up enabling the executive discretion it aims to constrain.

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[40] Yoo, *The Powers of War and Peace*, 160; Turner, *Repealing the War Powers Resolution*.
[41] Wang, "Whatever Happened to the War Powers Act Controversy?"; Ackerman, "Obama's Illegal War in Libya."
[42] Moe and Howell, "Unilateral Action and Presidential Power."
[43] Paulsen, "Most Dangerous Branch." Departmental interpretation—of the Constitution as well as ordinary law—is merely one aspect of unilateral executive action.

One response of legal constitutionalists to this prevalent weakness is to push for greater judicial defense of the rule of law[44]—reliable clarification and enforcement through case law that insists on clear legal authorization for executive action, narrowing the bounds of executive discretion to the extent possible. A related alternative is a view towards drafting exceedingly precise statutes—so clear and explicit that the clauses would be difficult for executive lawyers to interpret away and easier for courts to enforce. However, there are significant reasons to question Congress' contemporary capacity and motivation to enact such finely tuned legislation.[45] And the judiciary has not eagerly welcomed such a robust role, either as promoter of a thick conception of rule of law—with its attendant strict separation of powers[46]—through the development of Constitutional common law or in regards to the construction and maintenance of comprehensive statutory regimes.[47] Ultimately,

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[44] Franck, *Political Questions Judicial Answers*; Dyzenhaus, *The Constitution of Law*.

[45] Some are inherent to legislation, for example there is a limit to the circumstances that can be legislated for in advance—novel circumstances necessarily will arise. Others have to do with political circumstances particular to the United States Congress as presently constituted—for example the underlying motivations of individual members of Congress and the capacities as a two-party, two-chamber legislature to set, police, and enforce limits on executive power. The political foundations that lead to statutory vagueness—a *de facto* delegation to courts and executives characteristic of legal grey holes—and abdication of reliable *post-hoc* oversight and sanction, as well as the prospects for reconstituting a more durable, deliberative, balance of power emerge throughout this work.

[46] That is, an aversion to, and wherever possible constriction of, executive discretion.

[47] Courts often use doctrines of standing, ripeness, and mootness to avoid entering the fray on matters of national security, particularly when the case does not involve individual rights—such as the use of military force abroad. When the judiciary does rule on such matters, it tends to focus first on protecting and promoting the judiciary's own institutional standing and prerogatives—maintaining its claim as ultimate constitutional steward and avoiding institutional fights it cannot win. This can yield rulings that construct a legal ecosystem amenable to executive discretion in the absence of clear and active Congressional opposition. These tendencies and their

the approach of legal constitutionalism to the constraint of executive discretion—a focus on better law and a stronger judiciary—must contend with the persistence of contestation over constitutional and statutory meaning and the realistic prospects for constitutional settlement enforced by courts and abided by the political branches.[48] This pushes to the forefront of the debate the inevitability of *some* executive discretion[49]—action in the absence of, or contrary to, law—particularly in the area of national security, but also the fact that law is only one kind of check on public power.[50] Perhaps more importantly, adherents of the approach from legal constitutionalism to the war powers debate must grapple with the very real possibility that a *primarily* legal approach to constraining executive discretion not only can engender, through law, that which it seeks to proscribe, but that a predominating legalism enervates and displaces other political mechanisms that might better contest

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implications for the viability of legal constitutionalism as a model for constraining executive discretion are discussed more fully in chapter 3.

[48] Legal constitutionalism at full tilt is a complete commitment to "the rule of law project": aspiring to limit the exercise of arbitrary governmental power through good law (process, form, precision) and good adjudication and enforcement (efficient, specialized courts). See Dyzenhaus, *The Constitution of Law*. For a detailed proposal of a constitutional amendment to instantiate a robust conception of legal constitutionalism specifically for the use of military force, see Martin, "Taking War Seriously."

[49] This is the nub of the first half of the provocative argument found in Posner and Vermeule, *The Executive Unbound*; For an argument in favor of the rule of law project in light of the inevitability of discretion, see Shane, "The Rule of Law and the Inevitability of Discretion."

[50] Thus while "[l]aw has its limits," "informal enablement and constraint of power are at least as important as the formal aspects embodied in the rule of law." Lazar, "Making Emergencies Safe for Democracy," 507, 509; While this is particularly pertinent to discussions of "states of emergency," it holds true for any area of executive discretion, even in less exciting recesses of the administrative state. For a further discussion of the inevitablity of constitutional flexibility, see Lazar, "Why Rome Didn't Bark in the Night."

and constrain discretionary executive war power. When taken as the preponderance, if not the entirety, of the constitutional system, legal constitutionalism—which aspires to discipline the exercise of power with the rationality of formal processes—undermines the political foundations of a constitutional order where the exercise of power is reliably subject to deliberative constraints.[51]

An alternative approach to the war powers is from the vantage point of political constitutionalism,[52] which takes the enduring nature of competing claims to

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[51] Said differently, legal constitutionalism is an aspiration towards one version of a political constitution, with its own tendencies and limitations, whose own ordering must be politically constituted. One argument of this work is that legal constitutionalism is an inadequate theory of political constitution in relation to the use of military force. However, law and politics are on a continuum—or rather law is one particular end of a spectrum of politics—and while pervasive legalism can undermine certain kinds of politics, the limitations of law (and concerns about executive discretion) can be mitigated, and some of its promises can be bolstered, through the attentive construction of other elements of the political constitution. That such political mechanisms are central to the constitutional design of the American regime is discussed below and in more detail beginning in chapter 4. Avoiding legalism in the working constitution would be helpful, and perhaps is necessary, for reconstituting a deliberative constitutional system for war. It is unlikely, however, that a turn away from legalism will be a sufficient condition for such a reconstitution given other aspects of, and developments in, the broader political constitution related to warmaking. Such considerations are discussed in the second half of this work.

[52] This term has been used elsewhere, and this analysis draws upon, but is distinct from, prior theoretical conceptualizations. See for example, Bellamy, *Political Constitutionalism*; Thomas, "Recovering the Political Constitution"; Tushnet, "The Political Constitution of Emergency Powers"; Tushnet, "Political Constitution of Emergency Powers"; There are also more distant connections to popular constitutionalism such as Kramer, *The People Themselves*. The analysis herein draws most deeply on Elkin, *Reconstructing the Commercial Republic*, especially Part II, "The Political Constitution of the Commercial Republic." More particularly, a theory of political constitution situates a particular lawmaking order within an institutionally comprised constitutional order, which itself is animated by the broader constitutive modes—political and social forces—of the political order that are only diffusely connected to the written constitution but deeply intertwined with the lawmaking it enables. For a succinct characterization, see Elkin, "Constituting the American Republic," 224-225. The contours of this broader conception of political constitution

constitutional authority—and thus some measure of executive discretion—as not only given but desirable, and places this dynamic central to its model of constitutionalism. Eschewing the absolute primacy of legal settlement and judicial supremacy for limited government, this approach holds that in a republic, as a matter of political fact, there will necessarily be contestation over policy as well as the translation of written constitution into constitutional practice. Under this view, the design of the U.S. Constitution reflects and reinforces this tendency, establishing and harnessing such contestatory forces to discipline power with power in a fashion that promotes the public interest. In Madison's classic formulation, "ambition must be made to counteract ambition."[53] This is particularly so in the area of national security, where the written constitution has been aptly described as "an invitation to struggle for the privilege of directing American foreign policy."[54] The prospect of the use of force abroad not only stirs up divergent views regarding the wisdom of any particular martial action—over specific goals and the appropriate means to achieve them in light of developing circumstances—but also over the proper contours of the warmaking order within which such deliberation, decision, and reevaluation takes place. This politics of war largely centers on the primary branches of government and its elements are intertwined, as each branch will have a unique perspective to on questions of policy as well as on the apposite institutional roles in the decision process for war, while also having constitutional bases to assert their respective

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in relation to the war powers—with the warmaking order understood as unique kind of lawmaking order—are discussed in the second half of this work.

[53] Madison, Hamilton, and Jay, *The Federalist Papers*, No. 51.

[54] Edward S. Corwin, *The President: Office and Powers*, 4th rev. ed. (New York: New York University Press, 1957), 171.

positions. These bases are claims based in constitutional interpretation as well as structural ones arising from the basic characters of the institutions the Constitution calls into being.[55] The perennial war powers debate is thus both a sign, and element, of a constitutional politics of warmaking that emerges from the constitutional design.

However, despite the growing body of scholarship that purports to reject a legalistic approach to the war powers,[56] there remain significant disagreements within this emergent approach on how the political constitution of the war powers is to be understood. Such differences have important consequences not only for evaluating the contemporary working constitution, that is whether the constitutionally structured politics that ultimately yields the decision for war functions well, but also for the prospects for reconstituting a deliberative constitutional system for war given contemporary conditions.[57] While the view towards a political constitution where a the precise contours of a flexible warmaking order are determined politically—at root

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[55] Jeffrey K. Tulis, "The Two Constitutional Presidencies."

[56] Powell, *The President's Authority over Foreign Affairs*, 25; Yoo, *The Powers of War and Peace*, 8; Silverstein, *Imbalance of Powers*, 6; Zeisberg, "The Relational Concept of War Powers"; Griffin, *Long Wars and the Constitution*.

[57] The term "deliberative system" was introduced into the scholarly literature on deliberative democracy by Jane Mansbridge in an effort to highlight the importance and connection of "everyday talk in formally private spaces" to the deliberations and actions of the "public decision-making assembly." See Mansbridge, "Everyday Talk in the Deliberative System," 212; In an essay in the same collection, Jack Knight raises the question of the role of the Constitution in deliberative democracy, particularly whether certain constitutional processes are a precondition of deliberative democracy or whether a strong theory of deliberative democracy demands that constitutional processes must also be the subject of democratic deliberation and decision. Knight, "Constitutionalism and Deliberative Democracy"; The analysis of the constitutional politics of warmaking that follows works towards a conception of the political constitution *as* a deliberative system, of which the warmaking order, constitutional order, and broader constitutive political order are interconnected elements. For a recent collection of scholarship on deliberative systems Parkinson and Mansbridge, see *Deliberative Systems*.

an emphasis on the political enablement and constraint of executive discretion—is found in select works of executive and congressional war powers partisans alike, the former comprise the bulk of the proponents of such a view.[58] This trend is due in part to view among many legislative war power partisans that the constitutional interpretation they offer should be a normative trump that settles the ongoing dispute through the processes of legal constitutionalism described above. But it also stems from an important practical factor: the existing overall conditions of the contemporary constitutional order are favorable to permitting broad discretionary executive power to initiate war. At present, constitutional flexibility in the area of warmaking bounded by existing political checks entails executive dominance over the use of military force. Corwin's "invitation to struggle" has become Koh's "why the President almost always wins in foreign affairs."[59]

One thin variant of political constitutionalism hews to a strict realism, allowing few constitutional strictures that can aid in the evaluation of either a particular decision to use military force or the broader ordering of such a warmaking process. Beyond the fact that some formal participation on the part of both Congress and president is required for the use of military force, and a generalized notion that contestation can result from this, at its core it is a view that the use of military force is and should be determined by whatever the president can get away with—anything

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[58] The political constitution understood as "arrangement that allows for a substantial degree of executive initiative and discretion within a framework of political checks," where "congressional assertiveness…usually puts a ceiling on presidential power." Bessette, Joseph M. and Tulis, Jeffrey K., "On the Constitution, Politics, and the Presidency," 24, 26.

[59] Koh, *The National Security Constitution*, 117–153.

goes. Another strain of contemporary scholarship on the constitution of the war powers transforms a functional analysis of the contemporary institutional balance on matters of war into constitutional prescription. This is an argument that the constitutional design not only was to allow—through constitutional ambiguity or abeyance[60]—the possibility of executive initiative in war, but that it was institutionally and politically structured to promote it. Under this view the current state of the working constitution, characterized by the dominance of discretionary executive initiative over the use of force, should not be a subject of constitutional critique or reconstruction. Prominent advocates of executive discretion argue against legalism because they wish to largely affirm the basic contours of the contemporary warmaking order as in line with the constitutional design, while seeking to mitigate certain problems related to legalistic forms of institutional contestation.[61] Though this

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[60] Silverstein, "U.S. War and Emergency Powers"; Foley, *The Silence of Constitutions*. Nodes of constitutional ambiguity or abeyance are related to, but not necessarily coterminous with, constitutional grey or black holes. Claims of institutional authority, particularly executive authority, have a more tenuous claim to formal grounding in the former than in the latter. However, because sites of constitutional ambiguity are open ground for constitutional construction, what might be called constitutional white holes can increasingly become grey or black as the construction is legalized and thus suffers from the weaknesses described above and elucidated in chapter 3.

[61] Yoo, *The Powers of War and Peace*; Powell, *The President's Authority over Foreign Affairs*; Weinberger, *Restoring the Balance*; And more generally see Crovitz and Rabkin, *The Fettered Presidency*. Legal constitutionalism is thus by no means wholly inconsequential for the war powers in practice. As we will see, though ostensibly rejecting the constitutionality of clearly fixed lines of constitutional authority aspired to by legalism, Yoo smuggles in an element of formalism into his account of the constitution of the war powers in order to prohibit Congress from using law as an element of the *political* constraint of executive discretion. While the third chapter depicts certain perils of a pervasive legal constitutionalism for ordering the politics of war—that it can engender less transparent and deliberative decisions for war—this does not entail legal mechanisms for ordering politics are either constitutionally illegitimate or necessarily inconsequential. Instead they should be

version of the political constitution of the war powers allows a role for Congress, in that has its own constitutionally based claim of authority regarding the use of military force and has specifically enumerated constitutional powers to assert it, it largely glosses over any consideration of whether Congress is substantively fulfilling its role in the constitutional design as a matter of course and whether it reliably can do so as a matter of practical and political reality. It characterizes contemporary alarm over presidentially initiated warfare as overwrought, with Congress's power over appropriations[62] along with the disciplining effects of public opinion[63] and media scrutiny[64] enough to moderate executive excesses, while claiming that legal fetters by their nature run counter to the fundamental constitutional design and are unlikely to be effective.[65] Accordingly, any critique of American warmaking should be based on policy rather than constitutional requirements for the decision process for war, and largely directed towards the "decider" in the oval office.

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analyzed in terms of their interdependent relationship with other elements of the political constitution; while insufficient on their own and problematic when taken as the whole of constitutional construction, they can serve a useful role within a well-constituted deliberative system for war.

[62] Yoo, *The Powers of War and Peace*.

[63] Posner and Vermeule, *The Executive Unbound*.

[64] Goldsmith, *Power and Constraint*.

[65] McGinnis, "The Spontaneous Order of War Powers"; Posner and Vermeule, *The Executive Unbound*. Posner and Vermeule term the concerns articulated by those they characterize as "liberal constitutionalists" regarding executive discretion as "tyrannophobia." Scholars such as McGinnis see the contemporary working constitution as an adaptive, though nearly predestined, outcome of the constitutional design due to the tension between the generality of law and the specificity of security threats. In contrast, Posner and Vermeule triumphantly claim that "Madisonian oversight has largely failed," that the functioning of the constitutional system could not really have been otherwise, and that an executive unbound by law and effective oversight by the other branches is—insofar as it is subject to free elections, a free media, and a free market—is just fine.

A thicker theory of political constitutionalism moves beyond strict formalism and functionalism to offer norms for assessing the operation of a variable warmaking order drawn from the political forms that the written constitution calls into being. It highlights that the system of separated institutions sharing power is not only an elaborate mechanism to prevent the factional—unlimited, arbitrary—exercise of power due to its concentration in partisan hands but also a means for facilitating reflection, choice, and action towards the common good. From this perspective the politics of warmaking can be constitutionally evaluated on the extent the branches clearly express their distinctive institutional viewpoints on the use of force and review and respond to those of the others in institutionally distinct fashions. But while the written constitution formally secures a measure of distinctiveness within and responsiveness among the branches on matters of war, the extent to which the norms of political constitutionalism are upheld by the warmaking order is variable, dependent on its elaboration into practice over time by the branches themselves. A robust theory of political constitutionalism thus pushes scholarly inquiry on the war powers towards a consideration of the preconditions of a deliberative interbranch constitutional politics of war that involves the continual reassessment and reconstruction of the warmaking order, and thus the branches' own roles within it, to achieve broad deliberation on the prospective use of military force in light of developments in the nation's security context. In short, the argument that follows is that rather than a problem to be resolved, the seemingly interminable war powers debate—questions on how the United States should decide for war—should be recast as a central axis around which a deliberative constitutional order for war should

continually turn; and that the ordering of a constitutional politics characterized by systemic deliberation must itself be politically constituted.

To bring us to this conclusion, the arc of this study proceeds as follows. Chapter Two describes the contemporary working constitution of the war powers and the conventional war powers debate within it. It then reframes the debate from a focus on constitutional interpretation to settle the boundaries of institutional authority in war to a focus on the form of constitutionalism—the process for ordering ordinary politics—that is best suited to reliable and broad deliberation on such questions of constitutional construction. Chapter Three analyzes the predominant approach to the constitution of the war powers, legal constitutionalism. After describing the promise and process of the legal entrenchment of a separation of powers, it highlights how this approach is largely a contemporary phenomenon in relation to war powers and that when legal constitutionalism is pursued as the whole of constitutionalism it can undermine the purposes to which it aspires. Chapter Four turns to consider a more fully political constitutionalism, a conception with roots in the American founding and which has seen a revival in recent scholarly discussions. Political constitutionalism accommodates continual discord over the proper boundaries of institutional authority in war and the inevitability of some executive discretion as inherent and potentially salutary elements of the political order. But the flexibility of the warmaking order that emerges from such constitutional politics does not entail anything goes, but instead can be judged by the extent the branches engage in recurring interactions that amount to systemic deliberation, a standard drawn from the political form of the constitution itself. This study concludes with a sketch of how

processes of legal constitutionalism might be integrated into the deliberative interbranch warmaking politics aspired to by political constitutionalism and a view towards the broader political foundations of a deliberative constitutional system for war, each subjects of construction by the institutions of government themselves.

Chapter Two

The Constitution of the War Powers: Discretion, Discord, and Debate

> *In a constitutional order…the exercise of power must be authorized, justified, and constrained.*[66]

Introduction

On the orders of the President, the United States began firing Tomahawk missiles into Libya on March 19, 2011.[67] The US military involvement, continued through October of that year, would include over 110 missiles shot from US warships, extensive strikes from American military airplanes,[68] and the offensive use of armed unmanned drones.[69] No regular American forces were used on the ground, but small-scale clandestine operations were reported.[70] This martial action was an essential part of a multi-state coalitional intervention to establish a no-fly zone in Libya called for by the United Nations Security Council,[71] to protect civilians as well as the rebels who would ultimately overthrow the regime of Muammar Gaddafi. While the monetary cost to the United Sates for the military mission would exceed

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[66] Brandon, "War and the American Constitutional Order," 13.
[67] In a letter notifying Congress, two days later, President Obama stated that "at my direction, U.S. military forces commenced operations…in Libya." Obama, "Letter from the President Regarding the Commencement of Operations in Libya"; Fisher, "The Law," 178.
[68] Associated Press, "Libya Hit With 112 Cruise Missiles in First Phase of Allied Assault."
[69] Hopkins, "Drones Can Be Used By NATO Forces in Libya, Says Obama."
[70] Mazzetti and Schmitt, "Clandestine C.I.A. Operatives Gather Information in Libya."
[71] UN Security Council, *Security Council Resolution 1973 (2011) [on the situation in the Libyan Arab Jamahiriya]*, 17 March 2011, S/RES/1973(2011), available at: http://www.unhcr.org/refworld/docid/4d885fc42.html [accessed 22 November 2012].

one billion dollars,[72] there were no American casualties and the mission, conducted under the auspices of NATO, was widely deemed a success as a matter of both policy and execution.[73] Despite largely positive reviews from policy experts, the use of American martial force in Libya stoked a perennial, and often heated, debate on the constitution of the war powers. Political figures, scholars, and prominent voices of the commentariat were, once again, metaphorically "up in arms" over the process of warmaking, clashing over the constitutionality, legality, and propriety of the broad executive discretion to use military force characteristic of the contemporary United States, and on full display in the intervention in Libya.

The primary point of contention centered on the fact that this six-month long military action occurred without any explicit authorization, or specific appropriations, from the United States Congress.[74] President Obama, who as a presidential candidate argued against both the constitutionality and prudence of executive discretion to use offensive military force,[75] initiated and continued the intervention in Libya without ever asking for, or receiving, formal Congressional authorization or special funds to support it. In contrast to the preceding presidential administration, which openly

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[72] Rettig, "End of NATO's Libya Intervention Means Financial Relief for Allies."
[73] Daalder and Stavridis, "NATO's Victory in Libya."
[74] Ackerman, "Obama's Unconstitutional War."
[75] In a December 2007 interview with *Boston Globe* reporter Charlie Savage, then-Senator Obama said: "The President does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation….As Commander-in-Chief, the President does have a duty to protect and defend the United States. In instances of self-defense, the President would be within his constitutional authority to act before advising Congress or seeking its consent. History has shown us time and again, however, that military action is most successful when it is authorized and supported by the Legislative branch. It is always preferable to have the informed consent of Congress prior to any military action." Obama, "Barak Obama's Q&A"; Fisher, "The Law," 177.

argued that the executive has a constitutional prerogative to use military force as it sees fit,[76] the Obama administration insisted that the United States military actions in Libya had been both legally authorized and consistent with the bounds set by existing statutory frameworks. Initially, the administration argued that the Security Council Resolution, under the United Nations Charter, made the use of force lawful.[77] The claim of legal authority was supplanted with an assertion that "the United States had transferred responsibility for the military operations…to the North American Treaty Organization (NATO)," under which United States military forces remained engaged in the fight.[78] Later, to counter claims that the duration of the conflict would entail a violation of the clear limit, set by statute, on the length of any use of military force without formal Congressional authorization, the executive branch argued that "the President was of the view that...the operations in Libya [were] consistent with the War Powers Resolution…because [they were] distinct from the kind of 'hostilities' contemplated by the Resolution's 60 day termination provision."[79] For the Obama administration, questions of the constitutionality of the military intervention in Libya

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[76] An opinion of the Office of Legal Council (OLC), written by John Yoo in 2001, stated: "We conclude that the Constitution vests the President with the plenary authority, as Commander in Chief and the sole organ of the Nation in its foreign relations, to use military force abroad." Yoo, "The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them."

[77] Koh, "Statement Regarding Use of Force in Libya."

[78] Obama, "President Obama's Letter About Efforts in Libya"; Fisher, "The Law," 179; Despite the claim that NATO had taken over, an active duty American Admiral was at the top of the chain of command for the operations in Libya, and he ultimately reported to the Pentagon. See Ackerman and Hathaway, "Death of the War Powers Act?"

[79] "White House Report to Congress on Libya." June 15, 2011. Also see Wilson, "Obama Administration.". Report available at http://www.washingtonpost.com/wp-srv/politics/documents/united-states-activities-libya.html.

were moot because, they argued, the executive had been granted the legal authority, from disparate sources, to initiate and continue military force as it, in consultation with the allies of the United States, deemed necessary.

Prominent commentators and select members of Congress strongly disagreed, calling the American use of military force against the Gaddafi regime in Libya unauthorized, and thus both illegal[80] and unconstitutional.[81] Senator Jim Webb,[82] Representative Dennis Kucinich,[83] and Representative Ron Paul[84] were among the loudest Congressional voices, and there was some talk that Congress as a whole might act to limit or stop the intervention.[85] While the House of Representatives did pass several resolutions seen as symbolic rebukes of the President's actions,[86] no measure passed both houses of Congress to limit, stop,[87] or authorize[88] the ongoing

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[80] Ackerman, "Obama's Illegal War in Libya"; Kopel, "The Libyan Intervention Is Not Wholly Legal."

[81] Ackerman, "Obama's Unconstitutional War."

[82] Webb expressed his concern that "we have been sort of on auto-pilot for almost ten years in terms of presidential authority in conducting these types of military operations absent the meaningful participation of the Congress. We have not had a debate…this isn't the way that our system is supposed to work." Webb, Andrea Mitchell Reports Transcript - On Libya.

[83] Kucinich argued Obama's decision to use force without Congressional authorization "would appear on its face to be an impeachable offense." Sarlin, "Dennis Kucinich."

[84] Kapur, "Ron Paul: Libya No-Fly Zone 'Unconstitutional.'"

[85] Allen and Cogan, "Did Obama Lose Congress on Libya?"

[86] "Bill Summary & Status - 112th Congress (2011 - 2012) - H.RES.292 - THOMAS (Library of Congress)"; Steinhauer, "House Rebukes Obama for Continuing Libyan Mission Without Its Consent"; Steinhauer, "House Spurns Obama on Libya, but Does Not Cut Funds"; Fahrenthold, "House Passes Another Libya Rebuke of Obama."

[87] "Bill Summary & Status - 112th Congress (2011 - 2012) - H.CON.RES.51 - THOMAS (Library of Congress)"; Fahrenthold, "House Rebukes Obama on Libya Mission, but Does Not Demand Withdrawal."

[88] POLITICO, "Kerry May Scrap Libya Resolution."

military intervention. Although Congress never specifically appropriated funds for the half-year long military operations, they were supported through the use of money appropriated to the Department of Defense for general purposes.[89] On June 15, ten members of the House of Representatives sued the Obama Administration to cease American military involvement in Libya, based on a claim it was in violation of the War Powers Resolution.[90] The suit was dismissed, four months later and eleven days before the termination of conflict, for lack of standing.[91] American military participation in the fighting in Libya continued until the United Nations voted to end the operations, over six months after they had begun.[92]

The fires of the contemporary debate on the constitution of the war powers, which flared up in response to the military action in Libya, are fueled by a widespread perception of an ascendancy of discretionary executive power over the initiation of force beginning at the end of World War II and unseen in prior eras. Even though warmaking has been arguably the American way since its inception,[93] "[t]he vast majority of the uses of the American armed forces have occurred since 1900, and many of the more recent uses of force have occurred in the absence of any explicit congressional authorization."[94] Since the 1950s every president, with the exceptions

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[89] Ackerman, "Obama's Unconstitutional War."
[90] War Powers Resolution of 1973, 50 U.S.C. 1541-1558.
[91] Schoenberg, "Libyan War Lawsuit Against Obama by 10 U.S. Lawmakers Thrown Out by Judge."
[92] "UN Security Council Votes to End Libya Operations."
[93] According to Mark Brandon "the United States has been at war or engaged in significant military action for most of its corporate life….[I]t is not unfair to characterize the United States as a warrior state." Brandon, "War and the American Constitutional Order," 11.
[94] Weinberger, *Restoring the Balance*, 3.

of Dwight Eisenhower and arguably Barack Obama, has advanced a claim of executive prerogative over the decision to use military force—arguing that the Constitution affords presidents the discretionary authority to order American military forces to engage in hostilities in order to advance national interests and defend the country from immanent threats.[95] And the list of examples where presidents have made good on this rhetorical claim about their Constitutional authority in regards to war has grown as the claim has been repeated in varying ways through successive presidencies without clear and sustained countering by the other branches of government.[96] A glimpse of this be seen in the aftermath of the political controversy attending the Libyan intervention regarding the process, or lack thereof, for the initiation of military force. While there were minor stirrings among politicians to change how the United States goes to war following the intervention,[97] and despite

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[95] Silverstein, *Law's Allure*, 221. The Eisenhower administration was not unambiguously committed to the constitutional necessity of formal Congressional authorization for warmaking. While Eisenhower fervently voiced his desire for Congressional participation in warmaking, his secretary of state, John Foster Dulles, suggested that the executive had the constitutional authority to deploy troops to defend Formosa and intervene in the Middle East following the Suez Crisis without Congressional assent. See Silverstein, *Imbalance of Powers*, 75–6. The Obama administration, as seen above, has leaned on claims of existing authorization to avoid the question of inherent executive authority over warmaking.

[96] Silverstein, *Imbalance of Powers*. Executive claims of a unilateral constitutional authority to deploy and use the armed forces have not been consistently matched with unilateral action in practice. The reasons why presidents seek Congressional authorization, and why formal authorization is actually granted, given the claim of independent executive authority, are integral to the political constitution of the war powers.

[97] In May, 2012, Senator Jim Webb, who was not running for reelection, introduced legislation requiring Congressional approval for troops sent abroad for humanitarian interventions. It was never brought up for a vote. See "National Defense."

the earlier recommendations of a blue-ribbon commission to study the war powers,[98] political and popular interest in the issue of the war powers was quick to fade.[99]

Scholarly evaluation of the history of this state of affairs is markedly divergent, often hinging on respective interpretations of the constitution. For those who interpret the Constitution as requiring explicit legislative authorization for the use of military force the contemporary list of illegal—presidentially initiated—offensive wars inauspiciously begins with the Korean War, where "respect for constitutional government ended abruptly in 1950."[100] It continues with Congressionally unauthorized military actions in Cambodia in 1969,[101] Panama in 1989,[102] Iraq in 1990,[103] Haiti[104] and Bosnia in 1994,[105] Iraq in 1997-98,[106] Afghanistan and Sudan in 1998,[107] Yugoslavia in 1999,[108] and in Libya in 2011.[109]

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[98] Baker III and Christopher, *National War Powers Commission Report*; Baker III and Hamilton, "Breaking the War Powers Stalemate."
[99] Wang, "Whatever Happened to the War Powers Act Controversy?".
[100] Fisher, "The Law," September 1, 2005, 591; Adler, "The Constitution and Presidential Warmaking," 182.
[101] Silverstein, *Imbalance of Powers*, 90, 92; Whether the Gulf of Tonkin resolution authorized the Cambodian incursion is a matter of deep disagreement. For a clarifying discussion, see Zeisberg, "The Relational Concept of War Powers," 174.
[102] Fisher, *Presidential War Power*, 165.
[103] Ibid., 175.
[104] Ibid., 180.
[105] Ibid., 183.
[106] Ibid., 192.
[107] Ibid., 196.
[108] Ibid., 198, 264; Fisher, "Unchecked Presidential Wars." It should be noted that the question of whether there was appropriate Congressional authorization in each of these uses of force is contentious—centering on what kinds of legislative actions are to be considered authorization, complicated by ambiguity over what the War Powers Resolution of 1973 (WPR) authorized as a standing matter, and compounded by uncertainty on how such debates should be resolved, if at all. These issues—of authorization, interpretation, and settlement—are taken up in more detail below.

From this viewpoint, the contemporary history of warmaking by the United States is one of constitutional violations and a blatant disregard for the rule of law. The intervention in Libya is yet another example of a worrisome trend: the arbitrary use of military force by presidents, disciplined neither by standing laws or contemporaneous processes of democratic authorization.[110]

For others who argue against the propriety—constitutional and prudential—of formal *a priori* constraints on the use of force this trend tends to be seen as an understandable, permissible, and even positive adaptation to the contemporary security environment. One commentator recently described this view:

> Beginning with President Truman's actions during the Korean War, the threat posed by the Soviet Union to the United States during the Cold War demanded that decisions about troop deployments and the initiation of hostilities be made quickly, decisively, and flexibly. Such traits, embodied in the president's constitutional role as commander in chief, are the strengths of the executive branch, and thus the pendulum of war powers swung towards the president.[111]

Here the US Constitution is to be understood as a highly flexible instrument, permitting if not promoting the executive discretion over the use of force that the international context, it is said, currently demands. The contemporary history of American warmaking, with its widely varied inter-branch relations that include the Congressionally unauthorized uses of force that many scholars cite with alarm, is

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[109] Ackerman, "Obama's Unconstitutional War"; Ackerman, "Obama's Illegal War in Libya," June 20, 2011.

[110] Beyond that a president ordering the initiation of military force had been elected no more that four years prior and that the military apparatus he utilizes had been appropriated for no more than two years prior—neither necessarily contemporaneous or specific to a particular use of force.

[111] Weinberger, *Restoring the Balance*, 134. Weinberger further argues that the focus on the initiation of military force distracts from a more pressing concern with the protection of domestic liberties.

instead proof of a constitutional design that is largely operating as designed, which the establishment of formal constraints would unduly hinder.[112]

The contemporary history of the use of force by the United States, and the divergent and seemingly intractable common approaches to evaluating it, sets the primary backdrop for engaging the question of the constitution of the war powers. Despite the heated reactions of certain politicians, scholars, and popular commentators to the intervention in Libya, the contemporary *modus operandi* of the war powers—"executive initiative, congressional acquiescence, and judicial tolerance"[113]—was once again replayed. Unlike the mercurial attention given to warmaking by politicians and public alike, scholarly interest persists, pursuing the underlying questions of how to evaluate and address the working constitution of the war powers, tending the embers of the debate until the—inevitable—next use of force brings the issue back into the national consciousness, however briefly. But much like the popular debate surrounding the intervention in Libya, a scholarly consensus is hardly at hand and the disagreement often presents as institutional partisanship, an argument either for a greater Congressional or executive role in warmaking grounded in constitutional interpretation. This highlights a tension between the durability of the war powers debate—reliable institutional partisanship based in claims of constitutional fidelity, arguments with scholarly pedigrees that are echoed in political

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[112] "Practice as it has developed over the last few decades generally falls within the range of permissible outcomes allowed by the Constitution." Yoo, *The Powers of War and Peace*, 8; See also Kleinerman and Munoz, "Weekly Standard."

[113] Koh, *The National Security Constitution*, 5; Koh's description was written as a prelude to a critique, well before he became a legal advisor to the President working to legally justify an executive use of force. For a related characterization, in approval, see Yoo, *The Powers of War and Peace*, 13.

and popular discussions on the occasion of the use of force—and a widely noted trend towards increased executive discretion over warmaking in practice. Thus while one can expect heated, constitutionally inflected debate when the United States uses military force without explicit Congressional authorization, the use of military force without clear legislative approval can now also be expected.

What should be made of this contemporary working constitution of the war powers, one characterized by deep dissensus over constitutional meaning paired with the emerging *de facto* settlement in favor of executive discretion evidenced by recent practice? To work towards a comprehensive understanding of the war powers and illuminate prospective paths beyond the seeming impasse in interpretation and practice, the remainder of this chapter proceeds as follows. The next section charts out the constitutional ground overtly agreed to by nearly all members of the respective war powers camps—in terms of founding aspirations and design—an important overlap rarely acknowledged as such. This sets the stage to spotlight the primary points of divergence in the constitutional interpretations of the war powers, the usual debate, in a different hue. While the discussion centers around the particulars of Congressional authorization for the use of force—when it ought to be required and what such authorization should entail—moving the analysis a step back from *what* the institutional boundary of power regarding the use of force ought to be under the Constitution to *how* such an important constitutional question is to be determined reveals an often obscured theoretical fault line that has real consequences for operation of the war powers in practice. The vantage point of how the separation and balance of powers in regards to warmaking is to be constituted—ordered over

time—brings important differences in the approaches to the constitution of the war powers into relief, whose distinctive promises and perils will be explored in subsequent chapters. Thus while the interminable war powers debate described here is an important part of the working constitution of the war powers at present, asking if, and how, such constitutional contestation ought to continue opens up space to better conceptualize the warmaking order and the prospects for its reconstitution.

Constitutional Common Ground: Separated Powers; Collaborative Warmaking

As they are today, national security concerns were a key concern at the American founding: an element of debate at the constitutional convention, a primary aspect of the written constitution, and an important touchstone in the lead-up to ratification. While there is some scholarly discussion over whether problems in foreign or domestic affairs under the Articles of Confederation were the primary driver of the movement to fix and ultimately replace them with a new framework of government, the powers dealing with national defense and relations with foreign entities were clearly on the minds of the framers and an integral part of the constitutional design.[114] The Revolutionary War had exposed problems of the lack of centralized governmental power under the Continental Congress and subsequently the Articles of Confederation, particularly in relation to foreign affairs, which the drafters of the US Constitution sought to address. The pre-ratification writings of James

[114] For a concise discussion of problems of governing foreign affairs under the Articles of Confederation see Ramsey, *The Constitution's Text in Foreign Affairs*, 29–48; Adler and George, "Introduction," 4; Powell, *The President's Authority over Foreign Affairs*, 31.

Madison highlight this concern, as he stressed the external focus of the new compact as a primary selling point:

> [T]he powers delegated by the proposed Constitution to the Federal Government, are few and defined…[and] will be exercised principally on external objects, as war, peace, negotiations, and foreign commerce."[115]

While Madison's purposes here are at least in part rhetorical, designed to convince those wary of a strong national government that its powers would be limited in scope domestically, the discussions at the constitutional convention,[116] in other passages of the *Federalist*,[117] as well as the text of the Constitution itself lend credence to his emphasis on national security.[118] The founders had good reason to keep security concerns at the forefront of the constitutional design, as the infancy of the United States was a time of great national insecurity.[119] It had just recently concluded a war with Great Britain and had to be ready to contend with other security threats that might arise, including dealings with other European powers with colonial interests

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[115] James Madison, *Federalist* 45.

[116] Farrand and Matteson, *The Records of the Federal Convention of 1787*.

[117] Madison, Hamilton, and Jay, *The Federalist Papers*. For example, see *Federalist* 15, 22, and 47.

[118] The preamble identifies one purpose of the constitutional founding was to "provide for the common defense." Additionally, "[e]leven of the eighteen specific powers allocated to Congress in the Constitution are explicitly related to security." See Charles A. Stevenson, *Congress at War: The Politics of Conflict Since 1789* (National Defense University Press, 2007), 8. Also see Richard H. Kohn, *The U.S. Military Under the Constitution, 1789-1989* (New York: New York University Press, 1991), 71. In general it can be said that "the Constitution's text devotes as much space to war and military power as it does to any other foreign affairs subject. Ramsey, *The Constitution's Text in Foreign Affairs*, 218.

[119] Koh, *The National Security Constitution*, 83; Edling, *A Revolution in Favor of Government*, 76–88.

and ambitions in the Americas as well as with Native Americans on the frontier.[120] And as careful students of history, the founders knew that no matter the current international security context, security threats from abroad would be an enduring concern.[121] Establishing a capacity to defend and act against external threats was a primary, in not *the* primary, purpose of government—without it any other political purposes to which the political order aimed would be moot.[122]

However, the martial power that would likely be necessary to secure the nation against external threats carries with it its own kind of insecurity. Though the founders were keenly aware that protection against violence was a prerequisite to any other political aims, they also knew that the very means essential to achieving that security could be used in ways that conflicted with the other purposes to which the new political regime aimed, such as individual liberty and self-government, and potentially in ways that could ultimately undermine its security and very existence. A

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[120] Fisher, *Presidential War Power*, 268; Friedman, "Waging War Against Checks and Balances - The Claim of an Unlimited Presidential War Power," 213, 228; Ramsey, *The Constitution's Text in Foreign Affairs*, 29–48.

[121] In *Federalist* 34, Hamilton stressed potential security threats from abroad, in both the near and distant future: "A cloud has been for some time hanging over the European world. If it should break forth into a storm, who can insure us that in its progress a part of its fury would not be spent upon us? ...Let us recollect that peace or war will not always be left to our option; that however moderate or unambitious we may be, we cannot count upon the moderation, or hope to extinguish the ambition of others….To judge from the history of mankind, we shall be compelled to conclude that the fiery and destructive passions of war reign in the human breast with much more powerful sway than the mild and beneficent sentiments of peace; and that to model our political systems upon speculations of lasting tranquility, is to calculate on the weaker springs of the human character." Madison, Hamilton, and Jay, *The Federalist Papers*, No. 34.

[122] Consider John Jay's comments in *Federalist* 3: "Among the many objects to which a wise and free people find it necessary to direct their attention, that of providing for their *safety* seems to be first." Madison, Hamilton, and Jay, *The Federalist Papers*.

primary concern was that if unconstrained, martial power could be used in arbitrary or factional ways: directed internally to unnecessarily deprive the people of their liberties or externally in the pursuit of private gain based upon shared sacrifice—each contrary to the public interest. The former is a concern over domestic tyranny, the use of the military to institute government by coercion or force rather than self-government and the rule of law.[123] The latter is a worry that unnecessary uses of force—military adventurism or imperialism—would unduly burden the citizenry, weaken the republic, and even precipitate its decline. The founders knew that the historical tendency of executive ambition in war—a quest for individual fame, glory, and gain—might similarly lead presidents, if not properly constrained, to initiate wars contrary to the public interest.[124]

The overarching aspiration at the founding was that the nation's martial power ought to be balanced, at once effective for the national defense while constrained from arbitrary or factional use.[125] In historical terms, the American model for warmaking rejected the cumbersome distribution of power of the Articles of

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[123] Edling, *A Revolution in Favor of Government*, 101–105.

[124] Treanor, "Fame the Founding and the Power to Declare War"; Vermeule, "The Glorious Commander in Chief."

[125] One version of republican political theory casts such security concerns in terms of the principle of non-domination, where a republic must protect against private domination among individuals (*dominium*), domination by the state (*imperium*), and the threat of domination from other states (*imperium*). See Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997). Conspicuously absent from this framework is a discussion of domination over other states and peoples (imperium) *by* a republican regime, which at least in part hinges on the deliberative process for decisions to use military force.

Confederation[126] but was also a decisive turn away from monarchy and the English political theory and precedent that gave the executive great powers over war.[127] Though the drafters of the Constitution emphasized effective *national* security powers, granting unlimited authority to the federal government to raise, fund, and direct military forces,[128] they rejected the Lockean theory that all federative—foreign policy—powers, including and especially those related to warmaking, should properly reside in the hands of the executive.[129] The Constitution broke with established British practice, described by Blackstone, which placed the sole

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[126] Ramsey, *The Constitution's Text in Foreign Affairs*, 29–48; Edling, *A Revolution in Favor of Government*, 73–88. Under the Articles of Confederation the Congress acquired the sole authority of determining for war and peace, with the exception that the states were permitted to engage in warfare when invaded by enemies or threatened by native peoples. However, one of the Articles' primary flaws was a lack of power granted to the Confederate Congress to *effectuate* its authority on matters of national defense, as it was up to the states to raise and fund the military forces whose use the Congress might see fit to authorize. This distinction between authority and power, and in particular the understanding that control over the sinews of war—money and men—had been an (all too) effectual constraint on warmaking, was a critical consideration for framing the United States Constitution.

[127] See Fisher, *Presidential War Power*, 1–4; Adler, "The Constitution and Presidential Warmaking," 216.

[128] Hamilton emphasized the critical importance in the federal government having unlimited means to meet an unknowable security future in *Federalist* 23, where he argued: "These powers ought to exist without limitation, *because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them*. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed." Madison, Hamilton, and Jay, *The Federalist Papers*, No. 23, emphasis in original.

[129] John Locke, *Second Treatise on Government*, Articles 146-48; Fisher, *Presidential War Power*, 1. In light of the emphasis laid on Locke's political thought for supports of executive power in war, it is important to note that Locke insisted that the executive and the federative powers were to be "both Ministerial and subordinate to the Legislative, which as has been shew'd in a Constituted Commonwealth, is the Supream." Locke, *Second Treatise on Government*, Article 153 (emphasis omitted).

prerogative in war with the monarch, a power that could not be contested by any individual or other legal authority.[130] Though the powers of the national government necessary to warmaking would be unlimited in an absolute and formal sense, the ability for any one person or part of the national government to unilaterally take the country to war, and to continue military operations, was to be constrained by dispersing the powers necessary to effectuate war among the political branches of government. Congress was allocated the power to raise an army and navy, to fund and regulate any military force it created, to declare war, and to issue letters of marque and reprisal,[131] while any president as Commander in Chief was, as Alexander Hamilton put it, to "have only the occasional command of such part of the militia of the nation as by legislative provision may be called into the actual service of the Union."[132] And to ensure every Congress would need to affirmatively act to maintain the nation's material capacities for war, in times of peace as well as during active conflict, appropriations for armies were limited to a maximum of two years,[133]

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[130] Ibid., 2. Blackstone's analysis of British war powers is distinctly Hobbesian in its theory, seeking to unite the sword in the hands of one to avoid reconstructing an internal state of war in the process of protecting against an external one. See 2 William Blackstone, *Commentaries on the Laws of England* 238, 239, 257, 250 (1803).

[131] Letters of marque and reprisal were governmental authorizations for private seafaring interests to take up arms against a specified target, and whose success was rewarded with a prize. If unlicensed, such acts would be considered piracy; when authorized, privateers became an auxiliary naval force.

[132] Madison, Hamilton, and Jay, *The Federalist Papers*, No. 69.

[133] Congressional appropriations for the Navy are not limited under the Constitution, as it was seen as far less capable of oppressing the people domestically or engaging in protracted offensive warfare abroad on its own. For a discussion see Delahunty, "Structuralism and the War Powers," 1052. While the Air Force is generally understood to fall under the Army Clause, military appropriations for all branches are now done on an annual basis as a matter of course.

mirroring the biennial elections for the House of Representatives. Warmaking was to be a shared enterprise: the participation of both the legislative and executive branches—every Congress and each president—would be necessary to the use of military force.

This characterization of the broad aspirations of the constitutional founding in regards to warmaking is relatively uncontroversial and should be emphasized for what it is—constitutional common ground. While various contemporary analyses may quibble with the characterization of how much the American constitutional experiment was a break with historical and theoretical antecedents,[134] there was a clear effort to establish constraints on the use of military force by the executive and to induce Congressional interest in and influence over the prospect of war. This is evidenced by the fact that powers essential to warmaking were be separated so that the use of force would require the participation of multiple parties. Even the staunchest executive partisans acknowledge Congressional power of the purse and the power to commission and decommission military forces,[135] and the most fervent Congressional partisans accept that it is the president who has tactical command of

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[134] Unsurprisingly, executive partisans argue for greater continuity while those wary of unilateral executive discretion over the use of force assert a more decisive break. But even Yoo argues that, "Clearly the Constitution rejected the British system of a complete monopoly for the executive branch over the conduct of international relations." See Yoo, *The Powers of War and Peace*, 22; Fisher, *Presidential War Power*.

[135] Yoo, *The Powers of War and Peace*; Turner, *Repealing the War Powers Resolution*; Powell, *The President's Authority over Foreign Affairs*; Bobbitt, "Review."

the military in the field.[136] In a certain respect, then, there is broad agreement that the constitutional founding aspired to a model of warmaking comprised by some version of inter-branch deliberation and collaboration.[137] American use of military force would require the participation of both a representative and deliberative Congress—who at a bare minimum must act to provide the means for war and biennially appropriate to maintain it—as well as an executive primed towards action, and towards military victory once war is begun.[138]

It is over the further particulars of whether the Constitution additionally requires a more regimented and formalized process for the use of military force abroad, over the details of what kind of "legislative provision" is necessary to call a part of the "militia of the nation…into the actual service of the Union," where the divergence in opinion begins in earnest. This is largely a debate over whether a president can make use of the military that exists as he sees fit, if there are any standing constitutional constraints on the use of the martial apparatus that Congress has created and funded, and whether Congress can set statutory limits on the use of the standing military. But though the specific resolutions of these points of persistent disagreement, sketched in the next section, are critically important for the operation

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[136] Adler, "The Constitution and Presidential Warmaking"; Fisher, *Presidential War Power*.

[137] For an argument that preventing the use of the power of the state to serve unlimited—factional—purposes and developing deliberative forms of lawmaking are two primary elements of the public interest in a republic, see Elkin, *Reconstructing the Commercial Republic*, 132. A more detailed extension of this analysis to warmaking taken up in chapter four.

[138] For a discussion of the motivation of the executive to emerge victorious from military conflict, and thus to do what it takes to win a war that has been begun, see Vermeule, "The Glorious Commander in Chief."

of American warmaking in practice, it is a view towards *how* this persistent debate is to be resolved taken up in the subsequent section that lays the groundwork for a fuller understanding of the present constitution of the war powers and the prospects for meaningfully altering it.

War Authorization: Constitutional Ambiguity; Persistent Debate

The crux of the predominant framing of the contemporary debate on the constitution of the war powers is authorization: whether any non-defensive use of military force must be formally authorized by Congress, the proper form authorization must take, the extent to which Congress can set specific bounds on the use of martial force, and the extent of executive discretion over the initiation of force in the absence of a specific authorization or in violation of a specific limit. The range of answers offered to these questions often begin with an analysis of the meaning of the Declare War Clause,[139] but also draw upon broader analyses of the text and structure of the written constitution, its relation to historical antecedents, early American practice in war, as well as analyses of the decisions of the judiciary on related matters. The spectrum of interpretations of the Constitution on these issues in many ways *is* the contemporary war powers debate, as the particular way these questions about war authorization are resolved in practice largely answers the question of who takes the country to war. The conventional debate is an ongoing

[139] U.S. Const., art. I, sec. 8, cl. 11. "The Congress shall have Power to…declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."

effort to establish bright lines of authority on the use of military force, a view towards settling—clarifying and entrenching—the proper process for warmaking under the Constitution. The primary points of divergence in the scholarly debate on these issues are highlighted below before turning to a consideration of the underlying question of how—the constitutional form and process—these disagreements are to be settled, if at all.

As a matter of basic textual reading, there is much to be said for the view of Congressional partisans that the Constitution is rightfully interpreted as granting the sole power to authorize warfare to the legislative branch. Taylor Reveley was hardly exaggerating when he stated "[i]f we could find a man in the state of nature and have him first scan the war-power provisions of the Constitution and then look at war-power practice since 1789, he would marvel at how much Presidents have spun out of so little. On its face, the text of tilts decisively toward Congress."[140] Indeed, more than half of the specific powers allocated to Congress in the Constitution, "eleven of…eighteen" by one accounting,[141] are explicitly related to security, while those powers allocated to the executive branch are seemingly dependent on the legislature: "The President shall be Commander in Chief of the Army and Navy…when called into the actual Service of the United States" and shall have the power to make treaties, "by and with the Advice and Consent of the Senate."[142] But although the

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[140] Reveley, *War Powers of the President and Congress: Who Holds the Arrows and Olive Branch?*, 29.
[141] Charles A. Stevenson, *Congress at War: The Politics of Conflict Since 1789* (National Defense University Press, 2007), 8.
[142] U.S. Const., art. II, sec. 2, cl. 1 & 2. A vote of two-thirds of the senators present are necessary to approve any treaty.

Constitution formally allocated a great amount powers to Congress on matters of national security, any further specific role in sanctioning warfare reserved to Congress beyond creating and maintaining the means for war however is subject to broad disagreement.

One finds only a select few champions of the idea that the Declare War Clause should be read to require that Congress issue a highly formal declaration of war prior to any use of force, in the manner of previous historical eras. Those that do, emphasize the political benefits of an elaborate and regimented authorization procedure in terms of democratic deliberation and accountability rather than argue that the Constitution and early practice actually established such declarations, as a matter of formal constitutional precedent, as the only process for using force.[143] Instead, most analyses follow along with Alexander Hamilton's view that "[t]he ceremony of a formal declaration has of late fallen into disuse,"[144] to hold that formal declarations are not necessary prior to the use of force,[145] but break on what this

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[143] See Hallett, *The Lost Art of Declaring War*; Sidak, "To Declare War"; The potential benefits of a highly formalized process, or even a ritualized ceremony, to begin the use of force, in terms of emphasis on the solemnity of warmaking and an opportunity for democratic deliberation and accountability, should not be underestimated. The underlying political basis to engender such a process over time is, however, of critical concern. Indeed, a robust interpretation of the Declare War Clause to require a declaration of war in the highly formal mold of the past must confront the very real concern that this asks something that Congress at present is incapable of achieving. A detailed argument for this last claim can be found in Hallett, *Declaring War*. A broader discussion of the capacities and motivations of Congress to participate in warmaking, and potential ways to bolster them, is taken up in chapters 4 and 5.

[144] Madison, Hamilton, and Jay, *The Federalist Papers*, No. 25.

[145] In an early case that came before the Supreme Court, where a dispute between two private individuals over the payment due for the recovery of a ship by an American privateer turned on whether the United States was at war with France, the Supreme

entails for the meaning of the Declare War Clause. For executive partisans, Congressional power to declare war under the Constitution is wholly a tool to express a change in certain legal relationships, either in regard to other nations under international law,[146] or domestically as a trigger, and thus formal barrier, to legal changes that affect individual liberties during wartime. This latter reconstruction of the Declare War Clause would trade a Congressional claim to exclusive authority over the use of force abroad for a default presumption against the executive exercise of war powers directly related to individual liberties—confiscation of property, suspension of habeas corpus, etc.—without a highly formal Congressional declaration of war.[147]

Congressional partisans, in contrast, emphasize a broader conception of declaring war. For example, David Grey Adler argues that "at the time of the Framing, the word 'declare' had become synonymous with…'commence'; they both meant the initiation of hostilities."[148] Michael Ramsey, whose interpretation of the Constitution allows for greater executive authority over foreign affairs powers

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Court ruled that a Congressional statute had authorized "imperfect" war, and thus—for the purposes of the judiciary—that a formal declaration was not the only legitimate form of war authorization under the Constitution. *Bas v. Tingy*, 4 U.S. 37, 43 (1800). For a discussion, see Fisher, *Presidential War Power*, 25; Powell, *The President's Authority over Foreign Affairs*, 125. The topic of the war powers in the courts, including the significance of the subject matter of the cases the Supreme Court has taken up—usually involving questions of individual rights and property—is discussed in chapter 3.

[146] Yoo, *The Powers of War and Peace*, 44.

[147] Weinberger writes, "[T]he power to declare a war is not about the command, control, and deployment of the armed forces of the United States; rather it is about altering the legal domestic status of the United States from a peacetime to a wartime footing." Weinberger, *Restoring the Balance*, 10.

[148] Adler, "The Constitution and Presidential Warmaking," 187.

generally, agrees, highlighting that declaring war was understood in the founding era to be done through both formal statement as well as through the actual initiation of military action—either by word or by deed—both of which were reserved to the legislature.[149] A good amount of evidence from the founding era can be mustered to support this view. James Wilson, who during the constitutional convention argued for a break with prior practices on matters of war, because some of the prerogatives of the "British Monarch…were of a Legislative nature….[a]mong others that of war & peace,"[150] later argued to the Pennsylvania Ratifying Convention that,

> "[t]his system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large…nothing but our interest can draw us into war."[151]

Wilson held, and was attempting to convince others who would vote to ratify the Constitution, that the power to declare war would entail a collaborative inter-branch process going to war—no person or unitary council could take the nation to war at its own discretion, Congress as a whole had to be involved. In 1793 George Washington put forth his view on the constitution of the war powers, that "[t]he constitution vests the power of declaring war in Congress; therefore no offensive expedition of importance can be undertaken until after they shall have deliberated upon the subject and authorized such a measure." A few years later, Thomas Jefferson would state in a private letter to James Madison that his view was that the American constitutional

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[149] Ramsey, *The Constitution's Text in Foreign Affairs*, 218–38; For a similar argument, see Prakash, "Unleashing the Dogs of War."
[150] Farrand and Matteson, *The Records of the Federal Convention of 1787*.
[151] *How* the constitutional "system" was to guard against the nation being hurried into war, and whether those mechanisms still function as intended, is of critical importance, and is discussed throughout what follows.

order required some significant form of Congressional assent prior to the use of force, which would be an effectual means to constrain executive warmaking: "we have already given...one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay."[152] Later, Madison would write back to Jefferson that, "[t]he constitution supposes, what the History of all Governments demonstrates, that the Executive is the branch of power most interested in war, and most prone to it. It has accordingly with studied care vested the question of war in the Legislature."[153]

Given these expectations of the founding era that Congress would play an active role in any use of force but that every use of force would not necessarily be authorized by highly formal declarations of war, what, then, is proper form of Congressional participation in warmaking? In the terminology of the founders, precisely how is the question of war "vested in the Legislature," and by what "legislative provision" is the "militia of the United States" to be "called into the actual service of the Union?" Or, put slightly differently, how should Congress "deliberate[] upon and authorize[]" the use of military force, and what distinguishes an "offensive expedition of importance" requiring such authorization from the defensive or minor military operation that does not? The scholarly disagreement on these questions is broad and nuanced, ranging from the issue of what "war" means "in the constitutional sense," thus necessitating authorization prior to initiation, to the particulars of the constitutionally permissible forms of such authorization. The former

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[152] Thomas Jefferson to James Madison, Sept. 6, 1789, *The Papers of Thomas Jefferson* (J. Boyd, ed. 1958), 397.
[153] James Madison, Letter to Jefferson, 1798.

delves into the boundaries of the executive's plenary defensive power and the scope of executive discretion to order military action short of war. The latter involves issues such as delegation, contingent and restrictive authorization, appropriations as authorization, as well as states of emergency, *post-hoc* authorization, and executive prerogative. A brief survey of these foci of the conventional war powers debate highlights not only its complexity, but also its underlying legal tone, which raises the higher-order question of how these critical specifics regarding the institutional boundaries of power over warmaking are to be resolved.

The matter of what "war" is "in the constitutional sense" is at heart a question of what kinds of military action are within the constitutional purview of independent executive authority, either because they are non-offensive or because they are minor enough not to amount to war. Just as there are competing interpretations of "Declare"—which arguably should be interpreted to grant Congress the authority to initiate war through either word or action—so too are there different constitutional meanings ascribed to "war" that influence what kinds of military operations are to require such prior Congressional authorization. One side of this particular piece of the conventional war powers debate focuses on the use of martial force for defensive purposes. While most scholars of the war powers agree that presidents have the constitutional authority to use the military to defend the nation and its citizens against attack, the precise boundaries of such authority are not without controversy—turning on the distinctions between defensive war, preemptive war, and preventative war. Defensive war at its most basic is military action in response to an ongoing attack, while preemptive and preventative war involve military action in advance of an

imminent or emergent threat, respectively.[154] Madison's commonly cited rationale for the textual change from "Make War" to "Declare War" in the Constitution was to permit presidents to "repel sudden attack."[155] Seemingly straightforward on its face, there is great complexity among the proffered views on the proper boundaries of this authority. Just how far can an executive-led response to an attack go before Congress must authorize—when does repelling turn into attacking? And what, if any, authority do presidents have to stop a pending or likely attack on the United States without prior Congressional sanction—how exigent must the circumstances be to legitimize discretionary executive action?[156] The other side of this issue touches on whether the constitutional concept of "war" includes all forms of military aggression by the United States, or whether less substantial uses of force—"police actions,"

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[154] For discussions of these issues based on the Constitutional text and early historical practice see Ramsey, *The Constitution's Text in Foreign Affairs*, 243–248; Sofaer, *War, Foreign Affairs, and Constitutional Power*, 212. For discussions of when preemption and prevention are morally justified and their status under international law, see Delahunty and Yoo, "The 'Bush Doctrine': Can Preventative War Be Justified?"; Walzer, *Just And Unjust Wars*; Doyle, *Striking First*. It is critical here to distinguish the question of when Congressional authorization is, or ought to be, required to initiate military force from the question of whether any particular kind of military action ought to accord with prevailing moral standards or with international law. However, to the extent that an understanding of what distinguishes an 'imminent' threat that does not require *a priori* authorization is informed by those standards it becomes difficult to make a clean separation.

[155] While some commentators take an additional step to ascribe this executive authority to the president as Commander in Chief, the only mention of institutional authority in regards to repelling aggressors is found in a power granted to Congress: "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." Article I, sec. 8, cl. 15.

[156] Ramsey, *The Constitution's Text in Foreign Affairs*, 245–248.

"humanitarian interventions," or "hostilities"—are something short of war and thus must not necessarily be subject to prior Congressional authorization.[157]

The particulars of the conventional debate on the constitutionally permissible forms of authorization are no less complicated. One point of contention deals with whether Congress can, and in certain respects already has, delegated its authority to authorize military force through the treaty process,[158] for example through its participation in NATO or the United Nations Security Council.[159] Delegation also involves the issue of whether Congress can authorize, but not require, the use of military force against a specific target, leaving the decision of whether to actually initiate hostilities at the discretion of the president.[160] Contingent authorizations entail executive discretion regarding short-term military interventions subject to sunsets or

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[157] Ibid., 246.

[158] Delegation through treaty can be understood as an indefinite authorization of uses of force that meet certain conditions, an authorization that is highly entrenched as a formal matter though not quite as entrenched as a Constitutional amendment. In a delegation through treaty, executive authority to initiate military force is ostensibly contingent upon the terms of the treaty. What might be understood as a kind of executive discretion over warmaking from a domestic perspective would, as at least a formal matter, be dependent upon nondomestic political processes and conditions. A treaty of this kind, then, is best understood as a kind of standing, *contingent* delegation—a delegation of authority not only to the executive but also potentially to international political authorities. Further discussion on delegation, its relationship to authorization, and their relationship to contingency, are taken up in the next section.

[159] For an argument that U.N. police actions using the American military do not require specific Congressional authorization, see Franck, "Declare War? Congress Can't"; For a critical discussion of this view, see Fisher, *Presidential War Power*, 170. For a detailed discussion of these issues, see Fisher, "Sidestepping Congress."

[160] Ramsey, *The Constitution's Text in Foreign Affairs*, 250. For example, Congress may wish to strengthen the hand of the president on the international stage by making more credible any threat of a military response through an authorization that leaves initiation to the discretion of the executive.

other future procedural hurdles,[161] a situation arguably created by the War Powers Resolution.[162] Restrictive authorizations allow for the use of force against a particular enemy or in a particular theater of war. While this is what one might think of when discussing war authorizations, the notion of restriction here revolves around whether legislative authorizations are required at all[163] and also over the extent and nature of the limitations Congress can set on the use of force through statute. At what point do statutory constraints unconstitutionally impinge on executive power as Commander in Chief—can Congressional limits on the use of the military be *too* specific?[164] This is related to discussions over prerogative, the constitutional permissibility for presidents to transgress any formal boundaries on the use of force insofar as such discretionary

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[161] Standing authorization that is indefinite—requiring specific legislation or other formal process to repeal—might be properly termed a delegation, whereas long-term authorization for military operations with a sunset or other set future procedural hurdles might best be understood as contingent delegations.

[162] One reading of the War Powers Resolution (WPR) is as a Congressional delegation of authority to presidents to use force largely as they see fit for up to 60 or 90 days without (further) Congressional authorization while prohibiting military action from continuing beyond that time period without specific additional authorization by Congress. The WPR is discussed in further detail in chapter 3, but it is worth recalling here the Obama administration's claim that the military intervention in Libya didn't amount to the level of "hostilities" that trigger the conditions of the statute.

[163] A requirement of any kind of Congressional authorization for the initiation of force entails some restriction, though the particulars matter in practice. If clear and specific authorization is required before any use of force, then any authorized use of force would be restricted to the specific targets, locations, and timeframes delineated in the formal authorization. Any authorization less than a complete delegation would thus be in some way limited, and even a full delegation of authority to initiate force must be subject to at least biennial Congressional appropriations.

[164] For a discussion of the difficulty of establishing clean and clear boundaries between tactics, which are commonly argued to be properly within the sole purview of presidents, and more general matters of scope and strategy more commonly—but not universally—held to be subject to legislative constraint, see David J. Barron and Martin S. Lederman, "The Commander in Chief at the Lowest Ebb: Framing the Problem, Doctrine, and Original Understanding," 757–758.

action is conducted transparently, only when necessary, and made subject to political judgment as soon as possible after the fact.[165] The debate on the forms that constitute authorization continues with a discussion of whether appropriations for the military ought to be considered authorization and, if so, whether it supersedes any prior statutory restraint on the use of force.[166] Lastly, the debate engages the question of whether as Commander in Chief a president has the inherent authority to use the military that Congress has created as he sees fit, subject only to the political checks of the need for the military to be commissioned and appropriated for by Congress.[167]

In sum, we can best understand the conventional war powers debate as a disagreement on the particular resolutions to these issues, a spectrum of partisanship ranging from strong Congressional authority to strong executive authority over the initiation of military force. The most strident Congressional partisans argue for a requirement of explicit legislative authorizations prior to any non-defensive use of force abroad,[168] and for some, the more formal, ritualized, and specific the authorization, the better.[169] Under this view, the sole exceptions are those uses of

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[165] Thus an illegal act might be constitutional and even a clearly unconstitutional act can possibly become constitutional under certain conditions. For an enlightening recent treatment of executive discretion that explains these nuances by situating them in the history of American political thought, see Kleinerman, *The Discretionary President*.

[166] For a discussion, see Banks and Raven-Hansen, *National Security Law and the Power of the Purse*; Powell, *The President's Authority over Foreign Affairs*, 124–125; In brief, the latter argument is that since one Congress cannot bind the next, any appropriations in support of a military action without express limitation on its use effectively overrides any prior statutory restraint on the use of force. For an argument against appropriations as authorization see Ely, *War and Responsibility*, 26.

[167] This argument is most notably staked out in, Yoo, *The Powers of War and Peace*.

[168] Adler, "The Constitution and Presidential Warmaking," 184.

[169] Hallett, *The Lost Art of Declaring War*; Sidak, "To Declare War."

force absolutely necessary to defend against an attack before Congress can be consulted and asked to offer its authorization at the earliest instance after the initiation of hostilities.[170] While Congressional partisans are generally wary of delegations or indefinite authorizations of force, those against specific targets or within particular theaters of war are generally held to be constitutionally acceptable,[171] as there are no formal constraints on what the national government—Congress and president together—can do in terms of fighting abroad.[172] Less agreed upon are standing delegations, whereby Congress authorizes certain kinds of executive uses of force as a general proposition, essentially transferring the power to authorize such uses of force to the executive branch.[173] Though the answer to these questions on the specific kinds of authorization that are constitutionally permissible is

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[170] "The president's power is purely defensive and strictly limited to attacks against the United States…. All of the offensive powers of the nation…were located in Congress." Adler, "The Constitution and Presidential Warmaking," 189.

[171] But how long an authorization is acceptable and how long are authorizations valid? Louis Fisher argues that "Congress [has] no right to delegate war in perpetuity," intimating that authorizations have half-lives. Fisher, *Presidential War Power*, 193.

[172] Hamilton's argument in *Federalist* 23 regarding the broad power of national government—Congress and the president acting together—cited in note 60 above, was reaffirmed by the Supreme Court in *United States v. Curtiss-Wright Export Corp*., 299 U.S. 304 (1936). This case is often misinterpreted and its *dicta* cited as a precedent for an executive prerogative interpretation of the Constitution in foreign affairs. For a critical discussion see Silverstein, *Imbalance of Powers*, 26, 37–42. The question of the constitutionality of the use of force abroad when the executive acts without Congress, either when it is silent or against its expressed institutional position, was not at issue in the case nor part of the holding ruling of the Court. The judiciary's role in setting the institutional boundaries and process for the initiation of warfare is taken up in greater detail in chapter 3.

[173] Even contingent standing delegations are constitutionally suspect for some war powers Congressionalists. Louis Fisher, while not quite calling the delegation of authority to initiate hostilities for up to 90 days under the WPR unconstitutional, remarks that, "[t]he framers would never have allowed that kind of open-ended discretion." Fisher, *Presidential War Power*, 268.

important for the exercise of military force in practice, the question of plenary executive war power is critical, for if there is an inherent authority in the executive to initiate offensive military force the other particulars of the conventional debate are largely rendered moot.[174] Such plenary authority would undercut any argument for a constitutional requirement of formal authorization beyond appropriations, and may also entail that formal *a priori* constraints on the initiation and use of force—limits set by statute—would be unconstitutional.[175] This view also diminishes the relevance of prerogative to the war powers debate, as there would be little in the way of formal constraints on the use of force abroad that a president might violate.[176]

This overview of the predominant framing of the war powers debate around authorization and its focus on establishing bright lines of institutional authority—clarifying precisely when Congressional authorization is required and what forms are

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[174] Moot in terms of establishing constraints on the actual use of force. Formal clarification of the proper forms of Congressional authorization could still matter for issues of individual rights and private property that could hinge on whether war had been authorized by Congress. See Weinberger, *Restoring the Balance*.

[175] For example, Yoo argues that "placing a statutory straightjacket on war powers undermines the very flexibility…that the Framers understood the Constitution to establish." Yoo, *The Powers of War and Peace*, 160; Justice Jackson, in his well known *Youngstown* concurrence, referred to such legally indefeasible powers as "preclusive." *Youngstown Co. v. Sawyer*, 343 U.S. 638 (1952); For a discussion, see David J. Barron and Martin S. Lederman, "The Commander in Chief at the Lowest Ebb: Framing the Problem, Doctrine, and Original Understanding," 694. *Youngstown* is discussed in more detail in chapter 3.

[176] The power of the purse is the primary exception to this. Banks and Raven-Hansen argue that it is in the area of appropriations and spending where extra-constitutional executive action related to the use of force might rightfully occur: "The president…has the power, and perhaps the moral and political obligation, to respond to national security emergencies even before he has authorization or appropriation from Congress, but he must respond at his own risk, subject to subsequent 'legislative sanction and provision.'" Banks and Raven-Hansen, *National Security Law and the Power of the Purse*, 37.

permissible under the constitution—not only highlights the vast complexity of that task but calls into question how, if at all, this recurrent and seemingly intractable controversy attending the specific boundaries of power for use of military force is to be resolved. The particular resolution of these points of contention over the constitution of the war powers—which boundary-line within the spectrum above is put into political practice—is critically important as it would largely determine the process of American warmaking, or at least set its key contours. But once the debate moves from a strict requirement for a formal declaration of war prior to any offensive use of force, setting the boundaries of institutional power becomes exponentially more nuanced as it must navigate the many intricate choices described above.[177] The difficulty in establishing these lines of institutional power is compounded by the very fact that the variation in views of constitutional propriety on this matter is within the bounds of reasonable disagreement: none can be simply dismissed out of hand and political actors can conceivably be expected to continue to advance and adhere to different interpretations within the spectrum described above.[178] One only needs to look as far back to the response to the intervention in Libya in 2011 to see this phenomenon on full display. This points to a tension within the conventional war powers debate, as much of its underlying foundation rests on idea that there is, or

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[177] Even those who argue for a robust conception of the Declare War Clause must grapple with the fine distinctions separating defensive from offensive uses of force.
[178] On this point, and some political—constitutive—implications of such reasonable interpretive disagreement on related national security matters, see Tushnet, "Controlling Executive Power in the War on Terrorism," 2677. The import of this phenomenon, in particular that not all members of Congress reliably hew to the Congressionally partisan view of the proper constitution of the war powers as described above, will be picked up again in subsequent chapters.

ought to be, a constitutionally based resolution to these foci of debate: the arguments surveyed above are made for the purpose of their becoming the settled understanding and practice for the use of military force.

Often unstated, or at least not fully articulated and analyzed, however, is *how* any such boundary setting—the ordering of American warmaking—is to occur and endure. There are different ways of resolving such a political question politically,[179] and underlying the common debate over the distribution of institutional powers related to war are competing understandings about how the warmaking process is to be politically constituted. The distinction between legal and political constitutionalism, sketched below and detailed in subsequent chapters, has important implications for the ongoing debate over the proper boundaries of power described above, efforts to instantiate them, and for the decision to initiate of military force. This divergence in approach to constitutionalism is not only critical to the practicability of the varying schemas for the warmaking order but also to its political evaluation and prospective reconstruction. The form of constitutionalism is thus fundamental to the constitution of a durably deliberative constitutional system for war, an idea that will unfold throughout the remainder of this work.[180]

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[179] Elkin, *Reconstructing the Commercial Republic*, 153.
[180] Mansbridge, "Everyday Talk in the Deliberative System"; Parkinson and Mansbridge, *Deliberative Systems*.

Bounding War Powers: Two Forms of Constitutionalism

The aim of the conventional war powers debate towards demarcating the process by which United States comes to use military force often carries with it an important but often underemphasized premise: for an issue of such gravity as the exercise of martial power, the boundaries of institutional power that set the process for warmaking should be well established as a matter of constitutionalism. This entails that the particularities of the discussion above—when Congressional authorization is required, what forms of authorization satisfy that requirement, and what limits can be on warmaking through formal means—are to be properly understood as aspects of a constitutional debate, that there is a constitutional basis by which the disputes can be resolved, and that the conventional war powers debate ought to be settled accordingly. Undergirding much of the contemporary discussion on the war powers then is the view that ambiguity over the proper process for warmaking should be mitigated to the extent possible, the relevant boundaries of institutional power fixed as a matter of constitutional propriety. However, the process by which the precise boundaries of authority related to war are to be set is a constitutional question in its own right. This question of the form of constitutionalism, how the boundaries of the 'constitutional' are to be constituted—established and maintained over time—is a key distinction underlying the conventional debate on the constitution of the war powers that is often obscured by the emphasis on the particular foci described above. Refocusing the analysis on the constitutional processes for resolving the intricate questions that cumulatively constitute the warmaking process, moving the debate from the *what*—what the

distribution of institutional authority in war ought to be—to the *how*—how any such theory of the balance of power in war is to be translated into practice, sheds a critical new light on the very role the competing constructions of institutional authority have in constituting the warmaking process in practice.[181] Even more importantly, the approach to constitutionalism that necessarily underlies the variegated constructions of the war powers is critical to the very prospects for durably achieving any particular balance of powers for war to which they aspire.

That this question of 'how,' what constitutional process should determine the proper ambits of institutional authority over the use of military force, is fundamental to the conventional debate can be seen by extending the examination of some of the particular foci around which it revolves a bit further. Consider, for example, the questions of the constitutional strictures regarding the distinction between a defensive response to an ongoing attack and an offensive continuation of hostilities, or the parameters of institutional authority over defensive, preemptive, and preventative uses of force. Parsing these issues to determine when Congressional authorization ought to be required involves multifarious considerations, including the interpretation of the written constitution as well as nuances of *jus ad bellum* and international law, whose relevant differences and implications have been vigorously debated by philosophers, legal scholars, and politicians espousing a variety of reasoned and

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[181] The concept of constitutional construction has been described as a level of constitutional deliberation that "considers fundamental political principles," "structures future political practice," and "provides standards for political conduct." Keith Whittington, *Constitutional Construction*, 3-15.

reasonable positions.[182] The complexity of such issues and the difficulty of achieving a durable consensus on them highlight the importance of the process by which such boundaries are to be set. The question that opened the introductory chapter—"how should the United States decide for war?"—must be transformed into in a broader constitutional question: How should the competing, finely distinguished, conceptions of the proper process for warmaking under the Constitution be addressed and resolved in the American political order? At its core, this is a question of the form of constitutionalism; it is an inquiry into whether constitutional issues such as the institutional boundaries of authority over warmaking should be resolved through legal processes, ultimately clarified, entrenched, and enforced by the judiciary, or through other political processes. Underlying the various positions taken in the conventional war powers debate then are differing conceptions of, and approaches to, American constitutionalism, a choice between—or at least a tendency towards—legal constitutionalism or political constitutionalism.[183] This distinction is key to understanding the relationship between the competing constructions, the contemporary working constitution, and the prospects for its reconstitution.

The foundational place of this divergence is further evident in the ongoing dispute over delegation, which is concerned with the extent of discretionary authority

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[182] An ever-changing international security context complicates boundary drawing as well, as advances in military technology such as nuclear weapons can heighten the immediacy of security threats in ways relevant to the distinction between defense, preemption, and prevention.

[183] The "forms of constitutionalism" are characterized here in dichotomous terms—legal and political—for the sake of analytic clarity. Legal constitutionalism and political constitutionalism are more fully understood as counterpoints on a spectrum of political constitution, where legal and non-legal political processes take more or less precedence in ordering fundamental aspects of the polity.

over the use of force that can be granted to presidents by Congress—either through treaty or statute. Like many constitutional issues, there are two types of interpretive considerations: What are the constitutional boundaries for authorizing the use of military force abroad through treaties and statutes? And what does a specific treaty or statute mean for political practice—what in particular has been authorized? Of relevance here are whether standing authorization for military action can properly be given to presidents through treaties or statutes under the Constitution and whether under existing treaties or statutes presidents have actually been granted standing authorization to initiate military force—for example when in accordance with the United States' obligations under NATO, following approval by the United Nations Security Council, or under the terms of War Powers Resolution. Congressional and executive partisans alike worry about what can be done through treaties in regards to war authority, but in different ways. The most orthodox of the former argue that Congress cannot delegate away its constitutionally mandated role to authorize force, either to the executive or to international actors, as formal Congressional authorization is required before all non-defensive uses of force. Louis Fisher, for example, argues that Congress cannot "surrender to an international organization its prerogatives over war and foreign policy."[184] The most strident partisans of executive war powers argue against the constitutionality of *constraining* presidents through the treaty process, which would be an attempt to discipline discretion with foreign procedural conditions. John Yoo argues not only that "[b]ecause the president already has the domestic constitutional authority to initiate military hostilities without any

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[184] Fisher, *Presidential War Power*, 193.

authorizing legislation, he need not rely on treaty obligations for legal justifications [to initiate force]" but also that "presidents are not constitutionally or legally bound by international law."[185] A similar breakdown occurs in regards to statutory authorization, detailed above, where there is a multiplicity of views on whether any formal authorization is needed prior to the initiation of force, how broadly Congress can delegate authority to use force to presidents, and what limits—if any—Congress can set through statute on the use of force abroad.[186]

Though resolutions to these points of disagreement are critical to the practice of American warmaking, the persistent ambiguity and disagreement that characterizes the contemporary working constitution makes any clear and durable settlement appear dubious without a fuller view towards of the processes by which such a resolution is to be achieved. Excavating the framework of constitutionalism that necessarily underlies these competing constructions of the constitution of the war powers transforms the interpretive considerations discussed above to into constitutive questions: How—by what political process—are the boundaries for the use of military force to be established and enforced? Here in particular, how—by what political process—is the determination of what ambits of institutional authority can be properly set through treaties and statutes to be established and enforced? And how—by what political process—is what a specific treaty or statute actually authorizes to be established and enforced? This formulation brings the roles of all three branches of

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[185] Yoo, *The Powers of War and Peace*, 165, 172.

[186] Compare Yoo, *The Powers of War and Peace*; David J. Barron and Martin S. Lederman, "The Commander in Chief at the Lowest Ebb: Framing the Problem, Doctrine, and Original Understanding"; David J. Barron and Martin S. Lederman, "The Commander in Chief at the Lowest Ebb: A Constitutional History."

government in determining the boundaries of constitutional, and legal, propriety in regard to warmaking into the purview of the war powers debate, a broadened perspective that offers a different view of the conventional debate and its role in constituting the balance of institutional power for war.

Shifting the analysis from which constitutional construction is correct—based on constitutional exegesis, philosophical analysis, or pragmatic considerations—to the question of how such constitutional questions are to be decided politically spotlights the competing constructions discussed above in a new hue. The question of how is in part one of *who*—which political actors—needs to be convinced of the propriety of a given construction, and act accordingly, to bring it into being. The various constructions must be understood then as not only offering a theory of what those boundaries ought to be but also a theory, at least an implicit one, of the roles the branches of government ought to play in constructing the process for warmaking in practice—delineating ambits of institutional purview, monitoring practice, and sanctioning transgressions. Accordingly, the more self-conscious constructions of the war powers are pitched to convince the constitutional actors that they hold integral to resolving the dispute over the boundaries of power to instantiate that those ambits of institutional authority deemed proper by the construction. That a good deal of the scholarship that engages the war powers debate is legalistic in character—focusing on constitutional interpretation and case law—and that many proposals to set how the United States initiates warfare center on statutory delineations of the desired ambits of institutional authority reflects a view towards the priority of law, and the judiciary, for resolving constitutional disputes, bounding institutional authority and ordering

politics through formal constitutional entrenchment. The common forms of contemporary constitutional constructions of the war powers are thus both a sign and element of a widely held, but often unacknowledged, conception of the proper overriding form of constitutionalism.

A fuller, more political, conception of constitutionalism incorporates the idea that the construction of constitutional boundaries of institutional authority need not solely occur through formal means such as case law, statutory frameworks, and constitutional amendment. In the context of the war powers debate, such a view towards political constitutionalism can begin to be seen by taking seriously the argument—most often made by partisans of broad executive discretion over warmaking—that the bounds of institutional purview are rightfully established and maintained through the exercise of more basic, clearly enumerated, 'hard' powers. For example Congress's hard powers include commissioning the various elements of the military-security apparatus, appropriating for them, as well as its powers of contempt and impeachment while the hard powers in the executive include the veto and pardon.[187] The exercise of such powers roughly and contingently constructs the ambits of executive discretion, establishing a material and political basis upon which the use of military force depends.[188] Both the creation of that material basis for war

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[187] For a useful analysis of Congress's 'hard' and 'soft' powers, see Chafetz, "Congress's Constitution."

[188] Yoo argues, "*simply by refusing to do anything,* by not affirmatively acting to vote funds or to enact legislation, Congress may block presidential initiatives in our international relations. Without funding for the armed forces, for example, presidents will lack the weapons for war. Even with today's modern conflicts, waged by America's large standing militaries, the great expense in conducting war requires the president to seek supplemental appropriations from Congress. In the course of approving these measures, Congress can consider fully the merits of war, and it can

and its exercise are held to ultimately rest popular judgment expressed through elections, which has politically disciplining effects on institutions as they act in the light of past, and anticipation of future, electoral judgment. While executive partisans make this case in part to delegitimize legal constitutionalism on matters of national security and formally entrench a protected sphere for executive discretion—intimating that the judiciary should not enforce statutory limitations on the use of force, if not rule such efforts unconstitutional—their emphasis on the political enablement and constraint of discretionary executive power points to the importance of the informal—un-lawlike—aspects that order how the United States goes to war. From this vantage point, legal constitutionalism can be seen as but one particular approach to political constitution, its embrace of the formal ordering of politics a version of constitutionalism with unique advantages and limitations that can be compared and connected to more distinctly political orderings.

The distinction between legal constitutionalism and political constitutionalism as underlying approaches to the war powers can be starkly drawn out on one final point of debate that pops up in the scholarly literature: whether an unwilling president is compelled to use military force following an explicit Congressional authorization or Declaration of War, that is, whether Congress has the constitutional authority to mandate the actual use of force. The first point to emphasize with this issue is that it complicates the distinction between delegation and authorization, for if presidents can decline to execute uses of military force authorized by even the most formal and solemn Congressional means, then *any* Congressional authorization of military force

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easily forestall hostilities simply by refusing to appropriate a single dollar." Yoo, *The Powers of War and Peace*, 20.

is merely a specific delegation—giving a president legal sanction to use force against an authorized target at his sole discretion. While a situation where Congress affirmatively requires a use of force that a president firmly opposes might seem unlikely at present, such institutional positions are not unreasonable to imagine as presidents are not inherently interested in warmaking in all times and places and legislators may have reasons to push for certain uses of force despite their domestic costs.[189] The corresponding conflict that would be involved in such a scenario clearly implicates the constitutional boundaries of authority of the political braches related to the use of force—the relationship between legislative powers to Declare War and regulate and fund the military, and those of the Commander in Chief. The tension between these elements at its core is a question of the *how* of constitutionalism—whether such a constitutional question is to be ultimately resolved by a Supreme Court who has a preeminent claim over interpreting the written constitution and statutes and applying them to particular cases, or instead by the exertion of political pressure, Congressional or popular, on a pacifistic president in the face of bellicose legislature. Conversely, and perhaps more apropos to contemporary circumstances, given the Constitutional requirement for at least biennial military appropriations—now conducted annually as a matter of course—there is a built-in contingency where Congressional action is needed to create the possibility for new uses of force or

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[189] For a brief discussion of a statutory example of this from the Quasi-War with France, see David J. Barron and Martin S. Lederman, "The Commander in Chief at the Lowest Ebb: A Constitutional History," 970, note 90. For a discussion of President Cleveland's intimation that he would refuse to participate in warfare following a formal declaration of war against Spain, see ibid. 978, note 128; See also David J. Barron and Martin S. Lederman, "The Commander in Chief at the Lowest Ebb: Framing the Problem, Doctrine, and Original Understanding," 755.

continue ongoing military operations. In sum, *any* legislative enablement of martial power—formal, structural, material, and even rhetorical—helps to construct a framework for executive discretion in war, but this also entails that such discretionary power is always contingent and has the potential to be constrained. The extent of the contingency, and thus the prospects for constraining executive discretion, is tied to the levels of formal and political entrenchment—that is, the likelihood of effectual legal, material, or political checks on pending or ongoing uses of force.

The choice between forms of constitutionalism—here how the boundaries of institutional authority in war are to be established and maintained—is a political question, which can be resolved politically in different ways.[190] Though there may be a constitutional basis to argue for a particular resolution,[191] the process by which such

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[190] Again, the binary distinction between legal constitutionalism and political constitutionalism made here is relatively crude, which can obscure important nuances worthy of further analysis. For example, how the parameters of institutional authority are to be set, implemented, and maintained might be discrete political questions, best resolved politically in different ways—some through the processes of legal constitutionalism and others through more overtly political mechanisms. Additionally, the how ambits of institutional authority are determined might properly vary depending on the substantive issue at stake. For example, the process by which individual rights are protected of might best be determined, and occur, through legal forms, while the use of force abroad might best be ordered through more characteristically political mechanisms. Mark Tushnet, for example, argues that the "political constitution of emergency powers can fit comfortably with a legalized constitution of individual rights." Tushnet, "Political Constitution of Emergency Powers," 1472. For the sake of clarity, the analysis herein largely avoids parsing these distinctions too finely, though a consideration of non-legalistic political mechanisms is taken up at the end of this work. Key to the analysis that follows is the idea of constitutional entrenchment—both formal and political.

[191] For example compare Thomas Franck's view that judicial abdication on matters of foreign policy is "wholly incompatible with American constitutional theory" with George Thomas' view that "American constitutionalism is primarily about countervailing power and not about the legal limits enforced by courts." Franck, *Political Questions Judicial Answers*, 4–5; Thomas, *The Madisonian Constitution*, 2.

political questions are to be answered is *itself* a political question.[192] The remainder of this work engages these constitutive questions by evaluating legal constitutionalism and political constitutionalism for their prospects to order the use of military force in the manner aspired to at the founding: a deliberative constitutional system for war. While legal constitutionalism might be seen as the most direct and reasoned manner for constitutional construction—elucidating the meaning of the constitutional document and clarifying its lacunae through legal mechanisms; here fixing the boundaries of institutional authority over warmaking—constitutional construction is not coextensive with self-reflexive political action. Those political acts—legal, structural, material, and rhetorical—that help to construct the contours of the warmaking process are not always self-conscious attempts at constitutional construction.[193] Construction can be a byproduct of the pursuit of other political ends,

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[192] Seidman, "The Secret Life of the Political Question Doctrine"; Whittington, *Political Foundations of Judicial Supremacy*.

[193] Whittington, *Constitutional Construction*, 15; A alternative view is offered by Stephen Griffin, who argues that "the making of a new constitutional order is a self-conscious activity." Griffin, *Long Wars and the Constitution*, 55. One way to square this circle is to distinguish two types of constitutional change: constitutional construction and constitutional degeneration. Constitutional change can be understood as "self-conscious" construction insofar as the political actors involved pursue a coherent vision—preferably articulated, but potentially merely implicit—of a differing constitutional order. Such constitutional construction entails changes intended to structure future political practice in the pursuit of a different balance or set of fundamental political principles. Self-conscious construction can occur even if the necessary changes cannot be accomplished solely by any one "self," including a president, and even if some political actors involved are not self-reflectively aware of their role in the reconstruction of the constitutional order. Indeed, any theory of political constitution must rely largely on self-interest, sometimes understood in group or institutional terms, rather than any widespread self-reflective pursuit of a coherent vision of a constitutional order.

In contrast, constitutional degeneration can be understood as constitutional change unconnected to a coherent, if not articulated, constitutional vision that

such as the advancement of particular policy goals as well as partisan, or even individual, aggrandizement that may or may not be directly related to the constitutional issue at hand. This complicates the common view towards legal construction—the translation of constitutional theory into practice through legal means—as those who are held integral to that process may be moved by considerations other than instantiating a constitutional construction as such. Thus even a strong version of legal constitutionalism—with its concomitant heavy emphasis on legal construction—rests on complex political foundations that at minimum involve the motivations and capacities of the three branches of government to reliably engage in the kinds of construction it seeks. Though widely understood as a process for ordering politics, legal constitutionalism is at its core one kind of constitutional politics whose own ordering must be politically constituted.

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undermines fundamental aspects of the constitutional order. There is perhaps also a middle category of constitutional change, constitutional drift, where developments in political practice were largely un-self-conscious but relatively benign—that is, the change was not intended to be a rebalancing of political principles, but those consequences are not obviously contrary to the basic constitutional aspirations of the political order. From the perspective of constitutional conservatism, however, any significant drift might be considered degeneration, and certain kinds of constitutional construction might derogatorily be characterized as this kind of degeneratory "constitutional drift." For example, efforts in line with the idea of a "living constitution" are termed constitutional drift in this negative sense in, Thomas, *The Madisonian Constitution*, 78–84.

Constitutional maintenance is thus dependent on context: it can be active construction—restructuring the patterns of political practice to continue to, if not to better, work towards fundamental political principles of the constitutional order in light of inevitable developments in the basic political conditions of the polity; or maintenance can be the active prevention of constitutional change—seeking to stem constitutional degeneration from either untoward drift or imprudent (factional) construction.

Combining this with the idea that the ordering of American warmaking also occurs through less formal means, such as commissioning and funding of various aspects of the security apparatus, puts a fine point on the complex political foundations of the constitution of the war powers. The constitutional process by which the boundaries of institutional authority are constructed—both formally and informally—is itself a result of constitutional construction, which itself may not have wholly occurred through self-conscious political action. This broader picture of constitutionalism clarifies the idea that the contemporary working constitution of the war powers—the pattern of politics for the decision to use military force—has been politically constructed over time in complex ways, through legal as well as political means and in both direct and indirect ways. Such a perspective calls for a consideration of the role of law and courts in the contemporary working constitution and the prospects for the legal ordering of political practice for warmaking in the future. This is a view towards the interrelationship between legal constitutionalism and political constitutionalism: how the emphasis on, and effectiveness of, legal constitutional construction *depends upon and affects* aspects of the broader political constitution. It is in part a view towards the potential and limits of legal constitutionalism: focusing our attention on what the relationship between legal constitutional construction, bounding executive power,[194] and a deliberative and effective warmaking process is and might possibly be. It is also a view towards the informal ordering of how the United States comes to use military force, to the

[194] The ambiguity of the term 'bounding' used here is deliberate, as it draws a connection between the view towards delineating legal bounds on executive war power and the continued bounding (upwards) of that same power. For a related earlier usage, see Deudney, *Bounding Power*.

constitutive foundations of the patterns of warmaking politics that are only diffusely constructed by law, and which may also be essential to any reliably deliberative warmaking order. Given its predominance in the contemporary debate, the promise and perils of legal constitutionalism for ordering the use of military force is taken up in the next chapter. This is followed by an exploration of how a more distinctly political conception of constitutionalism, centered on how separated institutions sharing power can by a system means for weighing and advancing cross-cutting political purposes. As we will see, the distinction between legal constitutionalism and political constitutionalism is fundamental to the evaluation of the contemporary American warmaking order and the prospective reconstruction of a more durably deliberative constitutional system for war.

Conclusion

The controversy surrounding the use of military force by the United States in Libya in 2011 depicted at the beginning of this chapter encapsulates the emphasis of the conventional war powers debate on bright legal lines of institutional authority in war. Though there is a broad area of constitutional common ground that highlights the necessity of some inter-branch participation in warmaking, the contemporary war powers debate remains heated, its persistent disputes framed around authorization: When is Congressional authorization required for the use of military force abroad? What forms of Congressional action satisfy any such Constitutional requirement for authorization? And what uses of force have actually been so authorized? Though such questions seem straightforward at first blush, they involve nuanced considerations

that transform the common binary institutional split between Congressional and executive partisans into a broad spectrum of interpretations on the proper ambits of authority over initiation martial force. This gives the seemingly interminable war powers debate, whose persistence is lamented by many, some important context: such a multifaceted area of contention does not permit easy resolution, for once and especially for all. The complexity of the predominating focus of the war powers debate—what the appropriate ambits of institutional power in war under the Constitution—brings into view the broader constitutional question of how such boundaries are to be determined: through what political process should the way in which the United States goes to war be set and enforced? Reframing the war powers debate in this way exposes an important, but often obscured, approach to constitutionalism underlying the common war powers debate.

An inquiry into how the variegated and particular boundaries of institutional authority are to be determined, implemented, and maintained over time implicates the distinction between legal constitutionalism and political constitutionalism. Seen through the lens of the former, the question of the proper boundaries of institutional power over warmaking is a foundational constitutional question calling for formal settlement, a political process ending with a sole, final arbiter—the Supreme Court. Under such a view, constitutional construction is best, if not entirely, conducted as legal construction. Ultimately it is up to the judiciary to determine what, if any, bright-line constraints the Constitution establishes, or permits Congress to set, on executive discretion to use force and it is the Court that should be the site of enforcing those formal delineations of authority when disputes arise. Looking through the lens

of political constitutionalism broadens the issue to include how the ambits of institutional authority in war are bounded through less formal political mechanisms, as well as how both the formal and informal political processes that construct the war powers are themselves politically constituted. This permits an inquiry into the interrelationship between the legal constitution of the war powers and its political constitution. The promise and perils of legal constitutionalism as the predominant approach the war powers debate—constitutional construction primarily understood, and engaged in, as legal construction—is explored in the next chapter. The broader political constitution of the war powers—how the exercise of war powers is ordered politically—and how this political ordering might be altered to improve the constitution as a deliberative system are taken up subsequently.

Chapter Three

The Promise and Perils of Legal Constitutionalism in War

> *The narrowing, formalizing, and hardening of the terms of debate…efforts to legalize, formalize, and proceduralize; efforts to strip out the ambiguity of politics and the U.S. Constitution...*[195]

> *The increasing reliance on the Court to settle a wide variety of questions of political principle…very likely short-circuits public deliberation*.[196]

Introduction

American warmaking is characterized by persistent ambiguity and discord over the boundaries of institutional authority regarding the use of military force, in particular over when Congressional authorization is necessary and which actions properly authorize warfare. Whether favoring greater executive or Congressional authority, the conventional lines of the contemporary war powers debate—made by scholars and political actors alike—are exercises in constitutional construction that seek to instantiate a particular interpretation of the Constitution as the process by which the United States decides to fight. Implicit in many of the contemporary claims to constitutional fidelity is a fundamental but often unstated common premise: that among the most basic purposes of constitutionalism is to resolve fundamental questions of authority such as who properly takes the country to war. Though executive and Congressional partisans emphasize different harms associated with the persistent dissensus and contestation attending the complexities of the institutional boundaries for warmaking, a common touchstone is that the endurance of multiple

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[195] Silverstein, *Law's Allure*, 2.
[196] Elkin, *Reconstructing the Commercial Republic*, 264.

claims of constitutional fidelity—and the politics that accompanies the seemingly interminable war powers debate—is problematic and ought to be settled. This broadly shared view towards a comprehensive resolution of the ongoing controversy over the constitutional boundaries of the war powers has a corollary premise that is critical to understanding the contemporary working constitution: that the resolution should be formally entrenched, achieved through legal processes that limit ambiguity, and contestation, over the ambits of institutional authority to the extent possible.

The predominating view towards ordering how the United States decides to use military force—setting precise ambits of Congressional and executive purview in war—directly, and primarily, through legal entrenchment implicates a conception of the proper roles of the branches of government in establishing and maintaining the warmaking process that the respective institutional partisans seek. Such legal constitutionalism hinges on a decisive role for the judiciary, the Supreme Court held as ultimate expositor of constitutional meaning and steward of the constitutional design. Much of the conventional debate aims, at least in significant part, to persuade the Court to formally entrench a preferred interpretation of the Constitution, fixing the institutional ambits of authority in war as such issues are brought before the judiciary through relevant cases and controversies. Where Congressional partisans seek to bolster such a process through statutory framework legislation intended to clarify and ensconce an inter-branch warmaking process, executive partisans instead seek to put claims that any Congressional authorization is required prior to the initiation of force to rest, with the most fervent hoping to entrench that any such statutes are judicially unenforceable if not altogether unconstitutional. The

contemporary discord over the war powers is thus largely conducted against a backdrop understanding of American constitutionalism as legal constitutionalism, it revolves around competing attempts at legal constitutional construction, the pursuit of formally entrenched settlement of a fundamental question of political authority.

This chapter explores the promise and perils of legal constitutionalism for ordering the use of military force—the predominating pursuit of a formally entrenched settlement of the interminable war powers debate shared by many Congressional and executive partisans. It argues that efforts to order the political process for warmaking primarily through legal entrenchment are unlikely to achieve the results that either side seeks while propagating many of the ills that they aim to ameliorate. While both Congressional and executive partisans point to some real harms of the uncertainty and contestation characteristic of the contemporary working constitution, case law and statutory frameworks have failed to fix clear institutional boundaries of authority to initiate military force and a continued legal approach, focusing on well-drafted statutes and assertive judicial enforcement, is unlikely to lay the perpetual contestation over war authority wholly to rest. Perhaps more importantly, a heavy emphasis on legal ordering helps to construct a pattern of politics typified by legalistic discord, if not confusion, at moments of decision for war. The push towards formally fixing the parameters of institutional authority in war under the constitution, and thus ultimately towards judicial constitutional stewardship, can engender the broad executive discretion, under a thin aegis of legality, that many seek to discipline through law. This process can also impair the development and assertion of the unique perspectives of all three branches of

government on the national security context at hand as well as on the proper scope of their authority to face future security challenges. In short, the very real differences among those favoring greater Congressional or executive authority over the use of military force abroad obscure a broadly shared understanding of and approach to the American constitutional order, legal constitutionalism, whose prioritization of formal entrenchment can undermine the political foundations of a deliberative system for war.

The Promise of Constitutional Settlement

The contemporary war powers debate is rooted in the primacy of the written constitution in ordering the how the United States goes to war. As one scholar supportive of broad executive power in war puts it, "[a]s a matter of American political theory, the basic framework for the making of foreign policy is, or ought to be, the Constitution of the United States."[197] Congressional partisans heartily agree, arguing that: "constitutional arrangements and democratic values should govern the conduct of foreign policy."[198] Such views are the underpinnings of what has become a standard understanding of constitutionalism, that a key purpose of a written constitution is to clearly and decisively resolve fundamental questions of political authority. This conception is summarized nicely by Michael Foley:

> In portraying constitutions, there is normally a pronounced emphasis upon declaratory acts of creation, upon stipulated frameworks of institutional organization, and upon enumerated allotments of power—all centering on an

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[197] Powell, *The President's Authority over Foreign Affairs*, xiii.
[198] Adler and George, "Introduction," 6.

> underlying premise of a constitutional settlement in which major sources of conflict over the nature of political authority and obligation have been decisively resolved and which the constitution embodies as a lasting monument.[199]

This basic aspiration for the foundations of a constitutional order stands in stark contradistinction to the contemporary working constitution of the war powers, as described in the previous chapter. Though constitutional common ground does exist, the institutional roles in warmaking are only loosely defined at present, leaving key questions regarding the contours of the warmaking process—when legislative authorization is required prior to the use of force, what types of legislative provisions properly authorize force, and what restrictions can be set on warmaking through law—subject to a broad spectrum of opinion. The precise contours of the warmaking process under the constitution are relatively ambiguous and it is uncertainty, if not unpredictability, that define the contemporary constitution of the war powers. The pervasive confusion and dissensus that attends many uses of military force is widely held to be a failing of American constitutionalism. While arguing for different institutional allocations of power in war and sometimes emphasizing their differing benefits, advocates for both congressional and executive purview over warmaking share an aspiration towards a clear and lasting resolution to the seemingly interminable war powers debate.

Though the recent turmoil over war authority belies an enduring settlement of the constitutional allocation of power, competing narratives of settled prior practice are a common refrain in the contemporary debate. For many concerned with the expansion of unilateral executive power in war, modern presidential warmaking is not

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[199] Foley, *The Silence of Constitutions*, 9.

only a violation of the proper interpretation of the Constitution's textual provisions but is importantly a break with a constitutional consensus that had been in place for most of the United States' history. Louis Fisher, for example argues that:

> For 160 years, there was no ambiguity. Until President Harry S. Truman went to war on his own in 1950 against North Korea, no one recognized a conflict or tension between the war-declaring power of Congress and the commander-in-chief responsibilities of the president. No one argued that the president could initiate war. The president was only commander in chief after Congress declared or authorized war.[200]

Prominent executive partisans counter that a strict requirement for Congressional authorization was never an established expectation for all uses of force. John Yoo, for example, highlights the many instances of legislatively unauthorized military initiatives throughout American history:

> Without any congressional approval, presidents have sent forces to battle Indians, Barbary pirates and Russian revolutionaries; to fight North Korean and Chinese communists in Korea; to engineer regime changes in South and Central America; and to prevent human rights disasters in the Balkans.[201]

From his perspective, it is contemporary efforts to formally bind the president—to require Congressional authorization before any military initiative is begun or impose other standing statutory constraints on the use of force—that transgress previously settled constitutional practice:

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[200] Fisher, "The Law," March 2009, 129; A recent study by Stephen Griffin similarly argues that "the post-World War II [war power] claims of Cold War and later presidents…implied a massive constitutional change outside of formal amendment and judicial doctrine." Griffin, *Long Wars and the Constitution*, 45.

[201] Yoo, "War Powers Belong to the President"; Though Fisher acknowledges that between 1789 and 1950 "presidents used force a number of times without first obtaining Congressional authority," he emphasizes the rejoinder that "[n]one of those actions…could be called a major war." Fisher, "The Law," 2005, 591.

> Despite the record of practice…critics [of presidential war power] nevertheless argue for a radical remaking of the American way of war.[202]

There is thus a broadly shared aspiration for a return to differently settled constitutional boundaries of the storied, but not-so-distant, past—to ambits of war authority that were well established at the founding and which lasted through the second half of the twentieth century.[203] Though the contradictory nature of these claims invites inquiry into the extent—and form—of any such settlement,[204] such claims signify and reinforce a pervasive prioritization of a fixed constitutional order for warmaking: purported historical precedent ought not merely inform the contemporary construction of the warmaking process but should be determinative, rendering discord over institutional purview in war obsolete.

Beyond a general commitment to constitutional settlement and the continuation of political precedent, clearly established institutional boundaries for the use of military force are widely held as critically important to a well-ordered decision making process for war. This emphasis was on full display in the responses to President Obama's ordering of military force in support of Libyan revolution in 2011.

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[202] Yoo, "War Powers Belong to the President."

[203] There are some defenders of broad executive power in war who hold that the original constitutional design did require Congressional authorization prior to any use of force, but argue such a practice is unsuited to modern warfare and thus settled practice should be abandoned. See Rostow, "Once More Unto the Breach." No obverse pairing is prominent in the scholarly literature.

[204] The exploration of the theory and practice of legal constitutionalism as it relates to use of force below calls into question both historical accounts of, and theoretical support for, constitutional settlement. Indeed while executive partisans such as John Yoo seek to construct a constitutional black hole, a zone of pure executive discretion in war that cannot be disciplined through law, substantially muddying the constitutional waters may be enough to achieve much of those purposes given the predominance of legal constitutionalism along with other developments in the broader political constitution.

James Baker and Lee Hamilton, who had previously served on the bipartisan War Powers Commission to study and address the persistent constitutional ambiguity surrounding war,[205] argued that the American people and its soldiers in arms:

> Would be best served if our leaders debated the substantive issues regarding the conflict in Libya—and those of Afghanistan and Iraq—rather than engaging in turf battles about who has ultimate authority concerning the nation's war powers.[206]

Conservative political commentator Charles Krauthammer agreed, arguing that legal settlement of institutional authority in war would enable more focused and fruitful debate:

> We need a set of rules governing the legality of any future war. This will allow us to concentrate on the most important question: its wisdom.[207]

From this viewpoint, uncertainty regarding the constitutional requirements for the use of force imperils a rational and focused process for the decision for war. Institutionally partisan conflict can engender an unnecessary conflation of constitutional and policy questions, drawing the limited resources of political attention and energy away from important considerations that face the nation at the moment of decision for war. Instead of focusing on whether or not the use of martial force is appropriate in a given instance and what particular resources are necessary to the war effort, public debate is clouded with competing claims of constitutional fidelity regarding which branch can legitimately do what in war. The abiding concern is that if taken to an extreme, heated institutionally partisan rancor can completely displace dispassionate policy deliberations, the potential for a reasoned give and take

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[205] Baker III and Christopher, *National War Powers Commission Report*.
[206] Baker III and Hamilton, "Breaking the War Powers Stalemate."
[207] See Charles Krauthammer, "Who Takes Us to War?".

over what is to be done swallowed by contestation over the constitutional mandates for who ultimately decides for war. An entrenched settlement of the war powers debate thus promises deliberative dividends, replacing the unruly mix of ambiguity, discretion, and alarm that characterizes the contemporary working constitution of the war powers with a consistently disciplined debate focused on issues germane to the prospective use of force at hand.

The predictability that attends clearly settled institutional boundaries of power is also seen to be essential for the creation and operation of efficient and effective national security policy. Seth Weinberger argues,

> The distractions and inefficiencies caused by extensive attention to the power to control the deployment of the armed forces of the United States is not measured just in time spent to no avail…an adversarial relationship between the two political branches…degrades the operational effectiveness of policy.[208]

Perennial contestation over the proper institutional ambits authority under the Constitution creates an expectation of uncertainty and discord—a kind of predictability anathema to the rule of law—that can compromise the very ability of the United States to formulate and enact responses to foreign policy challenges. As Weinberger further articulates this view,

> Having a clear understanding of the proper balancing of war powers in place before the making of policy would…mak[e] it easier for all involved parties to formulate coherent strategies without fear of overstepping political bounds, having policies struck down as illegal or unconstitutional, or compromising public legitimacy.[209]

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[208] Weinberger, *Restoring the Balance*, 77.
[209] Ibid., 7.

In the face of constitutional uncertainty political actors may hedge their bets, choosing a politically safe but sub-optimal position, from their perspective, on the use of force instead of vigorously advocating for their preferred course of action. Thus not only can the seemingly interminable institutional rivalry over constitutional authority in war serve as a distraction from focused policy deliberation but it also can diminish the quality of the deliberation that does occur. Constitutional indeterminacy thus has the potential to induce legislators and presidents alike to obscure if not abjure their best judgment for fear of constitutional challenge and judicial or political repudiation. Durable settlement of the constitutional bounds of power relating to war is therefore held to be critical to departmental coordination, providing a fundamental political certainty that engenders inter-branch deliberation and collaboration that best yields coherent, efficient, and effectual national security policy.

In addition to enhanced deliberation and coordination between the branches of government, clearly delineated constitutional responsibilities are also seen as critical to ensuring their political accountability on matters of war. Harold Koh crystallizes this view when he argues that,

> The goal of institutional accountability [is advanced]…by clarifying the legal and constitutional framework within which foreign-policy decisions shall be made.[210]

When the particular boundaries of power are clear and widely known, not only will the institutions themselves know what to expect from one another and be able to comport themselves accordingly but the general public will be in a better position to influence a prospective military initiative. A clearly established decision-making

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[210] Koh, *The National Security Constitution*, 160.

process for war can enable interested parties to direct their views on the use of force at hand to the political officials responsible for the decision to initiate warfare and can also subsequently hold the political agents who are formally responsible for a given area accountable for how well they upheld their roles. The constitutional indeterminacy that characterizes the contemporary working constitution can enable political actors to avoid difficult political decisions—letting others take the lead, and the corresponding risk, on matters of national security—or at least dissemble their role in the decision for an ongoing or prior use of force that has not worked as intended. An settled resolution of the war powers debate can thus induce the responsibility in political actors that comes from procedural transparency and political accountability as the attention of both the political branches as well as the public—and their corresponding ire or accolades—are directed in a coordination fashion at those in a clearly established position of authority.

An entrenched resolution to the war powers debate is also seen as key to a strong and credible presence for the United States on the international stage. Persistent uncertainty regarding constitutional propriety can undermine a national unity of purpose that is held as essential to conducting and sustaining the military hostilities in which the United States elects to engage. On the domestic level the specter of unconstitutionality and the political discord it can provoke can diminish the support of the general public for military action taken in the name of national security. The cultivation of relatively broad and lasting political support is especially critical to sustaining the material foundations necessary for any long-term military initiative. Lingering and pervasive doubt about the constitutionality of executive

action on matters of war can also have a pernicious effect on the United States relations with foreign powers. When such an important use of power is tinged with claims of illegitimacy and usurpation of power, allies may hesitate to join a fight that is roiled in controversy within the United States. Similarly, domestic contention stemming from constitutional dissensus may embolden enemies to persist in fighting, as they might perceive institutionally partisan contestation over constitutional principle as evidence that a presidentially led use of force does not have domestic political support it needs to endure.[211] Constitutional settlement of the war powers debate is thus held to promise not only a more deliberative and efficient process for the planning and execution of military policy, but can also—*qua* settlement—yield national security dividends through its diffuse effects on foreign entities.

While these prospective benefits of a predictable, coordinated warmaking process are worthy of serious consideration in the construction of a national security order, those wary of the contemporary pattern of politics engendered by constitutional ambiguity on the use of military force still disagree on the details of what the constitutional settlement should entail and why a particular resolution is preferable. Beyond the competing claims of constitutional fidelity, Congressional partisans insist that "collective decision-making"—and thus a settled requirement for a robust form of Congressional authorization prior to the initiation of warfare—is key to the development of wise policy. From this viewpoint, unilateral executive decisions to use military force increase the prospects of imprudent military action. Lacking

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[211] For an argument connecting variations of the inter-branch process for warmaking to the 'signals' sent to international actors regarding the United States' intentions and capacities in war, see Nzelibe and Yoo, "Rational War and Constitutional Design"; For a critique, see Diehl and Ginsburg, "Irrational War and Constitutional Design."

broader participation and deliberation, discretionary executive martial actions may fail to fully account for the costs and benefits of a particular conflict and as a result are more likely to be based on partial rather than common interest. For many Congressional partisans, a primary aim of American constitutionalism is thus to cabin executive power within the rule of law, disciplining the decision and initiative characteristic of former with the democratic deliberation and legitimating authorization of the latter. The settled constitution of the war powers should thus be an entrenched expectation of formal Congressional authorization prior to the initiation of military force except in cases of absolute necessity. Presidential partisans counter that the "functional superiority" of the more hierarchical executive branch in terms of information, expertise, and dispatch make it the proper site for decision-making on the use of force. Only the executive branch is held to have the competency and capacity to judge the extent of any foreign threats and determine what diplomatic tools—including the use of violent force—should be deployed to address them. From the perspective of presidents and partisans of the executive branch, any undue delay in responding to exigent and even emergent threats can endanger the nation. Accordingly, presidents should be unfettered of formal procedural constraints, and undistracted by domestic controversy over the boundaries of power, at the moment of decision for war.[212]

It is important to note then that the widespread emphasis on settlement discussed above is never an argument for *mere* settlement, that is, that any clear and

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[212] For examples of such pragmatic arguments for the different warmaking models, compare Adler, "Constitution, Foreign Affairs and Presidential War-Making," 957; Powell, *The President's Authority over Foreign Affairs*, 97.

durable resolution of the debate will do, but rather for a particular model of warmaking for which settlement and its attendant promises are a critical element. The shared push towards differing versions of a settled constitutional framework for the use of military force brings us back to the underlying constitutive question of how such clear boundaries of institutional authority in war are to be established and maintained over time. If settlement is indeed desirable, how is it to be achieved? And what are the consequences of the politics of constitutional settlement for the war powers? The next section describes the connection between the view towards constitutional settlement and a pervasive legalistic conception of constitutionalism—constitutional settlement understood as, and sought through, formal entrenchment. Efforts to legally construct a settled resolution of the war powers debate that characterizes this predominating approach to constitutionalism are an important part of the contemporary working constitution of the war powers. As we will see, the pursuit of formal entrenchment has critical implications for the practicability of the competing models for ordering the use of military force, and thus for the construction of a reliably deliberative constitutional system for war.

The Process of Settlement: Formal Entrenchment

The widespread aspiration towards constitutional settlement that undergirds the war powers debate is closely linked to a juriscentric conception of constitutionalism: resolution of the perennial dispute is to be achieved through legal processes that limit ambiguity, and thus contestation, over the boundaries of governmental power to the extent possible. This approach takes its bearings from the

primacy of the rule of law in a constitutional order, a view crystallized by Charles McIlwain in his seminal work on the subject:

> [Modern] constitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law.[213]

Public power is to be authorized, justified, and constrained through law. Tethering the exercise of governmental power to formal authorization is sought in both foreign and domestic affairs, but it is perhaps of greatest concern when it comes to the use of violent force, where arbitrary rule is literally a matter of life and death. The emphasis on legal constraint is therefore focused most intently on the executive branch, a view forcefully expressed in the introduction to *The Constitution and the Conduct of American Foreign Policy*: "the very marrow of constitutionalism consists in the subordination of the president to the rule of law."[214] While conceptions of the rule of law vary, at minimum it requires that government act only where there is law and that laws must be clear, prospective, general, and well promulgated.[215] A seemingly straightforward constitutional principle at first blush, the rule of law is complicated

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[213] McIlwain, *Constitutionalism: Ancient and Modern*, 21–22.

[214] The editors, Adler and George, claim that all of the contributors to the edited volume share this view. Adler and George, "Introduction," 6.

[215] There is a running debate in the philosophy of law on whether the rule of law is wholly positivistic or if it necessarily contains substantive content, for example that the creation of laws emerges from democratic processes or that the content of the laws accord with certain normative standards. The thin conception of the rule of law, sometimes distinguished as "rule *by* law"—where a government act must have legal basis whether or not the law is acceptable under some substantive measurement—can still impose real constraints on the exercise of public power, insofar as it guides political practice. For a useful treatment of the rule of law, see Tamanaha, *On the Rule of Law*; For an argument that a commitment to the rule of law necessarily entails substantive commitments, see Dyzenhaus, *The Constitution of Law*.

by the existence of a written constitution and the inevitability of disagreement over the meaning of both higher and ordinary law.

If the written constitution is understood as a kind of law,[216] then subordinating the warmaking process to a thin conception of the rule of law does not necessarily entail any particular institutional distribution of power. Constitutional provisions that explicitly provide for certain kinds of independent executive authority, such as over the decision to move and use military forces created and maintained by Congress, are just as compatible with a thin conception rule of law as would be a requirement of highly formal legislative authorization before any offensive use of force. Broad statutory authorizations of executive power regarding the use of force are also compatible with the thin rule of law, insofar as such delegations are both clearly made and not proscribed by the Constitution that establishes such legislative authority. While any governmental action is to have a legal basis, it can be rooted directly in the written constitution—the higher political law that establishes the institutions of government and their ambits of authority—or can be a result of lawmaking processes with clear constitutional bases. It is discretion, action in the absence of or contrary to law,[217] rather than any particular boundaries of executive power itself that is antithetical to constitutionalism as defined by legal limitation on government.

While this thin conception of the rule of law may permit a wide array of institutional roles for the decision to engage in warfare, it does demand that the

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[216] The analysis here is not intended to reify this view but rather to highlight the constitutional practice that follows from its logic as relating to the exercise of military force. For an description of the constitution as "political" rather than ordinary law, see Elkin, *Reconstructing the Commercial Republic*, 99–100.

[217] For this formulation, see Kleinerman, *The Discretionary President*, x.

process for warmaking be clearly established by and operate through law. This approach to constitutionalism aspires towards a lofty ideal: foundational questions of institutional authority are to be clearly and comprehensively established in a constitutional text; such constitutional provisions are to be abided by all political parties; and any changes to the original distribution of authority would only occur through well established procedures of formal amendment, such as prescribed by Article V of the Constitution.[218] Executive power over the use of military force would thus be limited to that which is definitively allocated by the written constitution or has been duly authorized through legislation. At its most fundamental level then, constitutionalism as the rule of law appears to offer the promises of settlement. The contours of the exercise of governmental power—who can do what, and how—will be well known by all relevant parties in advance through their clear delineation in law, the expedience of politics tempered by the order and stability provided by a sharp separation of powers and the formal nature of law.

Enduring settlement of the kind this 'ideal' version of constitutionalism promises is not easily achieved, however. Constitution making, like any political process, involves the limitations of human foresight and the vagaries that result from compromise. Even relatively clear textual provisions can yield divergent interpretations over time due to changing circumstances and political understandings. Thus for law to rule—for law to order the use of martial power—there must be a political process to clarify what the constitution means as disputes arise and to induce

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[218] For an argument that only a formal constitutional amendment can properly alter the balance of institutional power in war, see Adler, "Virtues of the War Clause," 777–778.

compliance with it. This brings the connection between the widespread aspiration toward constitutional settlement, the primacy given to the rule of law, and the predominance of legal constitutionalism in the war powers debate into relief. The common view towards constitutional settlement seems to require a sole, ultimate arbiter to resolve disputes over fundamental questions of political authority as they inevitably arise.[219] Adding in the primacy placed on the rule of law and the common view of the constitution as kind of law, along with the judiciary's traditional role in interpreting laws and applying them to particular cases, and it is a seemingly small and direct step to situate the process of resolving the fundamental questions of institutional authority—and bounding executive power—over war in the juridical realm.

Legal constitutionalism, the pursuit of constitutional settlement through legal entrenchment, operates on two distinct, but related, tracks. When disputes over the foundational distribution of institutional power arise, this model of constitutionalism posits that the Supreme Court should clarify and entrench the basic structure of government through case law, tying down any open-endedness in the written constitution and preventing constitutional degeneration through small shifts in practice over time. David Adler offers perhaps the strongest version of this view,

> To maintain the integrity of the Constitution, the Court must police constitutional boundaries to ensure that fundamental alterations in our governmental system will occur only through the process of constitutional amendment. The judicial branch may not abdicate its function 'to say what the law is.'[220]

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[219] Alexander and Schauer, "On Extrajudicial Constitutional Interpretation."
[220] Adler, "The Judiciary and Presidential Power in Foreign Affairs," 2.

Where this mode falls short, formal settlement is to be secondarily pursued through statutory clarification and regimentation: framework legislation designed to close any gaps, setting bright legal lines of authority and thus mitigating confusion and discord over procedural propriety in a given area.[221] Gordon Silverstein aptly summarizes this overarching conception of constitutionalism,

> The Courts are responsible for the constitutional context within which the other branches operate, and the Supreme Court will judge the interpretation offered by the other branches, either giving it the sanction of constitutional legitimacy and establishing that law or action as a precedent for future officials, or striking it down and sending it back to the political system for alternative solutions.[222]

Constitutional settlement—and attendant strict separation of powers—is thus to be properly achieved via the ordinary workings of the juridical order, the boundaries of power clarified and entrenched as a matter of law over time. Legal constitutionalism ultimately rests on a decisive role for the judiciary in constitutional construction and maintenance: judges are to resolve novel and particular lacunae that inevitably develop in relation to both the written constitution and statutes, and the Supreme Court is to have the final say on matters of constitutional propriety and operation—it is held as *the* custodian of the constitutional design.[223]

However, as we will see in the overview of how disputes on the institutional balance of war powers have been dealt with by juridical system that follows, although

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[221] William Eskridge Jr. and Ferejohn, *A Republic of Statutes*.

[222] Silverstein, *Imbalance of Powers*, 21–22. While Silverstein seemingly endorses judicial supremacy here—thus embracing the first track of legal constitutionalism—he is wary of too finely wrought attempts to legalize the war powers, a point discussed below.

[223] For a succinct description of this view, from a critical perspective, see Elkin, *Reconstructing the Commercial Republic*, 96.

a fixed formal settlement of the ambits of institutional authority over the use of force has not been achieved, its pursuit has hardly been neutral for the practice of American warmaking. The next section describes how the progressive judicial settlement of constitutional lacunae on matters of war aspired to by legal constitutionalism has been discrete, at best, throughout much of American history. While the Court has been willing to hear cases involving and related to the use of military force, for most of its tenure it has largely avoided staking out constitutional boundaries of institutional power relating to warmaking while upholding the rule of statutory law and protecting the liberty and property of individuals affected by war when feasible. Though this overarching trend in judicial practice continues in many ways, the subsequent section highlights what has been a marked contemporary shift towards a formally entrenched resolution of the main points of the war powers debate. Such legalization, particularly the emphasis on the judicial clarification and enforcement of bright legal lines of authority, reconstructs the constitutional politics of warmaking on a distinctly legal plane, which has important consequences for the ordering of the decision process for war. While statutory delimits of executive power in war have the potential to serve as a clear statement of Congress's position on the proper ambits of institutional purview foreign affairs—which presidents may attempt to rebut through the ordinary course of politics—the pervasive view that American constitutionalism ought to be comprised by a strict and legally defined separation of powers that is ultimately stewarded by the Supreme Court has undergirded the construction of legal grey holes that have ramifications for the politics of warmaking. The pursuit of formal entrenchment—the aspiration towards narrowing, if not eliminating, all constitutional grey holes—can

engender a pattern of politics characterized by expansive executive discretion under the visage of legality, which undermines political deliberations on matters of war.

The War Powers in Court: Rule of Law Without Settlement

Despite the high frequency of American involvement in war throughout its history, and in contradiction to the now pervasive aspiration towards constitutional settlement and corresponding acceptance of judicial supremacy, the Supreme Court has only infrequently and somewhat cautiously taken up cases relating to the use of military force. This tension between the pervading norms of legal constitutionalism and political practice was recently highlighted in the National War Powers Commission Report, which laments that though there are strong constitutional arguments in favor of both congressional and presidential powers over war, "the only branch of government capable of resolving these disputes—the Judicial Branch—has consistently declined to do so."[224] Though this commonly held view of the Supreme Court's reluctance to intervene in constitutional disputes relating to war is largely correct,[225] the following review of the primary cases related to the use of military force shows that while the Court has not definitively resolved all of the particular points of discord over the ambits of institutional power in war described in the previous chapter, neither has it stayed wholly out of the matter, declaring either in

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[224] Baker III and Christopher, *National War Powers Commission Report*. The report goes on to recommend a statutory fix to this 'problem,' which is discussed below.
[225] See for example, Sheffer, *The Judicial Development of Presidential War Powers*, ix; Entin, "Dog That Rarely Barks."

word or deed that the balance of power in war is entirely a political question.[226] The primary questions around which the war powers debate revolves—when Congressional authorization is required, what constitutes proper authorization, and what restrictions can be set on the exercise of martial power—have been at issue, at least in some respects, in Supreme Court rulings over time. And while the question of the propriety of autonomous use of military force by presidents—warmaking in the absence of statutory authorization or constraint—has been largely left ambiguous, the Court's rulings have had subtle but important consequences for American warmaking.

Before proceeding to a discussion of specific cases, a point of clarification and emphasis is warranted. Any analysis of the separation of powers jurisprudence of the Supreme Court, and claims about any 'precedent' that was set, depend not only on the particulars of the cases—the context in which they arose as well as the substance and result of the controversy—but also necessarily on a conception of the role of the judiciary in the constitutional system. Though the Court has arguably played a role in the clarification and entrenchment of certain boundaries of institutional authority related to warmaking over time, the import that is given to its rulings rests on the critical, but often obscured, underlying distinction between legal constitutionalism and political constitutionalism. Looking through the lens of the former, the constitutional rulings of the Supreme Court are seen to properly govern the entire constitutional order—the process of constitutional codification and entrenchment through law described above. In contrast, from the perspective of political

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[226] Fisher, "Judicial Review of the War Power."

constitutionalism, the Court is free to expound its own institutional view of Constitutional propriety and enforce it *in its own sphere*—that is, its holdings determine the outcome of a particular case while the opinions that justify it are a constitutional argument from its particular institutional point of view as well as a signal of how the judiciary will comport itself on related matters in the future, qua system of courts.[227] The treatment of war powers disputes in the courts below thus not only charts how the judiciary has ruled on matters relating to the boundaries of institutional authority in war but also maintains a focus on how the judicial role in delineating and entrenching the ambits of governmental war powers has developed over time. As we will see below, though the Court has rarely made overt pronouncements of the necessity of legal constitutionalism and judicial supremacy, and has never enforced constitutional constraints on the use of military force, its modern separation of war powers jurisprudence has played a role in fostering a now pervasive juriscentric approach to the war powers that can impair a deliberative constitutional politics for war.[228]

Cases involving the horizontal separation of power in foreign affairs were atypical in early American history,[229] but the Supreme Court did take up and rule on a number of matters relating to the use of military force in the period prior to the Civil

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[227] The view from political constitutionalism, centering on how departmental constitutional interpretation and contestation might enhance the deliberative constitutional system for war, is taken up in the next chapter.

[228] The Court has not been the only, or even primary, promoter of judicial supremacy and legal constitutionalism. See Graber, "The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary"; Whittington, *Political Foundations of Judicial Supremacy*.

[229] More prevalent were questions about the extent of the power of the national government, acting as a whole. See Silverstein, *Imbalance of Powers*, 28.

War. The earliest cases relevant to questions of warmaking stemmed from the Quasi-War with France, where martial conflict centered on maritime commerce. The question of what 'war' is, and in particular what forms of legislative action are to count as authorization that would place the nation into a state of war, were first touched upon by the Supreme Court in *Bas v. Tingy*. The case involved a dispute over the compensation owed to a privateer following the recapture of a U.S. merchant ship from France. The amount the ship owner was to be liable for depended on whether France was an 'enemy' of the United States, a designation that would trigger greater compensation under the terms of a 1799 act of Congress. For the Supreme Court, the case ultimately hinged on whether the hostilities between the United States and France, despite the absence of a formal declaration, amounted to a legal state of war. In the Court's judgment Congress had authorized 'imperfect' war through statute, and ruled that the privateer was owed the greater sum.[230] In a related case the following year, *Talbot vs. Seaman*, the Court once again focused on Congressional authorization absent a formal declaration of war to resolve a dispute over a maritime seizure. Ruling the seizure legal, Chief Justice Marshall wrote: "The whole powers of war being, by the Constitution of the United States, vested in Congress, the acts of that body alone can be resorted to as our guides in this inquiry."[231] For the purposes of the

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[230] *Bas v. Tingy*, 4 Dall. (4 U.S.) 37, 43 (1800). Justice Washington wrote, "[H]ostilities may subsist between two nations more confined in its nature and extent, being limited as to places, persons, and things, and this is more properly termed imperfect war; because not solemn, and because those who are authorized to commit hostilities, act under special authority, and can go no further than to the extent of their commission. Still, however, it is public war, because it is an external contention by force between some of the members of the two nations, authorized by the legitimate powers."

[231] *Talbot v. Seeman* 5 U.S. (1 Cr.) 1, 28 (1801).

Court, disputes that depended on whether the United States was engaged in warfare—at least those between private parties—could be determined based on the existence of legislative action short of a formal declaration of war.[232]

A third Quasi-War case taken up by the Supreme Court, *Little v. Barreme*, was the first to touch directly on the boundaries of executive power over the use of force. The dispute stemmed from the capture of a vessel following a proclamation made by the Secretary of the Navy, on behalf of President John Adams, that ordered the seizure of American ships suspected of travelling to and from French ports. Because a Congressional statute only authorized the seizure of those American vessels suspected of sailing *to*, not from, a French port, the Supreme Court ruled that the capture in question violated the law. Responding to the claim by the captain that he was just following the orders of the president, and thus protected from legal responsibility, Chief Justice Marshall argued that only Congress can make laws and that a president, even in the role of commander in chief, could not authorize a military officer to commit acts in clear violation of the law. While Marshall emphasized here that the Court would enforce clear bounds on executive discretion in war where "the legislature seem to have prescribed that the manner in which this law shall be carried into execution," he also raised, but did not answer, the question of independent executive power. The Chief Justice further remarked that "it is by no means clear that the President [might] have empowered the officers" in the absence of Congressional

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[232] It is worth recalling, and comparing, here Seth Weinberger's innovative argument to reconstruct the Declare War Clause as a necessary trigger for the legality of a range of *domestic* war powers issues, particularly on matters of individual liberties. Weinberger, *Restoring the Balance*.

legislation, but left the matter unresolved by limited his ruling to the particulars of this case.[233]

The question of statutory regulation of executive warmaking was revisited by a circuit court two years later in *United States vs. Smith*, where the liability of an officer for the transgression of an act of Congress was reaffirmed. In ruling the attempted paramilitary expedition conducted by Col. William Smith against Spanish America a violation of the Neutrality Act of 1794, the court made a distinction between the president's defensive power to repel invasion and the authority of Congress to authorize offensive military actions. Responding to an argument by the defense that the President had secretly approved the operation, Supreme Court Justice William Paterson, who presided over the circuit trial, held that there was "a manifest distinction between our going to war with a nation at peace, and a war being made against us by actual invasion, or formal declaration. In the former case, it is the exclusive province of congress to change a state of peace into a state of war." The Constitution, "which measures out and defines the duties of the president, does not vest in him any authority to set on foot a military expedition against a nation with which the United States are at peace…that power is exclusively vested in congress."[234] While enforcing a penalty for the transgression of a statutory delimitation of executive discretion the judiciary rhetorically reinforced, and intimated that it might someday enforce, a Constitutional limit on discretionary executive use of offensive military force in the absence of such legislation.

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[233] *Little v. Barreme*, 6 U.S. (2 Cr.) 170, 171 (1804).
[234] *United States v. Smith*, 27 Fed. Cas. (C.C. N.Y.) 1229-1230 (1806).

The Marshall Court went even further in *Brown v. United States*, a case involving the seizure of British property found in the United States during the War of 1812, where it imposed constraints on executive discretion in war where Congress had already acted but had not specified the limits in question.[235] The conflict with Great Britain was the first major military engagement for the young nation and it was consequently authorized by a formal declaration of war rather than through the host of statutory provisions that characterized American warmaking since the Revolutionary War.[236] Chief Justice Marshall's majority opinion held that the seizure required authorization that Congress had not provided in its declaration of war, and that while the laws of war generally permitted a sovereign to confiscate enemy property found in its territory during war, that power was the legislature's to exercise.[237] In an important and interesting dissent, Justice Story pushed back on the question of the parameters of independent executive authority where Congress has not formally legislated. He emphasized that while Congress can impose limits "as to the extent to which hostilities may be carried by the executive,"[238] there properly remains a scope of executive discretion following a declaration of war insofar it is consistent with the laws of nations and is in the absence of domestic law that restricts it: "To regulate the exercise of the rights of war as to enemies, does not, however,

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[235] *Brown v. United States*, 12 U.S. 110 (1814).
[236] David J. Barron and Martin S. Lederman, "The Commander in Chief at the Lowest Ebb: A Constitutional History," 977.
[237] *Brown v. United States*, 12 U.S. 128-129 (1814).
[238] 147.

imply that such rights have not an independent exercise."[239] For Story, while Congress could regulate the exercise of executive war powers, at least some executive war authority had a legal basis beyond explicit Congressional authorization.

In subsequent decades, the Supreme Court offered a broad view of the bounds of executive discretion over martial force where Congress had authorized it in advance, as seen in two cases dealing with legislative delegation and the use of the militia. Article I, Section 8 of the Constitution empowers Congress to, "provide for calling forth the Militia to Execute the Laws of the Union, suppress Insurrections, and repel Invasions." In *Martin v. Mott*, the Court ruled that President Madison had been given statutory authority to order the states to call out their militias in advance of the War of 1812, ruling against a private who had challenged a fine resulting from his refusal to assemble with his company. In writing for the majority, Justice Story acknowledged a broad discretionary power in the executive to determine whether the security context triggered the authority granted to the president by law: "Whenever a statute gives a discretionary power to any person, to be exercised by him, upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts."[240] In the view of the Court, not only can Congress delegate its authority to call forth the militia to the president through statute, but any such delegation also entails that the actual decision to utilize the militia accords to the executive as well. While the early Court

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[239] 153. Justice Story was thus attempting to maintain a distinction between a formal declaration of war, which triggered the laws of nations, with more specific statutory legislation that might be held to occupy the field and limit executive discretion.
[240] *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 28 (1827).

may have been wary of executive discretion against or absent formally expressed Congressional will, it was willing to read the Constitution as permitting, if not promoting, strong government when the political branches were in agreement.

In 1849 the Court further emphasized that it would not step in to limit how broadly Congress could delegate martial power to the president. While *Luther v. Borden* is best known for centering on the question of whether Rhode Island's charter violated the constitutional guarantee of a republican form of government[241] and the Courts' determination that the issue was political question, the Court also held that Congressional legislation had delegated the authority to decide whether an insurrection had occurred and whether use of the militia was required to the executive. While acknowledging the potential abuse of the power given to the president in such a statue, Chief Justice Roger Taney averred from asserting a strong role for the judiciary in policing the discretion afforded by such a delegation, noting that, "it would be in the power of Congress to apply the proper remedy."[242] For the Court, the scope of any statutory delegation of authority to the president over the use of martial force was properly the concern of the political branches of government—Congress would be responsible not only for the judicious delegation of military power to the executive but also for checking its misuse.

Two Antebellum cases further touched upon the question when Congressional authority is required for certain exercises of executive power relating to war. In *Fleming v. Page* a dispute over the proper duties to be levied on goods from the port

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[241] Art. IV, Sec. 4.
[242] *Luther v. Borden*, 48 U.S. (7 How.) 43 (1849).

of Tampico, captured by the United States in its war with Mexico, hinged on whether the captured territory had become part of the United States, thus rendering the transportation of goods no longer an importation. In determining the duty had to be paid, Chief Justice Taney emphasized that the president, as commander in chief, "is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy," but that "his conquests do not enlarge the boundaries of the Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power."[243] Though the Court did not precisely define the parameters of unilateral presidential authority over the use of martial force, it again saw fit to decide a question of the domestic legal consequences of an act of war—here refusing that any enlargement of the territory of the United States without specific Congressional authorization was to be given legal effect by the Court.

A decade later, in *Durand v. Hollins*, a circuit court recognized broad executive discretion to use the military abroad to protect American lives or property. In 1854, an American ship was sent to the port of Greytown in Nicaragua in response to an affront to an American diplomat as well as complaints from American business interests about property losses there. After the ship commander determined that the local authorities had not made requisite reparations, he ordered the crew to bombard the town and then to come ashore to burn what remained of it.[244] In ruling that neither

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[243] *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850).
[244] Fisher, *Presidential War Power*, 40–41.

the president nor his agents can be held "personally civilly responsible for the consequences" of such an independent use of military force by the executive branch, deciding against an American resident of Greytown who filed suit for damages to his property from the siege, the circuit court further stated:

> [A]s it respects the interposition of the executive abroad, for the protection of the lives of property of the citizen, the duty must, of necessity, rest in the discretion of the president. Acts of lawless violence, or of threatened violence to the citizens of his property, cannot be anticipated and provided for; and the protection, to be effectual or of any avail, may, not infrequently, require the most prompt and decided action.[245]

While the court refused to enforce civil remuneration in this instance, a ruling that is often cited as a significant precedent by advocates of executive prerogative in foreign affairs, it is notable that the authority to protect Americans and their property abroad was not an area in which Congress had yet legislated national policy—either to authorize or restrict such discretionary use of the military by a president. Thus while *Durand* might be read to signal a move away from the strict construction of the Marshall Court, the question of whether Congress could limit such uses of force was not at issue in this case.[246] In 1868, Congress clarified its position in a statute that remains part of permanent law:

> [W]henever it shall be made known to the President that any citizen of the United State has been unjustly deprived of his liberty by or under authority of any foreign government, it shall be the duty of the President…to use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectual such release, and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress.[247]

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[245] *Durand v. Hollins*, 8 Fed. Cas. 111 (S.D. N.Y. 1860) (No. 4,186), 1123.
[246] Fisher, "Judicial Review of the War Power," 474.
[247] 15 Stat. 224, now 22 U.S.C. § 1732.

Neither the extent of discretionary executive power authorized by this statute—what military means used for the protection of American lives and property do and do not amount "to acts of war"—nor the extent of executive discretion to use the military to protect lives and property in the absence of such legislation, has been taken up by the Supreme Court since.

The period from The Civil War to the Second World War saw a number of war powers issues taken up and decided by the judiciary that showed both a continued willingness by the courts to engage disputes relating to national security as well as the limits of its institutional capacities to directly constrain the exercise of executive power in wartime. While the Court sought to reinforce certain broadly accepted boundaries of institutional authority, it did so largely in word rather than in deed, without directly interfering with the active exercise of martial power. The Civil War, which occurred on U.S. soil and was characterized by a number of emergency actions taken by President Lincoln which had direct impact on U.S. citizens and residents, brought a number questions regarding presidential power in war before the federal bench. Apart from the important questions regarding executive discretion to suspend the privilege of habeas corpus[248] resulting from an order given by President Lincoln at the onset of the Civil War,[249] the Court's primary decision regarding the use of

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[248] U.S. Constitution, Art. I, Sec. 9; Judiciary Act of 1789.

[249] Chief Justice Taney, sitting on circuit, ruled that the authority of suspending the writ belonged to Congress and not the president, but was unable to enforce his order. While this ruling is often cited as a precedent of the judiciary seeking to enforce a 'constitutional' limitation of executive discretion, it might also be reasonably understood as an enforcement of statutory law—a provision of the Judiciary Act of 1789 that specifically authorized the courts to adjudicate habeas corpus claims. *Ex parte Merryman*, 17 Fed. Cas. 144, 148 (C.C. Md. 1861) (No. 9,487).

military force in this period was in *The Prize Cases*.[250] Stemming from Lincoln's 1861 proclamation that ordered a blockade of Southern ports, the key question of constitutional import before the Supreme Court was whether the president had exceeded his constitutional authority by ordering the seizure of ships trading with the Confederacy without a declaration of war or specific statutory authorization.[251] The dispute between the parties in the case, whether the vessels captured under the blockade were prizes, and thus the legal property of the privateers who captured them, or the illegitimate result of piracy depended on whether the United States was legally at war. The Court recognized that the rebellion constituted a state of war, and put forth its view that not only did the Constitution grant the President the authority to order the use force in response to military aggression underway, but that the executive is "bound to resist force by force…without waiting for any special legislative authority.[252] However, the Court also emphasized a distinction between an executive authority to order the defensive use of military force and the legislative authority to authorize the initiation of war where active hostilities does not yet exist. The Court's view that the president "has no power to initiate or declare a war either against a foreign nation or a domestic State"[253] was hardly controversial. Legal counsel for the executive branch in the case agreed, insisting that President Lincoln's blockade did not involve "the right *to initiate a war, as a voluntary act of sovereignty*. That is only

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[250] *The Prize Cases*, 67 U.S. (2 Black) 635 (1863).
[251] Fisher, "Judicial Review of the War Power," 477.
[252] *The Prize Cases*, 67 U.S. (2 Black) 668 (1863).
[253] Ibid.

vested in Congress."[254] While the Court here had shown itself once again willing to determine that the United States was at war and warned that it saw a key constitutional distinction between defensive and offensive war, it also continued to avert specifying any test for recognizing war for constitutional purposes as well as from actively constraining the discretionary use of military force.

Following the war the Supreme Court was faced number of cases that further highlight the mixed nature of its role in resolving constitutional disputes related to warmaking. In its unanimous ruling in *Ex parte Milligan* the Court signaled its view that the President did not enjoy wholly unlimited constitutional discretion in waging war once begun, as well as a willingness to construe ambiguous statutory language regulating the execution of warfare—here the Habeas Corpus Act of 1863—against the president.[255] However, that the constitutional and legal questions before the Court in this case dealt with matters of military detention and trial—matters of particular judicial interest—and that the war had been terminated at the time of its ruling might reasonably mitigate any expectation of expansive judicial intervention into the use of executive power when hostilities are imminent or ongoing. While the Court ostensibly reinforced a clear constitutional requirement on the rights of individuals

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[254] Ibid., 660. Emphasis in original.

[255] *Ex parte Milligan*, 71 U.S. (4 Wall.) (1866). Notably, a brief filed in support of the Administration position by the Attorney General argued for the constitutionality of executive discretion as commander in chief in this area only "in the absence of all restraining legislation by Congress." The Court ruled that the Habeas Corpus Act of 1863 was such a statutory restraint. For a useful discussion, see David J. Barron and Martin S. Lederman, "The Commander in Chief at the Lowest Ebb: A Constitutional History," 1006–1008.

whose enforcement had been inhibited during the war,[256] the postwar reassertion of this boundary and its institutional authority to enforce after it had been unable to do so at the beginning of the war also reinforced a potentially inherent limitation in the capacity for judicial constraint of executive power in the midst of war. While the executive branch may have a legal price to pay for its discretionary use of power in war, such penalty would come as a delayed or post-hoc rebuke.

A year later, the Supreme Court took up a question of the boundaries of power of the national government vis-à-vis the states that implicated its own role in navigating disputes on the separation of powers. The State of Mississippi attempted to enjoin President Andrew Johnson from using the military from carry out two Reconstruction acts that were passed through a Congressional override of his veto. Based on "general principles which forbid judicial interference with the exercise of Executive discretion," the Court held that it lacked jurisdiction to "enjoin the President in the performance of his official duties," even though it acknowledged that the legislation was "alleged to be unconstitutional."[257] Chief Justice Chase openly mused about the prospects of a president refusing to comply if the Court had attempted to interfere, admitting that in such an event "it is needless to observe that the court is without power to enforce its process." Additionally, if such an injunction was issued and complied with, the Court might be helping to induce a "collision…between the executive and legislative departments of government," where

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[256] *Ex parte Merriman*. See note 55 above.
[257] *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 499 (1867).

the president might be subject to impeachment. Pointing towards the distinction between legal and political constitutionalism, Chase concluded his line of thought:

> And in that case, could this court…restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest the proceedings in that court? These questions answer themselves.[258]

While the Court acknowledged that it couldn't prohibit a president from complying with, nor compel the executive branch to act contrary to, an action imposed on it by statute, Congress was not under similar constraints. In 1868 it impeached President Johnson for a related violation of law.

In 1901 a case arising from the Spanish-American War brought up the question of whether a U.S. military commander could impose duties on goods coming from the United States into Puerto Rico. The Court ruled that while the executive had the authority to legislate for a conquered country, once a peace treaty is signed he must abide by the laws of his own country.[259] In a second case from that war, in deciding whether the seizure and detention of a ship owned by a Spanish corporation by U.S. naval forces was a legal exercise of executive power, the Court determined that the Spanish-American War did not legally end until the exchange of ratifications of the Treaty of Paris in 1899.[260] A year later, the a circuit court similarly proved willing to determine whether the United States was engaged in "a condition of war," a point upon which the conviction of a U.S. serviceman for murder—which occurred while 5,000 soldiers were deployed to China on the orders of President McKinley for

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[258] Ibid., 500-501.
[259] *Dooley v. United States*, 182 U.S. 222, 234 (1901).
[260] *Hijo v. United States*, 194, U.S. (1904). For a discussion, see Fisher, "Judicial Review of the War Power," 480.

the protection of American citizens threatened by the Boxer Rebellion—rested.[261] In wartime disputes, particularly those involving individual liberties and private property, the Court remained willing to analyze the particulars of the national security context to decide the dispute at hand without codifying what 'war' is for all constitutional purposes.

In a 1936 case that centered on the question of how broadly Congress can delegate to the president, in part a question of the parameters of power of the national government where the political branches act in concert, what ought to have been a relatively unremarkable decision was turned by Justice Sutherland into an opportunity to proffer a distinction between the bounds of constitutional propriety in domestic versus foreign affairs that has had lasting influence on the war powers debate. *United States v. Curtis-Wright Export Corp* dealt with a weapons manufacturer who had been convicted of selling arms to warring nations in South America in violation of an executive order, which was made pursuant to a joint resolution of Congress permitting the executive to issue such a formal prohibition at his discretion.[262] Though the decision upholding the constitutionality of the delegation was largely in line with the track of the Court's prior jurisprudence permitting broad delegations relating to issues of foreign affairs, the case is notable because dicta in Sutherland's majority opinion have become *de riguere* points of reference for contemporary partisans of plenary executive power.[263] His remarks that the president is the "sole

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[261] *Hamilton v. McClaughry*, 136 Fed. 445, (C.C. Kan 1905).
[262] *United States v. Curtis-Wright Export Corp*, 299 U.S. 304 (1936).
[263] The import attached to this seemingly minor case, as is the case with *Durand v. Hollis* discussed above, is another sign of the contemporary tendency towards legal

organ of the federal government in the field of international relations," and that the nature of the president's power in foreign affairs is "plenary and exclusive,"[264] are often cited as legal precedent for claims of independent and preclusive presidential power in foreign affairs.[265] However, close attention to the substance of the decision and the context in which Sutherland wrote reveals a concern with distinguishing broad constitutional powers of the national government in foreign affairs from the domestic powers of the federal government that he aspired to constitutionally constrain.[266] The question of the horizontal separation of powers—the parameters of power of the executive and legislative branches—on matters of foreign affairs were

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constitutionalism—the aggrandizement of a judicial opinion in order to construct, and ideally fix, constitutional meaning and determine future political practice.

[264] Ibid., 320.

[265] For example, Yoo references Sutherland's opinion in support of his claim that the president has "exclusive" powers in foreign affairs. Yoo, *The Powers of War and Peace*, 183, 229. In preferring the term 'exclusive,' Yoo avoids carefully distinguishing 'independent' versus 'preclusive' aspects executive power under his constitutional theory of the war powers. A view that Courts should not be involved in delineating the *constitutional* boundaries of institutional power in foreign affairs need not necessarily be coextensive with a view that Courts should not uphold *legislative regulation* of executive power in foreign affairs. For a detailed rebuttal of the claim that executive power in foreign affairs was ever broadly held to be beyond the scope of restrictive legislation, see David J. Barron and Martin S. Lederman, "The Commander in Chief at the Lowest Ebb: A Constitutional History"; David J. Barron and Martin S. Lederman, "The Commander in Chief at the Lowest Ebb: Framing the Problem, Doctrine, and Original Understanding." The role of the Court's modern jurisprudence relating to the statutory regulation of warmaking in the contemporary balance of institutional war powers is discussed below.

[266] For a helpful overview of Justice Sutherland's overarching intention to bifurcate the application of the Constitution depending on whether the matter was of domestic or international import, see Silverstein, *Imbalance of Powers*, 37–42; For Sutherland's misappropriation of John Marshall's earlier use of "sole organ," see David J. Barron and Martin S. Lederman, "The Commander in Chief at the Lowest Ebb: A Constitutional History," 970, note 88.

not directly at issue, rather the concern was the power of the national government to act as a unified whole.

From the American founding to the Second World War disputes relating to war were taken up and decided by the judiciary on a number of occasions, but the overall import that this jurisprudence can be given is subject to widely divergent interpretations and emphases hinging on whether they are viewed through the lens of legal or political constitutionalism. That is, what the Court's rulings entail for the boundaries of institutional authority in war depends on whether the judiciary is held to have the ultimate say in delineating and enforcing constitutional boundaries of institutional powers—a question of the parameters of constitutional authority in its own right. From the perspective of judiciary supremacy, the Court's early rulings can be seen to have resolved and entrenched some of the important questions of the constitutional allocation of power discussed in the previous chapter. A brief synopsis of the 'fixed' constitutional boundaries of institutional warmaking authority at the start of the Second World War, from this perspective, might entail the following: the use of military force can be authorized by statute, rather than a formal declaration of war;[267] the executive branch cannot violate clear statutory prohibitions or limits on warmaking;[268] Congress can delegate broad authority to the president to initiate military force;[269] Presidents cannot independently expand the territory of the United States;[270] Presidents have the discretion to take military action to protect American

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[267] *Bas v. Tingy*.
[268] *Little v. Barreme*, *Brown v. United States*, *U.S. v. Smith*.
[269] *Martin v. Mott*; *Luther v. Borden*.
[270] *Fleming v. Page*.

lives and property, at least when not prohibited by statute;[271] and the President can use the military as he sees fit to respond to military aggression against the United States already underway.[272]

A different, but not entirely contradictory, narrative takes shape when the cases are seen from the perspective of political constitutionalism, absent a conception of judicial supremacy. This more modest interpretation shows a judiciary willing to resolve specific legal disputes resulting from warmaking, particularly those relating to individual liberty and private property, but also one that balked from asserting sweeping *constitutional* requirements for warmaking, especially on the actual use of force. For example, instead of interpreting *Bas v. Tingy* as establishing that there is "no constitutional rule requiring Congress to approve military measures through some specified legislative form,"[273] the Court can be understood to have merely signaled in its early rulings that "any act of war, *to be entitled to judicial recognition as such*, must be ascribed to congressional authorization."[274] The judiciary would only exercise its powers where there was ordinary law upon which to base a ruling in a given case. Although the Court was later willing to determine the existence of a state of war in the absence of formal authorization in order to decide disputes, they were disputes over the application of existing law nonetheless.[275] Similarly, while the Court proved willing to hold executive officials liable for martial action taken in clear

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[271] *Durand v. Hollins*.
[272] *The Prize Cases*.
[273] Powell, *The President's Authority over Foreign Affairs*, 125, note 131.
[274] Corwin, *The President, Office and Powers*. Emphasis added.
[275] *The Prize Cases*, *Hamilton v. McClaughry*.

contradiction to existing law,[276] despite occasional hints that it might similarly rule in an instance where the use of offensive military force occurred in the absence of law, no such constraint on presidential power in war was ever substantively enforced. The judiciary, acting as a system of courts, was willing and able to impose certain limits on executive discretion in war within its sphere of competence—it consistently acted to uphold the rule of law. But promoting the rule of law did not entail the progressive entrenchment of *constitutional* boundaries of institutional authority in war. Key aspects of the parameters of institutional purview in war—including its own further role in delineating and maintaining them—remained in many ways undefined.

The Pursuit of Formal Entrenchment

The Second World War marked the beginnings of what many describe as a broad change in the balance of institutional powers relating to warmaking, with a marked growth in executive power. The war effort entailed a massive expansion of martial capacities that were sustained in many ways after the Allied victory,[277] and the decades that followed saw the development and growth of arguments for

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[276] *Little v. Barreme*; *U.S. v. Smith*. Barron and Lederman's comprehensive study provides extensive evidence of a broad, long-lasting, consensus that Congress could enact statutory limits on warmaking, and that it regularly did so. See David J. Barron and Martin S. Lederman, "The Commander in Chief at the Lowest Ebb: A Constitutional History," 951–993. However, that Congress can legitimately limit executive warmaking through statutory law does not entail that such formal limits best address the concerns with executive discretion in war discussed in the previous chapter. The contemporary view towards regulating the use of force through statutory framework legislation, and its consequences for the deliberative system for war, are taken up in the next section.

[277] Thorpe, *The Welfare-Warfare State: Perpetuating the U.S. Military Economy*, 61–131.

independent executive authority to use the martial capacities of the United States as well as a growing embrace of legal constitutionalism—a view towards the judicial settlement of the boundaries of institutional authority as well as the enactment of statutory framework measures to govern the intelligence agencies, military, and the conduct of war.[278] While the material and structural changes took root after the war are important elements constructing the contemporary political system for war,[279] the relatively recent emphasis on formal settlement of the war powers has also had critical effects on the balance of war powers. As we will see, legal constitutionalism tends to yield broad executive discretion under the aegis of legality, particularly in times of perceived exigency, and undermines political deliberation on prospective uses of force as well as the proper ambits of institutional authority relating to war.

Though the use of American military force against the Axis nations in the Second World War was authorized by formal declaration of war, the Supreme Court did take up a number of disputes relating to warmaking, and it largely adopted a posture of deference to the political branches—to broad legislative delegations as well as to presidential discretion,[280] while at the same time reflecting and reinforcing

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[278] Silverstein, *Imbalance of Powers*, 65–82; David J. Barron and Martin S. Lederman, "The Commander in Chief at the Lowest Ebb: A Constitutional History," 1058.

[279] This point, along with an argument that at least some of these developments should be understood as *constitutional*—that is, as aspects of constitutional construction—will be picked up in subsequent chapters.

[280] Examples of deference to legislative delegation include: *United States v. Bethlehem Steel Corp*., 315 U.S. 289 (1942), *Yakus v. United States*, 321 U.S. 414 (1944), and *Bowles v. Willingham*, 321 U.S. 505 (1944). Deference to executive discretion absent authorizing legislation includes *Ex parte Quirin*, 317 U.S. 1 (1942), *Hirabayashi v. United States*, 320 U.S. 81 (1943), and *Korematsu v. United States*, 323 U.S. 214 (1944).

a growing view towards judicial supremacy. The now infamous decision in *Korematsu v. United States*, which lent constitutional legitimacy to the internment of Japanese Americans, is a prominent example how a Court that understands itself as the ultimate guardian of constitutionality is likely to formally expand and entrench executive authority when faced a dispute over the parameters of institutional authority in wartime, a process that inhibits broader political deliberation. Justice Black's majority opinion held that the Court had the authority and responsibility to adjudicate disputes over the constitutionality of the actions of government but found no constitutional restriction that would justify judicial interference of the execution of its internment policy. The Court emphasized that had this been "a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice" its duty to reach a different ruling would have been clear. However the executive order was upheld because the Court said it was unable to judge the claim of a military imperative made "by the properly constituted military authorities," and thus could not reject it as contrary to the Constitution.[281]

Fully aware of its own inherent limitations to assess questions of military necessity but compelled to rule what the law is—the written constitution here taken as the 'law' in question—the Court seemingly expanded the boundaries of constitutionality to permit what was acknowledged as an extraordinary and unseemly exercise of power. Such broadening of the president's independent constitutional authority by the judiciary affects not only the outcome of a particular case, but also

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[281] Ibid., 216. While the Court's decision in *Korematsu* giving Constitutional sanction to an independent executive authority to intern American citizens has since been widely repudiated, the view towards formal entrenchment of such boundaries persists.

has important consequences for the balance of institutional power as well as the deliberative quality of the system for war in the near and long term. Giving constitutional sanction to what was widely acknowledged as an extraordinary exercise of executive discretion—so characterized by both the Court and the executive branch—undermines the prospects for the political interrogation and judgment of whether that particular use of governmental power was in fact necessary. Just because judges rightly understand themselves to lack the capacity to adequately judge the claim of military imperative does entail that others outside the executive branch cannot judge the wisdom, or better the necessity,[282] of such an act. Once the Court deems the act within the bounds of constitutionality, it becomes more difficult for

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[282] A principled claim of necessity is necessarily self-limiting: it requires that a legitimate government interest, here security, could not actually be achieved through clearly constitutional, if not legally authorized, means. For a discussion of necessity see Kleinerman, *The Discretionary President*, 9, 241–244; The self-limiting nature of necessity is related to how the Old Testament dictum of "an eye for an eye" is properly understood to be a principle of moderation—inhibiting a cycle of vengeance by proscribing any escalation of violence. However, necessity is best understood as a principle of *proportionality*, which is more nuanced. Proportionality aims for a highly efficient economy of political power—permitting only the most *minimal* action to *actually achieve* a *legitimate interest*. For an argument on proportionality as a universal principle of the rule of law, which should guide judges, see Beatty, *The Ultimate Rule of Law*. In contrast both Justice Black in his majority opinion and Justice Jackson in dissent argued that they did not have the capacity to adequately judge any claim of military necessity—that is, to decide whether the executive could have actually protected against domestic sympathizers to imperial Japan in a way that less infringed individual liberties. While Beatty seeks to employ judges in a political process that compels the government to make a case for necessity, given the justices own judgment about their capacities, particularly in emergent contexts, such a process—of investigation, justification, and decision; that is, such a deliberative process—might be better achieved through less legalistic forms. Insofar as judges can only enforce procedural requirements on matters of national security—that is they can only seek to ensure that the executive makes a 'good faith' consideration and justification of the actual 'necessity' of its proposed action—but cannot make a substantive judgment that the executive's rationale is inadequate, the likelihood of judicial legitimation of executive discretion remains.

Congress to take up the matter—to permit or restrict the action through law, or at least to pressure the executive to limit itself only to what is legitimately necessary for security and no more. A ruling by the Supreme Court affirming an a-legal or normally unconstitutional exercise of executive power alters the political burden of both action and justification: the president can now cite a constitutional authority for an ongoing action that has been legitimized by the Court, while Congress must have good reasons—and the political will—to interfere with an active exercise of constitutionally legitimate power on behalf of national security. Absent the alarm that can be triggered by the claim that the executive order is unconstitutional, or at least unauthorized, members of Congress are less likely to feel the pressures of public awareness and concern, and less able to muster the public against the presidential exercise of power.[283] And the executive branch will feel less pressure to publically justify why its exercise of power was necessary—here why the broad internment of

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[283] On the Constitution as a critical source for the 'elite cueing' of political mobilization, see Kleinerman, *The Discretionary President*, 10; Feldman, "Judging Necessity: Democracy and Extra-Legalism," 571–572. Where Kleinerman argues that *legislative* elites should cue the public regarding constitutional transgressions, Feldman argues that *judicial* elites may be more reliable to signal executive overreaching, to both legislative elites and the public at large. Critical to this discussion however, is that judges are *more* likely to serve such a role when they are not expected to be, and *do not understand their own role* as, the ultimate steward of constitutionality. That is, when the Court can stake out its own view of the apposite Constitutional boundaries of power and act upon that view in its own—juridical—sphere, while knowing the executive as well as Congress can each do the same in their respective spheres, this can enable it to publicly flag executive discretion *or* Congressional abdication—governmental action in transgression, or in the absense, of law—without stopping what may in fact be a necessary exercise of extraordinary power or legislating where Congress has fallen short.

Japanese Americans was the most minimal action necessary to actually protect the security of the United States.[284]

The lasting ramifications of judicial settlement of the boundaries of institutional power are equally important. As Justice Jackson stressed in his dissenting opinion in *Korematsu*, giving constitutional sanction to what all parties in the matter agreed was a relatively extraordinary action, outside of norms of prior governmental behavior, could lead to the entrenchment and further expansion of such power:

> Once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle [which] then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.[285]

The self-understanding that the Court has the institutional responsibility to resolve a dispute over the boundaries of institutional power under the Constitution, combined with judicially unknowable possibility that the policy in question was in fact necessary for national security, not only led the Court to set a constitutional precedent that might yield similar internment policies in the future but also sent a broader signal regarding how it might treat claims of military necessity more generally going forward. Instead of declaring the act unconstitutional without specific statutory authorization—thus leaving open the possibility for the post-hoc ratification of the policy, or clarifying that the act was not based in law but refusing to rule this act of executive discretion unconstitutional and enjoin it—thus refraining from expressing its independent constitutional judgment and leaving the matter a "political question"

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[284] Kleinerman, *The Discretionary President*, 242–244.
[285] Ibid., 246, Justice Jackson dissenting.

for Congress to weigh in on, potentially through a statute that the judiciary might then enforce—the Court showed it would accept and *affirm* the executive's own appraisal of its authority under the Constitution to meet whatever it deems a military necessity.[286] That this ruling dealt with the domestic infringement of individual liberties only reinforced the limitations of the Court should it be faced with claims of the necessity of the independent use of military force abroad.

Eight years later the Court was faced with a wartime dispute over the propriety of an executive order for the seizure of domestic steel mills—to ensure their operation in support of the fighting in Korea in the face of a severe labor dispute—area in which Congress had arguably already legislated.[287] For all of the justices in the majority, the fact that Congress had previously considered and rejected delegating authority to the president to engage in the action at issue, and had authorized less extreme remedies for resolving such labor disputes, played an important role in their decision to affirm the injunction against the Truman Administration. While upholding the rule of law in this way—deciding a particular case where there was statutory law upon which to rule—was in many ways in line with the Court's earlier jurisprudence, *Youngstown* is widely heralded as a landmark case because the wide range of

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[286] Justice Jackson offered an alterative view of the role of the Court, to be guided by its own independent interpretation of the Constitution but to only act on and through law: "I should hold that a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority. *The courts can exercise only the judicial power, can apply only law, and must abide by the Constitution*….[But] I do not suggest that the Court should have attempted to interfere with the Army in carrying out its task." Emphasis added to the original. For an insightful discussion see Kleinerman, *The Discretionary President*, 243.

[287] *Youngstown Co. v. Sawyer*, 343 U.S. 579 (1952).

justifications for its holding were not limited to enforcing existing law but extended to claims regarding the constitutional boundaries of executive power and implicated their judicial enforcement. The concurrence penned by Justice Jackson is the most nuanced and has had the most lasting influence, framing subsequent discussions of the separation of powers in the United States—serving as a key precedent in the jurisprudence of the Supreme Court and as well as a lens through with the parameters of institutional power are more widely understood.[288]

Jackson put forth what he described as "a somewhat over-simplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity,"[289] a tripartite schema for how judges should engage disputes on the separation of powers. The president has the greatest authority when acting pursuant to an express or implied authorization of Congress, because it "includes all that he possesses in his own right plus all that Congress can delegate." The Court would thus give such Congressionally authorized exercise of governmental power should be "the strongest of presumptions and the widest latitude of judicial interpretation." In contrast, Presidential power is "at its lowest ebb" when he acts against the express or implied will of Congress. Here the Court will review the discretionary act with heightened scrutiny, because if it sustained such a "conclusive and preclusive power" in the executive as constitutional, the Court will be "disabling Congress from acting

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[288] For a recent critique, see Bessette, "Confronting War: Rethinking Justice Jackson's Concurrence in *Youngstown v. Sawyer*."
[289] *Youngstown Co. v. Sawyer*, 635.

on the subject." Where Congress has not legislated, either to grant or deny executive authority, the President

> …can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference, or acquiescence may sometimes, at least, as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables, rather than on abstract theories of law.[290]

This articulation of a "zone of twilight" was intended to preserve executive discretion in the absence of law as a political question—to posit a realm bounded by politics where the Court need not tread. However, the necessity of a judicial role in resolving disputes that fall into the other categories, and thus the need to determine which category any disputes falls, seems to necessitate judicial inquiry and decision in all such cases.[291] Was the exercise of executive power treading into an area in which Congress had already acted—and, if so, what precisely had it 'expressly or impliedly' authorized or proscribed? And did Congress transgress the boundaries of 'preclusive' executive authority through any limits it sought to impose on presidential action? While Jackson's schema overtly sought to limit the judicial role in *constitutional* separation of powers disputes, its logic points towards the progressive settlement of the boundaries of institutional authority through legal processes. Not only does it invite future disputes over the boundaries of independent—constitutional in the absence of contrary law—as well as preclusive—constitutional despite contrary law—executive power to be taken up by the judiciary, but it also seems invite

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[290] Ibid., 637-638.
[291] Kleinerman, *The Discretionary President*, 233.

Congressional reliance on Courts to constrain executive discretion, as both its express and implied will is to be parsed and effectuated by judges in application to particular cases.[292]

Jackson did, however, signal that such reliance would likely be tenuous for disputes relating to the use of military force abroad. He took special care in his opinion note to draw a distinction between his willingness as a justice to enjoin a domestic seizure of property with the standards he would apply when faced with a dispute over the use of military force abroad. Although in his view Congress had the authority under the constitution to "impinge upon even [the President's military] command functions" through legal regulation, this was only so "to some unknown extent." When presented with a dispute over the regulation of warmaking, Jackson would afford "the widest latitude of interpretation to sustain [the President's] exclusive function…[to] command the instruments of national force…when turned against the outside world for the security of our society."[293] While Jackson sought to emphasize that it is Congress, and not the Court, who must act to prevent the

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[292] It is worth noting that a requirement of formal legislative authorization would not itself necessitate the articulation of the 'necessity' or proportionality of a given act of war—what counts as authorization matters and Congress can delegate broad areas of policy authority to presidents, whose substance is determined by executive discretion. For a proposal to have judges police and enforce the procedural requirements that the legislature authorizes all but the most minimal uses of force *and* that "decision makers contemplating the use of force sufficiently and demonstrably consider whether the proposed action is consistent with…principles of international law," specifically the principles of necessity and proportionality articulated in the contemporary *jus ad bellum* regime, see Martin, "Taking War Seriously"; For a proposal establishing a joint Congressional Committee required to draft a highly formal declaration of war prior to any use of force, see Hallett, *Declaring War*, 179–203.

[293] *Youngstown Co. v. Sawyer*, 644.

presidency from being "further aggrandize[d]," his view of the proper judicial parsing of regulations on the use of force abroad suggests that the Congressional tool he recommends for conscribing executive aggrandizement, "the power to legislate for emergencies," might not necessarily be best effectuated through formal legal processes.[294] *Youngstown* was both a step towards, and harbinger of the future perils of, legal constitutionalism. Though the Court struck down the act of executive discretion, it did so partly on constitutional grounds,[295] and even Jackson's more modest opinion contained an implicit tension—the move towards judicial settlement of the boundaries of institutional authority and a robust role for statutory frameworks backstopped by courts,[296] along with a judicial hesitancy to enforce limits on the use of force abroad—that hinted at the consequences of legal constitutionalism for the deliberative system for war that would follow.

Throughout the Vietnam War there were a variety of attempts to constrain the use of military force through legal processes, which occurred in the courts as well as through a variety of legislative approaches, and culminated in the passage of a framework statute designed to regulate the future use of military force. Despite the volume of lawsuits disputing the president's authority to conduct warfare in the absence of a formal declaration of war or explicit Congressional authorization that were filed throughout the war, the judiciary repeatedly avoided ruling on the

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[294] Ibid., 654.

[295] The Court held that "The Executive Order was not authorized by the Constitution or laws of the United States, and it cannot stand." Ibid., 579.

[296] For a discussion of how the view towards the regulation of executive discretion via statutory framework legislation can lead to the legal normalization of governmental acts contrary to basic constitutional values, see William Eskridge Jr. and Ferejohn, *A Republic of Statutes*, 394.

constitutionality of the use of military force, largely by dismissing them on grounds of nonjusticiability.[297] The litigants in these cases ranged widely, including citizens, servicemen, members of Congress, as well as the Commonwealth of Massachusetts. By and large the judiciary explicitly treated the question of executive authority in the absence of a formal declaration of war as a political question, "outside the judicial function."[298] As the war progressed, judges began to explore the question of Congressional participation in the war in their opinions—whether Congress had formally authorized, regulated, or supported the ongoing use of martial force—but continued to dismiss the cases as nonjusticiable political questions.[299] Later, some Federal courts began to state that the political questions doctrine did not preclude it from taking up the question of whether there had been adequate Congressional participation, but ultimately held that some minimal—but unspecified—level of Congressional participation necessary for a prolonged war had been met, with one judge observing: "[t]his is not a case where the President relied on his own power without any supporting action from Congress, as in the steel seizure."[300] Towards the end of the conflict, at the time of greatest political opposition to the war, some judges did indicate that there might be some situations where judicial limitation of

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[297] Fisher, "Judicial Review of the War Power," 484–488; Keynes, *Undeclared War*, 119; Entin, "Dog That Rarely Barks."
[298] *Luftig v. McNamara*, 252 F. supp. 819, 821 (D.D.C. 1966), aff'd, 373 F.2d 664 (D.C. Cir. 1967), cert. denied 287 U.S. 945 (1967); *Mora v. McNamara*, 387 F.2d 862 (D.C. Cir. 1967), cert. denied, 289 U.S. 934 (1967).
[299] *U.S. v. Sisson*, 294 F. Supp. 511 (D. Mass. 1968); *Davi v. Laird*, 318 F. Supp. 478, 484 (W.D. Va. 1970).
[300] *Berk v. Laird*, 317, F. Supp 715, 721-27, 729 (E.D. N.Y. 1970); Also see *Orlando v. Laird*, 443 F.2d 1039, 1042 (2nd Cir. 1970); *DaCosta v. Laird*, 471 F.2d 1146, 1147 (2nd Cir. 1973).

independent executive warmaking might be warranted, for example when faced with clearly unauthorized escalations of warfare,[301] but no limitations on the use of force—either constitutional or statutory—were enforced by the judiciary during the Vietnam War. After the political tides had turned on the war, though not quite in post-hoc fashion, the courts insisted on their role in delineating and enforcing the parameters of institutional authority in war—despite having never actually acted to constrain executive warmaking throughout the entirety of the war.

Congress certainly had not been inactive during the war. At first it delegated broad authority to President Johnson to use conventional military force in Southeast Asia.[302] Subsequently Congress acted to limit executive discretion over the scope of the fighting and eventually sought, through law, to stop American military involvement in the region altogether. The legislative attempts to limits the warfare included a provision in a 1970 Defense Appropriation Act forbidding the use funds "to finance the introduction of American ground combat troops in to Laos or Thailand."[303] When President Nixon decided instead to send troops into Cambodia, the Senate was prompted to conduct a wide-ranging debate on the power of Congress to regulate and limit the war in Cambodia. Robust debate continued for seven-weeks and culminated in the enactment of the Cooper-Church Amendment, which proscribed any funds being used to finance the introduction of troops to Cambodia. However, by the time the measure was finalized all ground troops had left Cambodia,

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[301] *DeCosta v. Laird*, 471 F.2d 1156 (2nd Cir. 1973); *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973); *Holtzman v. Schlesinger*, 361 F.Supp. 553 (E.D. N.Y. 1973).
[302] Tonkin Gulf Resolution, Public Law 88-408, 88th Congress, August 7, 1964.
[303] Department of Defense Appropriation Act, 1970, Pub. L. No. 91-171, § 643, 83, Stat. 469, 487, (1969).

leaving Congress and the President in agreement on that particular issue. Later, amid mounting Congressional and public pressure, and after vetoing a bill that cut off all funds for combat activities, President Nixon signed a bill that instantiated a delayed cut off of funds, giving the President six more weeks to conclude the war.[304] Finally, in light of the difficulty Congress faced in trying to stop the war, it passed a framework statute to regulate the future uses of force—the War Powers Resolution (WPR)—over President Nixon's Veto.[305]

The provisions of the statue read as an assertion of Congressional authority over the use of military force and an attempt to clarify and entrench many of the questions at play in the war powers debate as described in the previous chapter. The WPR demands information sharing on pending and ongoing conflicts,[306] delineates a small range of circumstances where executive discretion to initiate force is authorized in advanced,[307] requires formal Congressional assent to continue any military conflict

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[304] Second Supplemental Appropriations Act, 1973, Pub. L. No. 93-50 § 304, 307, 84 Stat. 99, 129. David J. Barron and Martin S. Lederman, "The Commander in Chief at the Lowest Ebb: A Constitutional History," 1064.

[305] Pub. L. No. 93-148, 87 Stat. 555 (1973 (codified at 50 U.S.C. § 1541-1548 (2000)). Silverstein, *Law's Allure*, 210.

[306] Section 3 requires consultation before the armed forces are sent into hostilities; Section 4 requires reporting during hostilities.

[307] Specifically, the statute states that where there has not been a formal declaration of war or specific statutory authorization, a president may only use force where there is "a national emergency created by attack upon the United States, its territories or possessions, or its armed forces." Sec. 2(c). The WPR additionally clarifies that authorization for the use of force from is not to be inferred "from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution. Sec. 8(a).

beyond a short window for executive discretion,[308] and authorizes Congress to compel the President to remove the armed forces from hostilities by the passage of a concurrent resolution.[309] In short, the statutory framework sought to delimit independent executive authority to initiate warmaking solely to cases of necessity, and provide a limited timeframe for presidents gain formal Congressional authorization before being legally compelled to cease combat operations.[310] The WPR was thus an attempt to clarify the warmaking process and reap the benefits of settlement. Ostensibly establishing in law that any use of force must be justified as a necessary emergency measure or through a regular process of bicameral debate and authorization—either up front or in short order after necessary response to a crisis—

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[308] Sec. 5(b). The sunset clause is to prohibit the use of military force without additional Congressional authorization after 60 days, but this can be extended to 90 days should the President certify the necessity of extra time for the safety of the armed forces.

[309] Sec. 5(c). A concurrent resolution, which is not submitted to the President for a signature or veto, would make it easier for Congress to act to formally stop a war without the need to mobilize a veto override. However, a provision in a different statute that provided for the substantive limitations on executive discretion resulting from a concurrent resolution has been rendered constitutionally suspect by a subsequent ruling by the Supreme Court, *INS v. Chadha*, 462 U.S. 919 (1983), but the WPR's provision has never been specifically reviewed by a court.

[310] Gordon Silverstein argues that because the delineation of situations where a president is permitted to introduce military force was moved to the "Purpose and Policy" section of the final bill, it is legally unenforceable. Silverstein, *Imbalance of Power*, 126-127. Because of this Silverstein describes the primary purpose of statute as an attempt to enable Congress to more easily *stop* ongoing uses of force: "Instead of requiring Congress to act to remove troops, the idea was to create a preemptive way to reverse the burden, writing a law that would order troops to withdraw *unless* Congress acted affirmatively to continue the mission….[T]he law was designed to…transform[] congressional silence into formal, legal, explicit *disapproval*. By not voting, a member of Congress would be forcing the president to end a war—and a war could *only* continue if Congress voted explicitly and affirmatively to support the policy." Silverstein, *Law's Allure*, 212. Emphasis in original. Once again, the political process by which the law is interpreted and enforced is critical to the import and effects of its terms, a point returned to in the concluding chapter.

the law ostensibly provides a solid foundation for reliable inter-departmental coordination and deliberation on matters of war.

However, while the provisions of the WPR attempt to construct a tightly regulated process for warmaking and place a tight legal leash on executive discretion to initiate martial force abroad, such formalization can have decidedly mixed consequences for the process of deliberation and decision. Presidents have consistently avoided submitting reports to Congress that would start the sunset clock, limiting information sharing and inhibiting the reliable consultation that Congress looked to secure. The law has also arguably provided a legal basis for up to ninety days of warfare without additional Congressional approval, which alters the default requirements of justification and venues for contestation. When independent executive authority to use military force is a subject of constitutional ambiguity, presidents face at least some risk of censure by the Supreme Court—as the Court has occasionally suggested that it might enforce a constitutional limits on independent executive warmaking—as well as the real prospect of political contestation mobilized by legislative elites leveraging the claim of a flagrant transgression of a constitutional boundary. Such built-in political pressure creates a high bar of justification for presidents who independently order the use of force: leaning on claims of constitutional authority as commander in chief or the presidential oath to "preserve, protect, and defend the Constitution" calls for an explanation of why initiating combat without the formal assent of Congress was in fact necessary, and in a way reaffirms Congressional participation in warmaking as a norm. Accordingly, such political pressures provides a real political incentive to get authorization whenever

feasible. Though the language of the statute attempts to codify the widely held view that the Constitution requires formal legislative authorization except in cases of necessity, it has been widely seen to formalize the once relatively ambiguous constitutional principle that it is up to the president's sole judgment when a national emergency necessitates the use of military force. Additionally, the sunset clause permits defenders of executive discretion to claim that the statute is properly understood as a *delegation* of authority over short-term military initiatives to presidents in general, as Congress formalizing it intention to play primarily a *post-hoc* role in the warmaking process.[311] A legal framework seemingly designed to assert and bolster Congress's role in warmaking and counter the growing claims and practice of discretionary executive warmaking has, when seen from a different light, constructed a rhetorical scaffolding for executive discretion—presidents can now leverage claims to both constitutional and legal authority to initiate warfare on their own accord.

Beyond bolstering the executive discretion it seeks to constrain, the War Powers Resolution might additionally be understood to yield even more perverse consequences for the planning and execution of military initiatives. The prospect that any military hostilities will be terminated after sixty or ninety days solely due to Congressional inaction can provide a powerful incentive for presidents to order the use of overwhelming force at the start of any conflict. Presidents reasonably would seek to avoid spending the political capital required to gain formal authorization to

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[311] For an interesting argument that Congress intended the law to be a means of 'stage management,' delegation as a method of influence, see Auerswald and Cowhey, "Ballotbox Diplomacy."

continue the conflict if it could conceivably be completed quickly. Even more importantly, they will seek to mitigate the risk that the military mission will be forced to end without completing its purposes due solely to the gridlock that can be caused by an intransigent Congressional minority. The sunset clause as written thus constructs a warmaking rationality that runs counter to the norm of proportionality that is built into the concept of necessity—instead of using the minimal military might necessary to achieve a legitimate purpose, or even to offer the best military strategy, military planners must ask the armed forces to fight in such a way that will best guarantee victory in war in a very short timeframe.[312] Additionally, while the very possibility that Congressional inaction can result in the premature termination of a nascent military initiative can distort executive war planning, the same deadline can impinge robust Congressional deliberation and action. With the sunset clause, Congress has ostensibly also required itself to openly engage the wisdom of the executive-led use of force at just the point when it would likely face a political context, due to such factors as the "rally 'round the flag" effect,[313] that would make it difficult to express and justify opposition, even if merely through inaction. At its most pernicious, such circumstances might induce Congress to formally authorize the ongoing military conflict and swallow any criticisms—and thus refrain from stringent

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[312] E.g. "Shock and Awe." Ullman and Wade, *Shock and Awe*.
[313] For an early analysis of the "rally 'round the flag" effect, see Mueller, "Presidential Popularity from Truman to Johnson."

demands for presidential explanation—of the necessity and purposes of, as well as the strategy for, the warfare already in progress.[314]

Since the Vietnam War and the passage of the War Powers Resolution a broad pattern of warmaking politics has emerged—"executive initiative, congressional acquiescence, and judicial tolerance"[315]—which brings the overarching ramifications of the legalization of the constitutional politics of war into relief. Defenders of executive discretion in war, including every president from Nixon through Obama, argue that there is an independent executive authority under the constitution to move troops around the world and to use military force to protect and promote the security interests of the United States, and many accordingly assert that standing statutory constraints on executive discretion in war—like the WPR—are unconstitutional.[316] In practice, presidents have seen fit to order short-term uses of military force without clear Congressional authorization: armed intervention in Grenada in 1983 and air strikes in Libya in 1986 ordered by President Reagan,[317] a military incursion into Panama ordered by President Bush in 1989, operations in Somalia and Iraq in 1993, Afghanistan and Sudan in 1998, and Yugoslavia in 1999 ordered by President

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[314] For a contrary analysis, that "[t]he War Powers Resolution creates a framework supportive of…serious interbranch deliberation and mutual accountability," see Shane, "Learning McNamara's Lessons," 1303, 1304. Shane's characterization of the political consequences of the WPR is decidedly a minority view.

[315] Koh, *The National Security Constitution*, 5.

[316] Silverstein, *Law's Allure*, 219; President Carter suggested that the sunset clause of the WPR *was* constitutional, but that the consultation provisions might not be. Neither view was put to a practical test. See David J. Barron and Martin S. Lederman, "The Commander in Chief at the Lowest Ebb: A Constitutional History," 1076.

[317] Fisher, *Presidential War Power*, 161–164.

Clinton,[318] and the strikes in Libya ordered by President Obama in 2011.[319] Though in many of these cases presidents have gone through some of the motions set forth in the War Powers Resolution, they have carefully avoided acknowledging its force or actually triggering its substantive provisions, and have also often argued that legal grounding for these initiatives came from international agreements and existing laws outside the WPR.[320] For military operations that were anticipated to be large-scale and long-term, presidents have sought—and received—formal Congressional authorization, though independent executive use of force was always overtly maintained as within the bounds of the president's constitutional authority.[321]

Despite the continual assertions of plenary executive war power in the face of a statutory framework designed to regulate it, the substantive provisions of the WPR have never been formally enforced in practice. Though the judiciary has occasionally hinted that it might step in to resolve a constitutional impasse over the use of military force, it has largely premised the prospects of any substantive judicial intervention

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[318] Ibid., 177–201.

[319] See the introduction to chapter 2 of this work.

[320] As Koh sketched the basic point: "Even a glimpse of the recent history reveals a consistent pattern of executive circumvention of legislative constraint in foreign affairs that stretches back to the Vietnam War and persists…." Koh, *The National Security Constitution*, 38; Or as Posner and Vermeule more forcefully frame it: "Framework statutes are one of liberal legalism's principle instruments of executive constraint, in a world of little constitutional constraint. But have been tried, they have been found wanting." Posner and Vermeule, *The Executive Unbound*, 89.

[321] In the lead up to the 1991 Gulf War, while the Bush (I) administration repeatedly argued that could initiate offensive military force against Iraq without Congressional approval, formal authorization was eventually requested and granted. For the wars in Afghanistan and Iraq, beginning in 2001 and 2003 respectively, the George W. Bush administration received broad formal authorization from Congress. Debate on the latter, however, was skewed in part by the administration's loud trumpeting of faulty intelligence. Fisher, *Presidential War Power*, 169–174, 202–230.

into warmaking on Congress having exhausted its independent institutional means to challenge the use of military force.[322] And although there have been a number of instances where members of Congress have attempted to challenge the use of military force in the courts since the law was passed,[323] the statute has never been subject to any formal judicial review or enforcement.[324] Additionally, in other decisions the Court shown a propensity to defer to executive discretion in interpreting and implementing other statutory frameworks,[325] thus requiring Congress to be both exceedingly clear in its proscriptions and willing to proactively contest executive transgressions of the law in question for standing legal constraints to have practical

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[322] *Crockett v. Reagan*, 558 F.Supp. 893, 898 (D.D.C. 1982), aff'd, 720 F.2d 1355 (D.C. Cir 1983); *Lowry v. Reagan*, 676 F.Supp. 222 (D.D.C. 1987), aff'd, no. 87-5426 (D.C. Cric 1988); *Dellums v. Bush*, 752, F. Supp. 1141, 1145 (D.D.C. 1990); *Campbell v. Clinton*, 52 F.Supp.2d 34, 42 (D.D.C. 1999), 203 F.3d 19, 21 (D.C. Cir. 2000). For a helpful summary, see Fisher, "Judicial Review of the War Power," 489–492. Even recent cases regarding habeas corpus and military tribunals, matters closely associated with the judicial function, show the Supreme Court at best asserting *itself* as the ultimate interpreter of the Constitution, while permitting—if not inviting—legislative delegation of power to the executive insofar as it does not infringe the purview of the judiciary. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Boudamine et al v. Bush*, 544 U.S. (2008).

[323] "One of the by-products of the War Powers Resolution is the frequency with which legislators turn not to their colleagues to challenge the President, through the many institutional powers that are available, but to the courts." Devins and Fisher, *The Democratic Constitution*, 121.

[324] That the Court has thus far refrained from reviewing the WPR is likely for the best for those seeking to constrain executive war power, however. In *INS v. Chada*, the Supreme Court overruled a provision providing for substantive limitations on executive discretion over a domestic matter following a the passage of a concurrent resolution, thus rendering section 5 of the WPR constitutionally suspect. *INS v. Chadha*, 462 U.S. 919 (1983).

[325] *Dames & Moore v. Reagan*, 453 U.S. 654 (1981); *Chevron v. Natural Resource Defense Council*, 467 U.S. 837 (1984). Silverstein, *Law's Allure*, 220–228.

bite.[326] For its part, Congress as a whole has not forcefully challenged the growing claims of executive discretion in war and has never attempted to compel the President to comply with the War Powers Resolution or even to file a report that would activate it.[327] And when presented with the prospects of a major war, it has willingly delegated great discretion over the use of military force to presidents through sweeping authorizations.[328] The turn towards statutory frameworks to close the lacunae of institutional power in war replicates, if not compounds, the problems associated with judicial supremacy discussed above. When faced with a dispute over the legality of an executive act of war, the judiciary—which had refused to constrain executive discretion without a formal Congressional prohibition, thus inviting statutory regulation of the warmaking process—has subsequently permitted existing statutory frameworks to be stretched to by creative executive interpretation. Formal constraints on the use of military force become a legal aegis for executive discretion and Congress is left to muster opposition against a purportedly illegal, rather than unconstitutional, executive action conducted under the banner of American national security interests.

The pattern of politics engendered by legal constitutionalism and the consequences for the deliberations for war were crystallized in the military strikes in

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[326] "If Congress disapproves of the administration's interpretation [of ambiguous statutory regulation], legislators are free to pass an explicit statute that makes clear their preferences. This is perfectly simple in theory—but extraordinarily difficult in practice given the institutional barrier or overcoming a filibuster in the Senate or a presidential veto." Ibid., 227. Of course, passing a statute is only one means toward the constraint of executive discretion, as will be discussed in the next chapter.
[327] National War Powers Commission Report, 21-26.
[328] Silverstein, *Imbalance of Powers*, 133–138; Fisher, *Presidential War Power*, 154–235.

Libya ordered by President Obama in 2011.[329] Despite the election of a president who had championed the legislature's constitutional role in authorizing the use of force except in cases of self-defense, the United States engaged in a bombing campaign without specific Congressional authorization or appropriations. Though the Obama administrated provided Congress with notice of impending military involvement in Libya as required under the War Powers Resolution, ostensibly starting the sixty day sunset clock and reinforcing the legitimacy of the statute in general as well as its substantively constraining provisions, it subsequently insisted that the missile strikes and drone attacks were not "hostilities" as defined under the WPR.[330] Congress not only did not insist on presidential compliance with the statutory framework, but it never expressed a formal institutional viewpoint on the use of force through an authorization, prohibition, or even through specific funding. A lawsuit filed by fifteen members of Congress, which claimed the terms of the WPR had been transgressed,

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[329] For a more detailed account, see the introduction to chapter one.

[330] In crafting this statutory interpretation Harold Koh, who was serving as Legal Advisor to the State Department but had previously criticized the increasingly unilateral politics of warmaking in his *National Security Constitution*, reaffirmed what he once sought to change. In an astonishing foreshadowing of future events, in that book Koh proposed the following hypothetical:

> If asked…whether the president can…bomb Colonel Qaddafi's headquarters, the presidential lawyer must answer three questions: (1) Do we have the legal authority to act? (2) Can Congress stop us? And (3) Can anyone challenge our action in court?

But given his analysis that the president's advantage in foreign affairs derives "first…because it has incentives to take the initiative in foreign affairs and has often done so by *construing laws that were enacted to constrain executive authority to authorize its actions*," along with the contemporary trend of Congressional acquiescence and judicial tolerance, his actions as advisor to the president might leave us less than astonished. Koh, *The National Security Constitution*, 5, 116–118, emphasis added; Koh, "Statement Regarding Use of Force in Libya."

was dismissed for lack of standing, in line with contemporary judicial precedent. The contemporary view towards formally settling ambits of institutional authority in war has not only failed to achieve its goals, but the emphasis on law and courts has seemingly enabled what they seek to constrain. It has created a legal structure upon which presidents can, perhaps disingenuously, ground their authority to initiate force,[331] undermining inter-branch deliberations for war.[332]

Conclusion: The Perils of Legal Constitutionalism

The contemporary pattern of politics for warmaking must be understood as occurring within the context of a pervading view towards formal settlement of the boundaries of institutional authority in foreign affairs. While for most of American history the precise allocation of authority over the use of military force under the constitution remained a matter of considerable formal ambiguity, following the Second World War presidents began to increasingly assert broad independent authority to act on matters of national security that was met with an increasing view towards fixing the ambits of war authority through juridical mechanisms. This embrace of legal constitutionalism in regards to warmaking has important consequences for the deliberative quality of decision-making process for war and the constraint of executive discretion.

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[331] For a related discussion see Sanford Levinson and Jack M. Balkin, "Constitutional Dictatorship: Its Dangers and Its Design," 1857.
[332] For a sustained examination of how statutory framework legislation can be, and has been, a site of constitutional deliberation and constraint, see William Eskridge Jr. and Ferejohn, *A Republic of Statutes*.

As the basic premise of legal constitutionalism—that every exercise of governmental power must be within the law—becomes the predominating principle of the constitutional order, it undermines the constitutional politics that best serves as a deliberative constraint on the use of military force. When the written constitution is understood as law, the debate over the boundaries of institutional authority becomes a legal debate, to be ultimately resolved by the Supreme Court. But as the foregoing overview described, the interventions of the judiciary into the boundaries of institutional authority in war have not constructed an adequate legal framework for the use of military force, nor has it shown itself willing or able to substantively restrain executive power on matters of national security. The modern Supreme Court has, however, repeatedly asserted its rightful role as the final word on such issues,[333] reinforcing the predominance of legal constitutionalism in the political culture while quietly showing its very limitations.

The pull of legal constitutionalism has also led Congress to try to formalize the warmaking process in the aftermath of the Vietnam War, further constructing of the politics of warmaking on legal grounds. Even when carefully drafted, such laws can be interpreted—via creative statutory construction by executive branch lawyers, its own kind of executive discretion—as broad delegations. At the same time, the view towards the judiciary as steward of a legally ordered constitution has encouraged Congressional passivity, if not irresponsibility, as members of Congress increasingly look to the judiciary to "clean up" the constitutional and legal ambiguity surrounding the boundaries of institutional authority on matters of national security

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[333] Kleinerman, *The Discretionary President*, 230.

that it has played a role in creating.[334] A pervasive embrace of judicial supremacy thus has diffuse but important effects on the balance of power between Congress and the president, the Court's interventions creating a kind of "judicial overhang" that misdirects Congress in its pursuit of its constitutional responsibilities if not to altogether colonizing its constitutional judgment.[335] Legal constitutionalism has also had important consequences for executive branch decision-making and public justification on matters of war. Though statutory frameworks such as the WPR designed to establish bright-line constraints on the use of force have proven susceptible to being transformed into legal aegises for executive discretion to initiate military hostilities, they can also be understood to lead presidents to publically justify their decision to use force in legalistic terms and even to tailor its exercise—such as the use of brief but overwhelming force—to avoid any legalistic judgment instead of making a public case for his preferred military ends and means or basing the decision for war on an assessment of what would be approved through more robust mechanisms of retrospective public judgment. Perhaps most concerning of all is the disciplining effect that legal constitutionalism has on the constitutional judgment of the citizenry in relation to the use of military force, altering the sense of responsibility

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[334] Benjamin A. Kleinerman, "'The Court Will Clean It Up': Executive Power, Constitutional Contestation, and War Powers"; Such a phenomenon cannot be laid solely at the feet of an expansionist judiciary, but must also be assessed in terms of Congressional motives for deference and delegation to the courts. See Graber, "'The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary.'"; Soltan, "Delegation to Courts and Legitimacy."

[335] On "judicial overhang" see, Tushnet, *Taking the Constitution Away from the Courts*; Also see Tushnet, "Congressional Constitutional Interpretation"; Tushnet, "Some Notes on Congressional Capacity to Interpret the Constitution"; Tulis, "On Congress and Constitutional Responsibility."

and agency the people have over constitutional elaboration and practice,[336] a point that will reemerges in succeeding chapters.

[336] Kramer, *The People Themselves*.

Chapter Four

Political Constitutionalism in War: Forms and Norms

> *Constitution making outside the courts is more free-form, more unsettled, since it does not have one decision maker at the apex analogous to the Supreme Court.*[337]

> *There is never a constitutionally mandated allocation of authority, except in the sense that the Constitution creates a framework within which president and Congress contend for power; not one determined by text, not one determined by practice*.[338]

> *The institutional design of the regime must…facilitate deliberation, that is, the exercise of practical political reason through which the public interest is given concrete meaning; and, in order to make that possible, it must prevent any breach of the rule of law, and, more broadly, control faction.*[339]

Introduction

Where the formal settlement of the boundaries of institutional authority aspired to by legal constitutionalism has been an exercise in sharply diminishing returns for the deliberative constraint of the use of military force, an alternative version of constitutionalism embraces the kinetic tensions of continual contestation over such political questions as an inherent, and potentially productive, element of the American constitutional order. At its most basic, political constitutionalism posits that matters of political principle—here the decision for war—ought to be contingently determined through politics rather than fixed in advance for all time.[340] Bounds on the

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[337] Treanor, "The War Powers Outside the Courts," 158.
[338] Tushnet, "Congressional Constitutional Interpretation," 284.
[339] Elkin, *Reconstructing the Commercial Republic*, 38.
[340] "A political constitutionalism…concentrat[es] on who exercises power and how, rather than trying *a priori* to circumscribe where it can be used and for what purposes." Bellamy, *Political Constitutionalism*, 146; Consideration of the proper

exercise of political power are properly established by the dynamic equilibrium of the interaction, and sometime competition,[341] of interested political agents and institutions. Though the Constitution clearly anticipates a minimal level of participation of both Congress and the president for the use of military force and grants specific powers that can be used to bolster their respective roles—the constitutional common ground discussed in chapter two—a political conception of constitutionalism centers on a considerable measure of flexibility in the decision making process for war as a general matter over time and the potential necessity, if not inevitability, of some executive discretion in any given instance of martial conflict. From the lens of political constitutionalism the unsettled nature of constitutional warmaking authority, and the tumult over the proper process for warmaking that can arise on the occasion or in the aftermath of a particular offensive initiative, are integral mechanisms of the constitutional design—features to be built upon rather than bugs to be eradicated from the system. Constitutional indeterminacy serves as an invitation for the branches of government to assert themselves on matters of foreign affairs: an inducement not only to influence particular decisions on the use of military force but also to participate in the construction of the legal and political context for future security decisions. But while the manner through which the United States decides for war is not reducible to textual provisions of the Constitution, it is

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ambits of institutional power are linked to considerations of policy: "Constitutional theory rooted in constitutional politics focuses on public policy rather than on abstract moral values." Graber, "Constitutional Politics and Constitutional Theory," 330.

[341] A view aptly summarized by Jeffrey Tulis: "The founders urged that "line drawing" among the spheres of authority be the product of political conflict among the branches, not the result of dispassionate legal analysis." Tulis, "The Two Constitutional Presidencies," 102.

emphatically a constitutional issue—the balance of fundamental political principles in practice is determined by patterns of politics that are ordered in many ways by their relation to the written constitution.

Despite a burgeoning recognition of the perils of the pervasive view towards formal constitutional settlement,[342] and particularly a nascent scholarly wave that rejects legal constitutionalism in connection to the balance of institutional power in war,[343] there remain significant differences among political conceptions of the constitutional ordering of the war powers. The primary distinctions center on constitutional forms and norms: what elements of the political order are emphasized, if not simply included, in the idea of a constitutional order upon which the theory of political constitutionalism is built; and what, if any, normative leverage can be derived from an analysis of that political constitution to guide an evaluation of the contemporary warmaking system. Analyses of the war powers from the vantage point of political constitutionalism are highly institutional in focus, hinging on the differing characters and functions of the branches of the federal government and the varying output of their interactions.[344] They share a view of constitutionalism as

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[342] Thomas, *The Madisonian Constitution*; Bellamy, *Political Constitutionalism*; Tushnet, *Taking the Constitution Away from the Courts*; Agresto, *The Supreme Court and Constitutional Democracy*; Kramer, *The People Themselves*; Schwartzberg, *Democracy and Legal Change*; Ceaser, "Restoring the Constitution."

[343] Powell, *The President's Authority over Foreign Affairs*, 25; Yoo, *The Powers of War and Peace*, 8; Silverstein, *Imbalance of Powers*, 6; Kleinerman, *The Discretionary President*; Zeisberg, "The Relational Concept of War Powers"; Griffin, *Long Wars and the Constitution*.

[344] Such analyses thus proceed from a conception of the constitutional order as comprised primarily by the patterns of politics within and between the institutions that are ordered in significant ways by a relation to the constitutional text. For a characterization of the institutions that make up the separation of powers in terms of

predominately comprised by "separated institutions sharing power" rather than the progressive formal entrenchment of the bounds of political power resulting from continual exegesis and enforcement of the written constitution by the Supreme Court.[345] However, while embracing the idea that "there is no one constitutionally correct method for waging war,"[346] recent political approaches to the war powers differ on whether and how the operation of a flexible constitutional system for warmaking can be judged. If there is no singular bright-line procedure for how the United States decides for war, and the warmaking process is properly bounded by politics, is whatever emerges from the political system—what the politics will bear at a given moment—acceptable? Or is there a constitutional basis upon which to assess the patterns of politics that determine whether and how the martial power of the United States is exercised abroad?[347] And how are constitutionally salutary warmaking orders to be constructed—debated, structured, assessed, and reordered

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patterns of politics, see Elkin, *Reconstructing the Commercial Republic*, 92; 328, note 1.

[345] The turn of phrase "separated institutions sharing power" was coined in Neustadt, *Presidential Power and the Modern Presidents*, 28–32; The more common terminology "separation of powers" can sometimes imply the fixed, clean, and precise institutional natures that legal constitutionalism has unsuccessfully sought to formally delineate. For an argument for using "balance of powers" instead see Bellamy, *Political Constitutionalism*, 195.

[346] Yoo, *The Powers of War and Peace*, 8. While rejecting formal constitutional settlement, the proper role of the judiciary remains an important site of variance in treatments of the war powers from the lens of political constitutionalism. Though courts have not formally settled the boundaries of institutional power in war, that juridical processes *have* influenced the interactions between the political branches demands attention to their place in a political model of constitutional war powers—a task taken up below and in the subsequent chapter.

[347] In other words, are there internal grounds to judge the variety of possible warmaking orders as better or worse—are there standards for an imminent constitutional critique?

over time? Finally, what constitutive modes engender such a deliberative constitutional politics on matters of war? The different approaches to such questions of constitutional forms and norms have important consequences not only for analyzing contemporary uses of force—whether the constitutionally-based warmaking order functions well—but also have implications for the construction and maintenance of a deliberative constitutional order, and the broader deliberative system of which it is a central element, on matters of war.

This chapter begins with a discussion of the baseline perspective of political constitutionalism that holds that matters of constitutional principle such as the parameters of institutional authority regarding the use of military force properly depend on the outcome of political interactions between the branches and thus that there is no single, fixed process for the of use force under the Constitution. When the boundaries of power are to be delimited by politics rather than parchment distinctions the ostensible range of constitutionally possible and permissible warmaking processes appears quite broad, including the prospects of extensive executive discretion as well as a president constrained by a highly assertive Congress. The discussion then turns to engage recent treatments of the war powers that have pushed this emphasis on the constitution as political structure rather than strict legal code even further, drawing normative implications from the institutional framework. One version argues that the executive discretion in using military force characteristic of contemporary American foreign affairs should not merely be understood as one of a broad range of constitutional possibilities, but rather a realist assessment of constitutional function sets the unfettered president as the rightful norm. While the constitution is rightly

understood to invite institutional struggle for the direction of foreign affairs, the natures of the branches it establishes advantage executive discretion in war and the contemporary warmaking order is largely a preordained outcome of the fundamental constitutional design.

Alternative analyses draw broader normative aspirations for the warmaking order from the constitutional text and the institutional structures its establishes, even if its bounds are not to be strictly fixed and formally entrenched. An embrace of constitutional flexibility for the process by which the United States decides for war not only entails a rejection of formal constitutional settlement and an acceptance of the prospect of some executive discretion over the use of force, but also demands that the constitutional "invitation to struggle" remains a continuing invitation to a fair fight. At minimum a political constitutionalism must include the enduring possibility of a substantive rebalancing of institutional purviews, which requires the 'hard' mechanisms for political constraint established by the constitution to remain practically viable. Thicker versions of political constitutionalism move beyond this baseline aversion to constitutional entrenchment to develop prescriptions for the functioning of the constitutional order in relation to war. While the practical possibility of a reordering of the warmaking process entails the prospect of broad deliberation over its proper contours, a thick political constitutionalism eschews isolated and unchallengeable institutional purviews and emphasizes the importance of recurrent inter-branch interactions that yield systemic deliberation on the use of military force as well as the process by which the decision for war is made.

A Perilous Invitation to Struggle: Anything Goes?

While legal constitutionalism maintains that the lines of political authority ought to be settled through processes of juridical entrenchment, political constitutionalism takes its bearing directly from the unsettled, often contestatory nature of American constitutional practice. The contentious and variable character of institutional purviews under the Constitution is particularly evident in matters war. Edward Corwin's seminal description of the constitution of foreign affairs is a useful starting point for engaging the idea of the political constitution of the war powers, as he decisively avoids any emphasis on parchment distinctions yielding fixed political practice and maintains an analytical focus on a flexible constitutional model girded by the interplay of institutional politics:

> What the Constitution does, *and all that it does*, is to confer upon the President certain powers capable of affecting our foreign relations, and certain other powers of the same nature upon the Senate, and still other such powers upon Congress; but which of these organs shall have the decisive and final voice in determining the course of the American nation is left for events to resolve…. All of which amounts to saying that the Constitution, considered only for its affirmative grants of powers which are capable of affecting the issue, is an invitation to struggle for the privilege of directing American foreign policy.[348]

The disjunction between this oft-cited passage and the pervasive contemporary view towards formal constitutional settlement can be partly understood in terms of historical context. First published in 1940 and reprinted as-is in a revised 1948 edition, Corwin's constitutional analysis occurred during a period that bracketed the Supreme Court's infamous *Koretmatsu* decision but which predated the landmark

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[348] Corwin, *The President*, 218, emphasis in original. Corwin, *The President's Control Of Foreign Relations*, 156.

judicial review of the separation of powers relating to war in the *Youngtown* case—early steps in the change from 'the rule of law without settlement' to the 'pursuit of formal entrenchment' described in the previous chapter. What would become a growing embrace of legalistic efforts to gain and keep institutional advantage—or perhaps to stem defeat—within the struggle Corwin identified was at best a nascent, and relatively unremarkable, development at the time of his study.

Corwin's emphatic claim that *all* that the Constitution does is to distribute institutional powers that can be used to affect foreign affairs appears at first blush to abjure the possibility of constitutional judgment in the realm of external governmental action. Stated most simply, such a conception of political constitutionalism would entail that when it comes to matters of foreign affairs, such as the exercise of military force, whatever the political system will bear is constitutionally acceptable—anything goes. Such a starkly realist view of constitutionalism cannot be fairly imputed to Corwin, however, who elsewhere made a distinction between constitutional theory and practice:

> Theoretically the power [to independently order military force] is a defensive power and reserved for grave and sudden emergencies. Practically the limit to it is to be found in the powers of Congress and public opinion.[349]

Though he did not delve deeply into how this normative interpretation was derived or how this sense of constitutional propriety should be translated into political practice, this underlying view led Corwin to a concern over an observable growth of executive power, particularly in wartime.[350] Marked by a combination of discretionary

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[349] Corwin, *The President's Control Of Foreign Relations*, 156.

[350] The connection between the pull of that normative sense of constitutional propriety—a distrust of executive discretion and penchant for the rule of law

executive action, statutory delegations, as well as rulings by the Supreme Court, Corwin worried that American constitutional development in this area might be a kind of political ratchet, characterized by unidirectional movement towards broader executive power.[351] This tension between constitutional description and prescription spotlights a potential conundrum for any theory of political constitutionalism. Can a conception of constitutionalism that centers on political contestation determining matters of political principle—here delimiting the proper process for the decision for war—also provide principled, constitutional, grounds upon which to assess the working constitution? One influential line of contemporary scholarship, described below, embraces a kind of constitutional realism that seemingly abjures substantive bounds on the politics of warmaking. Ostensibly neutral, this conception of the political constitution has been interpreted by some to not only permit, but also in many ways to promote, executive discretion in war.

Continuing on where Corwin stopped short, a recent wave of scholarship emphasizes and embraces the strikingly protean character of American constitutionalism in foreign affairs. Sharpening the basic premise forged by Corwin, Mark Tushnet argues that "the Constitution prescribes no distribution of power at all,

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seemingly stitched into the American constitutional soul, even if not definitively inscribed in the constitutional text—and the actual exercise of those political limits—how the constitutional lacunae in regards to warmaking are filled; the constitution in practice constructed politically—is critical to the notion of political constitutionalism discussed in what follows.

[351] "[I]n each successive crisis, the constitutional results of earlier crises reappear cumulatively in magnified form." Corwin, *The President, Office and Powers*, 313; more generally see 275–318.

but only sets up a framework of political contestation over that question."[352] Under such a thin version of political constitutionalism, because Congress and presidents have constitutionally-based institutional tools to alter the balance of their influence over foreign policy, the trend of executive initiative on matters of war that has only increased since the middle of the twentieth century is merely one of a nearly infinite array of permissible warmaking orders. Tushnet goes even further, arguing that on the question of the proper process for warmaking, "*whatever* the political process produces is what the constitution requires."[353] Under such a highly distilled realist interpretation of the constitution of foreign affairs, not only can no fixed formal rules for warmaking be derived from a proper interpretation of the written constitution, constitutional judgment is seemingly ruled out altogether. Taken to the hilt, a thin—'realist'—conception of political constitutionalism is not merely 'anything goes,' it also entails that the constitutional *is*—the working constitution—subsumes the constitutional *ought*.

Other recent treatments of the war powers push this idea of a politically rather than formally ordered constitution even further, drawing even more prescriptive implications from the practice the institutional framework has yielded over time. Though the constitution is understood to invite institutional struggle for the direction of foreign affairs, the historical trend of political practice is held as evidence that the political constitution is purposively structured to advantage executive initiative in war, perhaps necessarily so. H. Jefferson Powell leans heavily on early American

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[352] Tushnet, "Political Constitution of Emergency Powers," 1472, note 89.
[353] Ibid., 1468, emphasis in original.

political practice to argue for "the existence in the founding era of a coherent…'presidential-initiative' reading of the Constitution."[354] While stressing that constitutional authority in foreign affairs is variable and political, he concludes that the "functional superiority" of the executive on display from the very beginning of the republic engenders "a clear best reading of the Constitution that resolves questions about where authority to determine American foreign policy is vested."[355] A similar thread of reasoning can be found in the war powers analysis of John Yoo. Acknowledging that "practice alone cannot provide the answer to its own constitutional legitimacy,"[356] Yoo also stresses that "the structural advantages of the executive branch and the functional exigencies of international politics have led to the centralization of foreign affairs power in the president,"[357] and that this was a widely expected result of the constitutional design at the time of the founding.[358] For Powell and Yoo, though the constitution is rightly understood to include some measure of institutional interaction over the direction of foreign affairs, a realist analysis of the constitution shows that it is structured, at its core, to favor executive initiative in war.

The purest articulation of constitutional norms for warmaking being derived from the functioning of the working constitution frames the issue in organic, almost teleological terms. John McGinnis, for example, describes contemporary American

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[354] Powell, *The President's Authority over Foreign Affairs*, 7.
[355] Ibid., 5.
[356] Yoo, *The Powers of War and Peace*, 24.
[357] He continues: "The history of American foreign relations has been the story of the expansion of the executive's power thanks to its structural abilities to wield power quickly, effectively, and in a unitary manner." Ibid., 22.
[358] Ibid., 88–142. Yoo's historical analysis has been widely criticized as a kind of 'lawyer's history,' one that places ends before means.

warmaking as a "spontaneous order generated by the dynamic interplay of institutions."[359] The balance of power between the branches of government over the use of military force is held to be the result of a kind of institutional purview free market, whose adaptability yields near optimal results given a continually changing and unknowable international security context.[360] But while the current equilibrium point of the war powers is described as the outcome of dynamic—highly variable—interbranch "bargaining game," McGinnis goes on to claim that "the existing spontaneous order is the result intended by the Framers…and is a natural consequence of the system they established."[361] Because "the very nature of the subject matter could not be governed by fixed rules, but required discretion to maximize the effective deployment of the strength of the nation,"[362] ambits of institutional power that were left relatively undefined have developed—through a kind of invisible hand of institutional accommodation—into a fairly reliable executive dominance in practice. Though it is formally permissible and ostensibly possible for Congress to constrain executive initiative in war, the fundamental nature of the constitutional design entailed that the legislature would usually serve a more limited,

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[359] McGinnis, "The Spontaneous Order of War Powers," 1317.

[360] Benjamin Kleinerman and Vincent Munoz have put forth a similarly rosy accounting of the flexible working constitution of the war powers: "If a situation calls for more "energy" and speed, the president will likely win. If the situation calls for more deliberation and more circumspection, Congress will likely win." Kleinerman and Munoz, Vincent Phillip, "Weekly Standard"; Kleinerman's recent scholarly work on this issue is far less sanguine. See Kleinerman, "Separation of Powers and the National Security State." The difference can be most succinctly explained in terms of a tension between a statement of constitutional aspirations for popular consumption and an empirical analysis of constitutional practice to advance academic understanding.

[361] McGinnis, "The Spontaneous Order of War Powers," 1326.

[362] Ibid., 1324.

reactive, role.[363] While a thin conception of political constitutionalism claims to permit a near free-for-all, the balance of powers in practice is a playing out of the deep-seeded natures of those institutions of government—an ordering more a matter of predestination than evolution or self-conscious construction.

These relatively 'thin' conceptions of political constitutionalism on matters of war are not all quite as starkly realist as they first appear, however, as a complete embrace of "anything goes" can potentially erode the foundations that differentiate a political conception of constitutionalism. Tushnet, for example, draws one key normative claim from his analysis of the Constitution, "that the political constitution excludes the courts from deciding what the Constitution prescribes to be the institutional power between the President and Congress."[364] While the political constitution should be understood as no more or less than the branches of government contending for political power, a constitutional system premised on dynamic institutional interactions must normatively preclude the judiciary from formally entrenching a settlement of the war powers debate. The extent of the normative bounds on the judicial purview varies among these analyses, with some permitting the

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[363] Such a view thus extends the kind of structural constitutional interpretation pioneered by Charles Black, who argued that due to Congress's complex organization: "What very naturally has happened is simply that power textually assigned to and at any time resumable by the body structurally unsuited to its exercise, has flowed, through the inactions, acquiescences, and delegations or that body, toward and office ideally structured for the exercise of initiative and for vigor in administration." Black, "The Working Balance of the American Political Departments," 13, 17, 20.

[364] Tushnet, "Political Constitution of Emergency Powers," 1472, note 89; While Tushnet does not work through the rationale for this norm in his writings on war powers, elsewhere he largely grounds his critique of judicial supremacy and judicial review in their practical outcomes. Tushnet, *Taking the Constitution Away from the Courts*, 1999.

enactment of statutory constraints on executive warmaking and their judicial review and enforcement and others proscribing this along with judicial supremacy,[365] but even the seemingly thinnest conception of political constitutionalism includes at least some guidelines for the institutional interplay that determines their respective purviews. For the political constitution to function as such—to remain dynamic—the authority of the judiciary must be constrained so as to prevent constitutional calcification. The halfhearted constitutional realism of these conceptions of political constitutionalism is a key normative thread that, when pulled, reveals additional fundamental—immanent—elements of a political model of constitutionalism that have important implications for understanding and addressing the American warmaking system.

Invitation to a Fair Fight: Politically Bounding Power

The inadequacy of a thin conception of political constitutionalism that merely proscribes formal constitutional entrenchment and the contours of a thicker normative conception begin to become evident by taking seriously the basic premise of variability, that the precise ambits of institutional purviews should be decided through political processes whose result is never settled for all time. If matters of principle are

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[365] Compare Powell, *The President's Authority over Foreign Affairs*; Yoo, *The Powers of War and Peace*; McGinnis argues that it is largely in the interest, if not the nature, of the judiciary to avoid involving itself too much in war powers issues. McGinnis, "The Spontaneous Order of War Powers," 1325–1326; McGinnis, "Constitutional Review by the Executive in Foreign Affairs and War Powers"; That courts are by nature incapable of involving themselves in setting bounds on the use of force is belied by comparisons with other constitutional democracies. For a discussion, see Martin, "Taking War Seriously."

to be contingently determined through a dynamic constitutional politics then political power must be durably dispersed and meaningfully interconnected in a fashion that maintains at least a rough balance over time. James Madison succinctly summated the basic necessity of separated branches of government: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many…may justly be pronounced the very definition of tyranny."[366] Because political constitutionalism depends on the interaction of multiple centers of political power, not just anything that the political process produces goes. Without some lasting equilibrium between distinctive institutions any notion that political power will be subject to principle collapses into decisionism—unbounded discretionary power.

The question of the mechanisms by which a relatively balanced constitutional order is to be sustained over time brings the discussion back to the 'constitutional how' spotlighted in the second chapter. Formal constitutional entrenchment of precise parameters of institutional power was viewed as impractical and unwise from the very start of the republic. Madison argued that telling the branches of government what they ought to do and not do, even if their purviews were delineated in the written constitution, would not be enough maintain a division of governmental powers: "a mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands."[367] The

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[366] Madison, Hamilton, and Jay, *The Federalist Papers*, No. 47.
[367] Ibid., No. 48.

separation of powers had to be constituted politically, but the mechanisms for maintaining a durable balance of institutional power—critical to the success of the constitutional system as a whole—could not be constructed in any straightforward way. Just as a written constitution could not reliably constrain the aggrandizement of one branch at the expense of the others on its own, other external mechanisms for constitutional maintenance also had their own particular weaknesses that left them incompatible with a meaningful balance of powers over time.

No single constitutional authority, either popular or institutional, was seen as a reliable steward for the separation of powers. Though the endurance of any republic ultimately rests on the people themselves, Madison argued that formal appeal to the people as a whole, either on an occasional or periodic basis, would not be dependably prevent "encroachments of the stronger [branch]…or [redress] the wrongs of the weaker."[368] Frequent appeals to popular judgment was seen to carry with it the implication that the founding constitutional order was defective which could undermine the public veneration that Madison held to be essential for constitutional endurance. Even more importantly, the public's esteem would not be equally distributed to the branches of government but instead would likely be biased towards the institution with the closest connection to the public. Such a disparity over time could ultimately serve as a constitutional ratchet, fostering an increasingly imbalanced separation of powers as one branch was favored more often than not and

[368] Ibid., Nos. 49 and 50.

its powers aggrandized accordingly.[369]

There could similarly be no secure reliance on any single supreme institutional authority charged with adjudicating the proper contours of institutional purview, according to Madison. Partisanship for particular branches, or for the agenda of those who hold the prominent offices of those branches, would be replicated inside any constitutional council because its composition would likely be made up of political elites who formally held the offices whose boundaries of power they were now charged with adjudicating.[370] Such bias also precluded any claim by one of the branches to be the singular steward of the constitution: "The several departments being perfectly co-ordinate by the terms of their common commission, none of them…can pretend to an exclusive or superior right of settling the boundaries between their respective powers."[371] Madison held firm to such a political conception of constitutionalism following ratification and in the midst of heated political debate. While offering a range of constitutional arguments to counter the expansive interpretation of executive power in foreign affairs offered by Hamilton during the Washington Administration, Madison reemphasized the inherence of such institutionally-partisan constitutional politics: "It may happen also that different independent departments, the legislative and executive, for example, may in the exercise of their functions, interpret the constitution differently, and thence lay claim each to the same power. This difference of opinion is an inconvenience not entirely to

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[369] Ibid., No. 49. Madison thought that Congress would predominate because the legislators' "connections of blood, of friendship, and of acquaintance embrace a great proportion of the most influential part of the society."
[370] Ibid., No. 50.
[371] Ibid., No. 49.

be avoided. It results from…a *concurrent* right to expound the constitution."[372]

Instead of relying on formal entrenchment of constitutional authority interpreted and enforced by a purportedly—but impossibly—neutral arbiter, American constitutionalism incorporated partisanship into the constitutional design, harnessing such disparate political energy as a mechanism to translate constitutional principles into practice while maintaining a substantive balance of power over time. This would be accomplished by "so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."[373] Madison continued:

> [T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place."[374]

The construction of such a self-balancing constitutional system began with the written constitution, which laid out the basic contours and powers of the primary institutions of government and broad principles to which it aspires, and then was to operate through the interplay of those institutions as they engage in the work of governance to achieve those widely shared ends. The precise parameters of institutional authority were not determined *a priori* and in the abstract but were to emerge from the conflict and collaboration of the political agents who comprised the branches of government

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[372] Hamilton and Madison, *The Pacificus-Helvidius Debates of 1793-1794*, Helvidius II, 68.
[373] Madison, Hamilton, and Jay, *The Federalist Papers*, 51.
[374] Ibid., No. 51.

as they pursued their particular policy interests through their respective institutions in the face of developing circumstances. While the difficult process for formal amendment made sweeping alterations of the basic framework of government an unlikelihood, the absence of highly codified institutional purviews would serve as an inducement for those inhabiting the political offices of the legislature, executive, and judiciary to seek to enlarge the parameters of their respective institution's powers when possible as a means to their own political agency. But because the formal constitutional plan not only provided each branch with select ascribed powers but also required the participation of more than one branch of government for most exercises of public power, including those acts that further constructed the political order, the anticipated proclivity of each institution towards protecting and enlarging its own purview was harnessed as the primary mechanism to ensure that the public power would remain dispersed and at least roughly balanced over time.

This places the aversion to judicial supremacy discussed above in fuller context and points to a broader normative baseline for evaluating the political constitution of the warmaking order. Not only can the prospective bias of a sole authoritative constitutional arbiter lead to a "gradual concentration of the several powers in the same department" on its own, but a widespread prioritization of juridical constitutional entrenchment can also undermine the constitutional ambition that is a foundational basis for the separation of powers. As Joseph Bessette and Jeffrey Tulis succinctly state the point: "failure to defend 'the constitutional rights of the place' is made more likely when everyone simply defers to the courts to

determine constitutionality."[375] Maintaining a multi-polar constitutional system in relative balance requires a widespread understanding that the respective place of each institution in the constitutional order is not fixed for all time and that it is largely up to the 'branches themselves' to assert their perspective on proper institutional roles as the constitutional order is constructed and reconstructed over time.[376] But while the concern regarding the diffuse effects that the pursuit of formally codified parameters of institutional authority has on political deliberations for war accords with the analysis in the previous chapter, the diminished sway of judicial supremacy is not a sufficient condition for the dynamic interplay upon which a system of separated institutions sharing powers is premised. Madison's well-known passage underscores a foundational element of political constitutionalism glossed over in many realist accounts: each institution of government must have, and continue to have, the *capacity* as well as the *proclivity* to act in ways that maintain a relative balance of power going forward. That the constitutional invitation to struggle should never be definitively won not only proscribes formal constitutional entrenchment, it demands an ongoing fair fight. Accordingly other forms of constitutional construction that

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[375] Bessette and Tulis, Jeffrey K., "On the Constitution, Politics, and the Presidency," 12.

[376] The boundaries of power determined by the branches ultimately rest on popular acceptance by the citizenry, but in a indirect and diffuse rather than a direct and formalized way. See Kramer, *The People Themselves*; For an interesting argument that such bottom-up constitutional judgment must ultimately be spurred by political elites, in particular by leveraging popular veneration for relatively durable "constitutional landmarks" to counter popular constitutional apathy, see Kleinerman, "Can the Prince Really Be Tamed?". However a pervasive legal constitutionalism can undermine the politics of such constitutional judgment, as landmarks such as the declare war clause and that the executive must faithfully execute the laws begin to crumble through variations in practice over time and become fogged over by complicated juridical exegeses—a kind of constitutional degeneration.

unduly affect the capacities and incentives of branches of government to maintain themselves in relative balance—that transform the constitutional pendulum of power into a politically entrenching ratchet—run counter to political constitutionalism as well.

The issue of whether the branches have adequate means and motives to properly participate in the constitutional politics of warmaking does arise in the contemporary war powers debate, but the varying perspectives on the baseline capacities and motivations necessary to the maintenance of institutional balance are often inextricably linked to rigid conceptions of the warmaking order that should result from the operation of the political constitution. Louis Fisher for example argues that the "constitutional system [for war] is in tatters" largely because the institutional ambition of Congress has faltered in the contemporary era. While the framers "expected Congress to be especially vigilant in protecting the power to go to war…the record since 1950 reveals an alarming decline in congressional confidence and institutional self-esteem."[377] The use of military force abroad without contemporaneous legislative authorization from this vantage point is *de facto* evidence of constitutional degeneration, as Congress should always have the motivation to compel presidents to stay the dogs of war until it formally assents or immediately seek its retrospective authorization in cases of emergency. John Yoo offers a wholly different analysis of the very same trend:

> The practice of the political branches in making war since the end of World War II has fallen within the constitutional design. While Congress never declared war in Korea or Vietnam, among many other places, it had every opportunity to control those conflicts through its funding powers. That it did

[377] Fisher, "Unchecked Presidential Wars," 1638.

> not was a reflection of a lack of political will rather than a defect in the constitutional design.

Here the emphasis is that Congress's 'hard' powers, in particular its discrete authority to raise and appropriate for the military, entail sufficient capacity to constrain executive warmaking and are all that is necessary for political model of constitutionalism. While this seemingly offers a minimal guideline for assessing if the political constitution of warmaking remains a fair fight, whether Congress can actually "control [military] conflict through its funding" and other assigned powers, such a standard leaves little constitutional ground upon which to evaluate institutional behavior.[378] Insofar as the military is funded by the legislature, congressional passivity on matters of war can be characterized as reasoned preference that could have been, but never ought to have been, otherwise: "In these conflicts, Congress *chose* instead to allow the president to take the initiative in warmaking but also to suffer the political consequences along."[379] These starkly divergent characterizations of a salutary "flexible" constitutional politics of warmaking—consistent Congressional contestation to compel the need for its formal authorization before all military conflict versus a highly constricted role for Congress as military appropriator and little else—at their core are largely refractions of the formalistic binary of the conventional debate discussed in chapter two. Though abjuring juridical constitutional

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[378] For analyses that question whether Congress's formal power of the purse realistically remains an effectual constraint on the use of force, see Silverstein, "Constitutional Contortion? Making Unfettered War Powers Compatible With Limited Government," 352; Ackerman and Hathaway, "Limited War and the Constitution"; Banks and Raven-Hansen, *National Security Law and the Power of the Purse*. For a consideration of whether impeachment remains an effectual political constraint, see Tulis, "Impeachment in the Constitutional Order."

[379] Yoo, *The Powers of War and Peace*, 13. Emphasis added.

codification they remain characterized by inflexibility contrary to the core of political constitutionalism. The next section describes a thicker conception of political constitutionalism that provides additional leverage to understand and assess the variability of the warmaking order that can result from the constitutional invitation to struggle. Deriving norms from the political forms established by the constitution, this perspective directs our view towards the underlying rationale of a system of government made up of distinctive branches that share the powers through which much of ordinary politics and constitutional construction occur.

Political Constitutionalism's Promise: Desiderata and Deliberation

The constitutional politics of warmaking can be more fully engaged from a perspective that looks beyond the current functioning of formally ascribed institutional powers to the broader purposes of a constitutional form composed of separate institutions that share powers and have concurrent rights to expound the constitution. From such a systemic vantage point the dispersion of power among distinctive branches of government who must regularly interact in order to act can be seen not only as a mechanism for inhibiting the concentration of public power in the hands of a single agent or group but also as a means of structuring deliberation and action towards the public good.[380] While political constitutionalism at minimum

[380] Separation of powers is thus a primary mechanism in the political ordering of "active, limited government." Elkin, *Reconstructing the Commercial Republic*, 144, 150; While the following section is firmly grounded in the above work, it also draws heavily upon Tulis, "Deliberation Between Institutions"; Zeisberg, *War Powers: The Politics of Constitutional Authority*.

requires the branches to maintain a latent capacity to check the others, a bulwark against the factional exercise of public power, the patterns of politics that determine the exercise of United States martial power abroad can be more robustly assessed on the extent the branches advance the perspectives they are structured to represent in the constitutional system and substantively review and respond to the views put forth by other branches. These two norms of political constitutionalism are intrinsically linked, as the full development and expression of distinctive viewpoints occurs most reliably within a context of a continually responsive relationship between the branches. Inter-branch relations need not always be either wholly contestatory or collaborative, but regular and significant institutional interaction is essential to the functional excellence of each branch as well as to that of the constitutional system as a whole. But while the written constitution formally secures a measure of distinctiveness within and responsiveness among the branches on matters of war, the extent to which the norms of political constitutionalism are advanced is variable,[381] dependent in many ways on the elaboration of the constitution into practice over time by those selfsame institutions. As we will see, the construction of a deliberative and effective warmaking order in line with the norms of political constitutionalism must account for and address the institutional preconditions for achieving those standards over time, a view towards the capacities and motivation of the branches to reliably engage in forms of recurrent interactions to which it aspires.

One aspect of the constitutional structure essential for understanding its broader purposes, and that can guide an evaluation of the constitutional politics of

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[381] Zeisberg, *War Powers: The Politics of Constitutional Authority*, 31.

warmaking, is the very *separateness* of the branches of government, which can be understood in terms of distinctive institutional characters and relative independence. The foundations for this separateness begin in the basic schemas for the branches set forth in the written constitution, which yield particular political traits and tendencies in practice. As Jeffrey Tulis describes, the "[p]lurality or unity of office-holders, extent of the terms of office, modes of selection for office, as well as specified powers and duties combine to create a set of institutions that behave and 'think' quite differently from each other." On the whole these distinctive institutional characters can be understood as each representing "differing desiderata of democratic governance" including "the expression of popular will in and about public policy; protection of individual rights; and…provision of security or self-preservation for the regime."[382] The institutional embodiment of these basic political values is not cleanly divided, however, as each branch is structured to consider multiple and overlapping values while understanding and prioritizing them differently.[383]

Congress's geographically dispersed constituencies gives it a unique claim to represent the diversity of opinion and interests of the citizenry,[384] while its legislative processes take time to refine and reprioritize them as they are translated into generalized legal forms. Its constitutionally prescribed role in commissioning and appropriating for the armed forces along with the biannual elections for the entirety of the House of Representatives and a third of the Senate make it particularly attuned to

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[382] Tulis, "Deliberation Between Institutions," 208.
[383] Ibid., 150; A detailed extension of Tulis' general argument to matters of national security can be found in Zeisberg, *War Powers: The Politics of Constitutional Authority*, see especially 26–27.
[384] Elkin, *Reconstructing the Commercial Republic*, 162.

the domestic costs of war. But the public's general concern for their security from violence will also be reflected in the deliberations and efforts of the legislature. The provision of the sinews of war necessary to public protection, any formal authorization or restriction of their exercise, and oversight in advance of further Congressional support or constraint are thus to be tempered by concerns with the domestic inconveniences associated with the mobilization of military resources, the consequences of military expansion and engagement for the national interest abroad, and any misuse of that martial power. A sign of these complex and competing interests with Congress is that it has organized itself through committees to cultivate the expertise and direct the attention of select members on matters such foreign affairs, the armed services, intelligence, and appropriations,[385] who will at least occasionally alert the houses of Congress as such matters become pertinent such as in anticipation of military conflict, in response to hostilities underway, or on the occasion of requests for special military appropriations.[386]

In contrast, the unitary and hierarchical structure of the executive branch, the president's sole claim to represent the nation as a whole and roles as commander in chief and head of state lend themselves towards quick and decisive action in external affairs. While prone to chafing at formal and material limits on government power, presidents do attend to public opinion and to its relationship to the blood spilled and

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[385] https://www.govtrack.us/congress/committees/

[386] Ackerman and Hathaway, "Limited War and the Constitution."

treasure spent in war,[387] are concerned with maintaining at least the perception of lawfulness,[388] and can bolster their power through practices of self-binding.[389] And though the president sits at the decisionary apex of the executive branch of government, administrations can be constructed to include a diversity of voices in order to improve its internal deliberative capacities and its credibility to Congress and the public in advance of any unitary decision.[390] A complex mixture of desiderata is also represented in the judiciary. Structured to focus most intently on the rule of law and individual rights on a case-by-case basis, the Supreme Court is not disinterested in either public opinion[391] or the policy goals of the other branches,[392] including exigent security concerns proclaimed by the executive.[393] But while Congress, the president, and the judiciary each consider a range of political principles and interests

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[387] "Governments lose popularity in proportion to the war's cost in blood and money. Of the two, blood (American) seems the more important." Russett, *Controlling the Sword*, 46; Also see Gelpi and Feaver, *Paying the Human Costs of War*.

[388] As encapsulated by word and subsequent deed of Harold Koh, that "presidents almost always win" in court on matters of national security entails that they devote extensive resources to their legal representation—in the legal as well as the public sphere.

[389] Holmes, *Passions and Constraint*; Holmes, "Lineages of the Rule of Law"; Posner and Vermeule, "The Credible Executive"; Katyal, "An Executive Branch 'Drone Court.'"

[390] Goodwin, *Team of Rivals*; Katyal, "Internal Separation of Powers: Checking Today's Most Dangerous Branch From Within"; On bipartisan appointments within the executive branch as a form of credible commitment, see Posner and Vermeule, "The Credible Executive."

[391] For example, Barry Friedman describes a "symbiotic relationship between popular opinion and judicial review." Friedman, *The Will of the People*, 15.

[392] Graber, "The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary."

[393] As the discussion of the *Korematsu* case in the previous chapter highlights, the Supreme Court's attention to the security arguments from the executive branch can lead to decisions in stark tension with the principles of the rule of law and individual liberty at the core of its purpose as an institution, especially when it understands its rulings as the last word on constitutionality.

internally, their distinctive characters combined with measures of constitutionally prescribed independence entail that their views on policy, as well as on the proper contours of their respective roles in determining ends and means for a given policy area like warmaking, will rarely be in full accord.

This leads directly to a second feature of the fundamental constitutional design essential to understanding its overarching purposes and to norms that should guide an analysis of its flexible operation: the powers of the national government are in many ways *shared*—the cooperation of more than one branch is necessary for any political will to be fully effectuated. All sides in the war powers debate accept the constitutional common ground discussed in chapter two that it is up to Congress to muster the sinews of war while it is the president who is to command the armed forces in battle. While the precise circumstances under which formal Congressional authorization is required for the use of military force and the proper form that such approval should take are subject to persistent debate, the United States cannot engage in hostilities without a military apparatus that is commissioned by and regularly appropriated for by Congress *and* without a specific order from the president. And though the 'political' branches will be those most substantively involved in the use of military force abroad, the judiciary is not without a role to play in the basic warmaking order framed by the constitution.[394] While the emphasis on the Supreme Court as primary site for resolving constitutional questions relating to war is a

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[394] Distinguishing the legislature and the executive as the "political" branches obscures the inherently political—contingent—nature of the construction and exercise of judicial power. See Graber, "Constructing Judicial Review"; Graber, "'The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary.'"; Whittington, *Political Foundations of Judicial Supremacy*.

relatively recent construction, the judiciary has been relatively consistent in adjudicating legal disputes that result from warfare, particularly those that deal with questions of individual liberties and property. Even while limiting its rulings to cases pertaining to the relationship of the individual to the state and to relationships between individuals, some of which will hinge on whether a condition of war 'formally' exists to trigger particular statutory provisions, the courts can have real influence on the arguments and efforts of the other branches on matters of national security.

That the powers of the national government are shared does not make independent—discretionary—action by one institution impossible, but it does establish a political contingency at the core of the exercise of governmental power that is critical to prospect that the use of military force will be reliably disciplined by principled deliberation. The sequential nature of shared powers entails that achievement of most political goals are dependent on the active cooperation of multiple institutions and that each branch is always subject to prospective review and response by others. At its core, the aim of shared powers is towards a context where each branch must convince the others of the merits of its distinctive perspective or it will be subject to varying degrees of resistance in its pursuit of a disagreeable course of action. And because much of the persuasion between the branches is conducted in view of the public, who ultimately has its own capacity for review and response through the electoral process, even the most partial of interests a likely to be

articulated as arguments about the public good.[395] This "transformation of interest into good" can be understood to occur through a loosely defined process aptly described by Jeffrey Tulis:

> Personal ambition is translated into partisan position; partisan position is translated into an institutional point of view; institutional points of view are translated into statements of public good, often in constitutional language.[396]

In requiring inevitably divergent political interests to be pursued through distinctive branches of government that must publically work together through sequenced joint powers—through a system of checks and balances—the constitutional design is an elaborate contrivance to subject the exercise of public power to political principle. In short, a thick political constitutionalism aspires towards a constitutional order characterized by systemic institutional deliberation where public power is reliably "authorized, justified, and constrained"[397] in a manner that makes "effective governance more likely."[398] The warmaking order can thus be constitutionally evaluated on how well it is characterized by the expression of institutional perspectives on ends and means and their review and response by the other branches.

However, while the basic system of separated institutions sharing power framed by the written constitution establishes a formal baseline for a "pattern of

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[395] Elkin, *Reconstructing the Commercial Republic*, 35; Secrecy thus poses unique problems for the political constitution of a deliberative national security system and calls for unique political remedies. For an insightful recent treatment see Sagar, *Secrets and Leaks*; Fung, "What the Snowden Affair Tells Us About American Democracy"; Sagar, "Whistle-Blowers and Democracy." For a brief but useful discussion of the conditions where temporary executive secrecy can be productive element of systemic deliberation, see Zeisberg, *War Powers: The Politics of Constitutional Authority*, 179–183.

[396] Tulis, "Deliberation Between Institutions," 206.

[397] Brandon, "War and the American Constitutional Order," 13.

[398] Tulis, "The Two Constitutional Presidencies," 101.

mutual testing and deliberation" between institutions recently described by Stephen Griffin as a "cycle of accountability,"[399] the substantive contours of the warmaking order within which the deliberation and decision for any particular use of force occurs are highly variable over time. While the conventional war powers debate focuses on the meaning of the declare war clause and its elaboration into practice, many constitutionally delineated grants of institutional authority—not all of which are particular or overtly connected to war—are potential elements of the warmaking order depending on how they are constructed and exercised. For example the manner in which Congress appropriates for the military, regulates and oversees its operation, as well as how it generally wields its capacity to impeach the president can vary in terms of frequency and substance that have real consequence for the deliberative quality of the patterns of politics that comprise the warmaking order.[400] And although each branch's participation in warmaking can be roughly categorized in terms of prospective and retrospective elements, the various elements of the warmaking order are often interconnected and developments in one area can have consequences elsewhere. For example the expectation of retrospective judgment and sanction, and the form that such political processes will take, can affect prospective institutional claims and behavior. Thus while the executive is often said to be the prospective branch on matters of war while Congress and the judiciary are the retrospective branches,[401] all three branches help to construct the context—legal, structural, and

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[399] Griffin, *Long Wars and the Constitution*, 5, 243.
[400] Ackerman and Hathaway, "Limited War and the Constitution"; Tulis, Jeffrey K., "Impeachment in the Constitutional Order."
[401] Bessette and Tulis, Jeffrey K., "On the Constitution, Politics, and the Presidency."

rhetorical—in which the decision for war is made and in which it is judged politically. This study concludes with a view towards the political construction of a deliberative constitutional order for war in light of the normative guidelines clarified by a thick conception of political constitutionalism.

Conclusion

Where a thin political constitutionalism requires the underlying possibility of institutional contestation and rebalancing—and ongoing invitation to a fair fight—a thick conception of political constitutionalism offers a constitutionally derived standard for assessing the patterns of constitutional politics relating to the use of military force. The warmaking order can be evaluated on how well it advances the norms of systemic deliberation imminent in the constitutional design: the expression of distinctive institutional perspectives on ends and means and their review and response by the other branches. The final chapter concludes this study with a sketch of the prospective roles of more overtly political processes in a deliberative warmaking order, including a consideration of the role that the political processes integral to legal constitutionalism might play within it. It also considers some ramifications of the idea that it is largely the branches themselves that are responsible for elaborating the basic principles and processes formally delineated in the Constitution into political practice, and thus for determining how well the norms of political constitutionalism are enacted in their own patterns of behavior over time. As we will see, at its best the political constitution is a framework for an ongoing inter-branch relationship that is a form of public deliberation on ends and means on

multiple levels: the core values of democratic political order represented and weighed within a given decision on the use of military force as well as in the reconstruction of the warmaking order that structures such decisions in light of the contemporary security context. A postscript points towards further areas for inquiry, a view towards the broader political foundations necessary to such a self-reflective deliberative constitutional system for war.

Conclusion

Towards a Deliberative Constitutional Order for War

> *We can evaluate them in terms of how well they bring their special institutional capacities to bear on the problem of interpreting the Constitution's substantive standards about war.*[402]

> *The thrust of theorizing on the subject of balance has focused on establishing the normative guidelines to the exclusion of a consideration of the institutional preconditions for the enforcement of those guidelines.*[403]

> *Political judgment ought…to start with the design of the institutions that will interpret, elaborate, and extend the values that the political order is committed to serving.*[404]

Introduction

This study began with a question that continues to spur heated debate in both public and scholarly spheres: how should the United States decide for war? Though there is a broad spectrum of perspectives on the proper answer to this question, most commentaries coalesce around two key points: the American warmaking process has been subject to significant *change*, the most dramatic of which has occurred since the Second World War; and the proper roles of the branches of the federal government in warmaking—the ambits of institutional power relating to the use of military force—is a *constitutional* issue, rendering the dramatic rise in executive war power a cause for concern. The analysis that followed engaged with the interminable constitutional debate over the war powers to clarify its essential contours, to excavate the theoretical frameworks that underlie the primary approaches to it, to investigate the promises and

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[402] Zeisberg, *War Powers: The Politics of Constitutional Authority*, 18–19.
[403] Sagar, "Who Holds the Balance?," 181.
[404] Elkin, *Reconstructing the Commercial Republic*, 79.

perils of the constitutional practices that follow from those conceptions, to derive a constitutional standard by which the variable patterns of politics that order the decision for war can be evaluated from the political form of the constitution, and ultimately to inform prospective efforts at reconstruction. To bring this project closer to that end, this concluding chapter briefly recapitulates the arc and primary findings of the preceding chapters before offering a brief view towards a deliberative constitutional order for war and avenues of further scholarly inquiry.

Chapter Two began with a description of the domestic institutional politics relating to the use of military force in Libya in 2011, a snapshot of the contemporary working constitution of the war powers and the executive discretion, political discord, and constitutional debate over institutional authority that are among its most salient features. It then detailed the prevailing contours of the war powers debate, including its often unrecognized common constitutional ground—a view towards warmaking as a shared enterprise that requires at least some inter-branch collaboration—as well as the primary points of disagreement—when Congressional authorization is required for the use of military force and what form it should take. The chapter then reframed the war powers debate from the conventional fault line between partisans of executive and legislative authority over the use of force. It argued that the narrow focus on constitutional interpretation to settle *what* the boundaries of institutional purview in war are under the constitution should be broadened to include a key underlying theoretical consideration that is often obscured in scholarly analysis: *how* such an important constitutional question should be determined politically, under the constitution. The chapter closed with a view towards the analysis that would follow,

an argument that the form of constitutionalism—the processes by which ordinary politics, the ambits of institutional purview, is to be ordered—is critical to the prospect that the use of military force is authorized, justified, and constrained; and that the ordering of a deliberative constitutional politics of war must itself be politically constituted.

Chapter Three analyzed legal constitutionalism, the predominant approach to the constitution of the war powers, which centers on competing attempts at legal constitutional construction in pursuit of an entrenched settlement of political authority. It began by clarifying two key premises upon which the claims to constitutional fidelity characteristic of much of the contemporary engagement with the war powers rest: a basic purpose of constitutionalism is to resolve fundamental questions of authority such as who properly takes the country to war; and such a resolution should be formally entrenched, achieved through legal processes that limit ambiguity and contestation over the bounds of institutional power. The chapter then identified the key promises of the constitutional settlement aspired to by legal constitutionalism: clearly fixed ambits of institutional authority are said to allow political debate to focus on the wisdom of policy rather than the ambiguities of process, facilitate institutional responsibility and public accountability, promote forthright institutional behavior with diminished concern over prospective constitutional censure, and foster a unity of purpose within the federal government on matters of foreign affairs that is critical to the state's international posture and national security. The chapter then depicted the political processes through which formal settlement of the ambits of institutional authority in war are to be settled under

the rubric of legal constitutionalism, constitutional case-law and statutory framework legislation, which ultimately rely on a decisive role for the judiciary as steward of the Constitution.

Turning to constitutional practice, Chapter three then detailed the history of disputes relating to the use of military force that came before the Supreme Court. It highlighted how the progressive judicial settlement of constitutional lacunae on matters of war aspired to by legal constitutionalism has been discrete, at best, throughout much of American history. The pursuit of a final and formal resolution to the war powers debate has largely been a contemporary phenomenon. The political ramifications of the push towards a formal resolution of the war power debate were then analyzed, and it was argued that when legal processes are pursued as the whole of constitutionalism they can undermine the promises to which legal constitutionalism aspires. In short, the crux of chapter three is the finding that the pursuit of formal entrenchment of the war powers—the aspiration towards narrowing, if not eliminating, constitutional grey holes through legal means—can engender a perilous pattern of politics characterized by expansive executive discretion under the visage of legal restraint and deformed political deliberations on matters of war.

The preceding chapter turned a more overtly political approach to the constitution of the war powers that emphasizes the institutional forms called into being by the written constitution and the norms of a contingent constitutional politics that can be derived from them. Political constitutionalism begins from the premise that although the Constitution frames much of the distinctive characters and interrelationship of the legislature, executive, and judiciary, the exact roles of the

branches in deciding matters of principle cannot, and should not, be entirely fixed for all time. Instead a political conception of constitutionalism accommodates continual discord over the proper boundaries of institutional authority as policy disputes inevitably arise, and the prospect of some executive discretion, as inherent and potentially salutary elements of the political order. Constitutional indeterminacy and variable institutional authority serve as an invitation for the branches of government to assert themselves on matters of foreign affairs, an inducement not only to influence particular decisions on the use of military force but also to participate in the construction of the legal and political context for future security decisions. After detailing a thin conception of political constitutionalism that holds that such constitutional flexibility largely entails anything goes on matters of war and critiquing its susceptibility to the exercise of unlimited—factional—power, chapter four argued that norms derived from the political form of constitution should discipline the construction and functioning of the warmaking order. At bare minimum, the variability that is at the core of political constitutionalism demands the enduring possibility of a substantive rebalancing of institutional purviews—the constitutional invitation to struggle in foreign affairs must continue to be a fair fight. A political model of constitutionalism thus requires that the capacities of the branches to constrain one another remain practically viable, and accordingly proscribes certain kinds of constitutional entrenchment—structural as well as formal—as contrary to its imminent norms.

Chapter four then turned to a thicker conception of political constitutionalism that emphasizes the fundamental purposes of a system of separated institutions

sharing power as a fuller basis upon which the flexible behavior of the branches of government can be assessed. From such a vantage point the dispersion of power among distinctive branches of government who must regularly interact in order to act can be seen not only as a mechanism for inhibiting the concentration of public power in the hands of a single agent or group but also as a means of structuring deliberation and action towards the public good. The constitutional politics of warmaking can thus be properly evaluated on the extent the branches reliably engage in practices that amount to systemic deliberation: the expression of distinctive institutional perspectives on both policy and process, and their review and response by other branches, all done in institutionally particular fashion. However just as with the view towards maintaining a fair institutional fight, though the written constitution structures inter-branch interaction, the reliability and quality of institutional deliberation—over particular uses of force as well as the over the construction of the warmaking order within which such decisions are made—rests upon on the capacities and motivations of the branches of government that are subject to change over time.[405]

A robust conception of political constitutionalism thus aspires towards continual institutional relations that not only yield reliable and broad interrogation of the wisdom of any use of force—its purposes, the plan for achieving them, likelihood of success, prospective costs, and viable alternatives—but also that engender the at least occasional consideration of the proper construction of a warmaking order

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[405] Whether such change is judged as constitutional construction, drift, or degeneration, depends on one's normative conception of the political constitution. For a brief discussion of this issue, see Chapter 2, note 193.

capable of such a reasoned and effective politics of war. A deliberative constitutional order subjects power to political principle on multiple levels: not only must its institutions regularly weigh and decide matters of national security policy, they must also intermittently grapple with questions of how the necessary elements of a wise decision for war—of a broad and substantive consideration of ends and means—are to be reliably secured in light of the inevitability of developments in the contemporary security context.[406] The latter is the realm of constitutional construction; it is a view towards how the patterns of political practice, centered on institutions, should be structured to achieve security—in the face of constantly evolving and potentially unknown external threats—that is in proportion with other constitutional principles such as political equality, individual liberty, and the rule of law.[407] The design of a reasoned and effective warmaking order is thus most profitably understood, and achieved, as the contingent result of a recurrent deliberative process of constitutional construction, a pattern of politics in which questions of policy and constitutional propriety are tethered and mutually fructifying, which itself must be constituted politically.

But while a thick theory of political constitutionalism offers guidelines for the behavior of officials and institutions on matters of war that accommodates a

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[406] Examples of developments that demanded significant change to the warmaking order might include: the advent and spread of nuclear weapons; the bipolar Cold War and later disintegration of the Soviet Union; and the challenges of non-state terrorist organizations with international agendas.

[407] The war powers debate must thus center on an "institutional conception of the public interest." Elkin, *Reconstructing the Commercial Republic*, 79, 130.

significant measure of constitutional flexibility,[408] the most complete statement of which integrates variability in the precise ambits of the proper roles of the branches in the warmaking order as well as in their actual capacities to embody such roles in practice,[409] most normative treatments of constitutional war powers fall short of deep engagement with the political conditions necessary to reliably engender the practices immanent to them.[410] The next section concludes this project with a view towards further research in this area, a brief sketch of considerations of intra-institutional and inter-institutional design towards a more reliably deliberative constitutional order for war.[411] And given that it will be the branches themselves that are responsible for constructing the precise contours of the constitutional order in which they act, a further view towards future lines research on the political foundations of a reflexive deliberative system for war—of its underlying constitutive modes—is taken up in the postscript.

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[408] Tulis, "Deliberation Between Institutions," 209–210.

[409] "The aspirations the relational conception enjoins are one that are at least sometimes within reach. And, while the branches' absolute capacities (in terms of their ability to project power) change over time, the relational conception's standards are relative, asking only that the branches make good use of the capacities they do have at the moment." Zeisberg, *War Powers: The Politics of Constitutional Authority*, 51–52.

[410] Stephen Elkin, drawing on the Madisonian constitutional thinking, states the importance of this point sharply: "we should not pretend that we can achieve republican government by *telling* lawmakers what to do, as if that is sufficient incentive for them to do the right thing." Instead of treating "constitutional theory as advice to lawmakers of how to serve the public interest…we can see it as an account of how to constitute the politics of the regime so that it revolves around deliberative ways of lawmaking." Elkin, *Reconstructing the Commercial Republic*, 49, 278.

[411] What follows is thus a view towards reform: "in a political society that to some degree has in place the constitutive institutions it needs, the central task will largely consist of maintaining these when they are well ordered, strengthening them when their operation is on the right track, and reforming them when things go awry." Ibid., 113.

Towards Deliberative Interbranch Warmaking

The practicability of the normative guidelines for the interbranch politics of warmaking under a thick conception of political constitutionalism can be elucidated with attention to the variable forms that such a constitutional politics can take. Such a view towards the constructed practices of political constitutionalism in war highlights the key roles that nonlegal political processes play in eliciting the advancement of distinctive institutional viewpoints and their substantive review and response by the other branches. But it also spotlights the processes of legal constitutionalism in a more positive light than they were left in chapter three, pointing towards the important *political* role laws and courts can play *within* a deliberative constitutional order for war. In addition, a view towards institutional practices relating to war brings the systemic nature of the political constitution into relief. Although each branch's participation in warmaking can be roughly categorized in terms of prospective and retrospective elements, the various elements of the warmaking order are often interconnected and developments in one area can have consequences elsewhere and for the deliberative quality of the decision for war. For example the expectation of retrospective judgment and sanction, and the form that such political processes take, can affect prospective institutional claims and behavior. The two norms of political constitutionalism are thus intrinsically linked, as the full development and expression of distinctive viewpoints occurs most reliably within a context of a continually responsive relationship between the branches. Inter-branch relations need not always be either wholly contestatory or collaborative, but regular and significant institutional interaction is essential to the functional excellence of each branch as well as to that of

the constitutional system as a whole. A brief discussion of the executive, judicial, and legislative branches within a deliberative constitutional order for war is taken up below.

The Executive

Concerns over rising executive discretion over the use of military force lie at the heart of the contemporary war powers debate but, as described in chapters two and three, discretion is often framed in legal terms—as governmental action in the absence or contrary to law. This legalistic conception of constitutionalism leads executives to make creative legal claims to justify the use of force and also permits broad Congressional delegation of authority to the executive in war through sweeping statutory legislation. The theory of political constitutionalism described in chapter four puts the roles of the branches in the deliberative constitutional order for war in a different light, as it calls for the exercise of public power not only to be "authorized," but also to be "justified" and "constrained." American warmaking should not only be evaluated on whether the military operations commanded by the president received formal Congressional authorization, but also more broadly on the extent that a case for military conflict was publically made, publically deliberated, and whether another branch could realistically have frustrated a proposed or ongoing action to which it objects. Accordingly, a war president should be judged on whether he has offered a substantive justification for the use of force that permits, if not induces, the distinctive review and response of the other branches, and whether he reviews and responds to the distinctive perspectives of the other branches in kind.

But under what conditions will presidents reliably act in ways that contribute to systemic deliberation on war? One strand of thought looks toward the internal composition of the executive as a primary area whose alternative construction could yield considered decisions for war. This view begins from the fact that the organization and integration of the administrative agencies that comprise the national security apparatus, and in particular the access that their primaries have to the president, largely determine the range of actions considered in advance of a prospective military operation. This tact looks towards how the interagency process could be reordered to ensure that presidents receive as wide a spectrum of information and viewpoints on a prospective use of force as possible. One recent proposal along these lines argues that processes integral to the separation of powers be brought *into* the executive branch as a mechanism for deliberation and review that preserves the executive virtues of secrecy and speed.[412] However, while alternative compositions of the internal structure of the executive branch might enable presidents to more fully develop their own perspective on a prospective use of force, ultimately it is the president who sits at the decisionary apex of a hierarchical branch of government. The unitary nature of the presidency inevitably engenders a propensity towards swift and decisive action, a particular propensity towards seeing an upside of warmaking,[413] and a culture in which inferiors publically support presidential decisions. While the character of the executive represents virtues essential to a

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[412] Katyal, "Internal Separation of Powers: Checking Today's Most Dangerous Branch From Within"; Katyal, "An Executive Branch 'Drone Court'."
[413] As Madison, writing as Helvetius, stated the point, it is "in war…that laurels are to be gathered, and it is the executive brow that they are to encircle." Hamilton and Madison, *The Pacificus-Helvidius Debates of 1793-1794*.

government actively engaged in the pursuit of the public good, it also represents the potential for heedlessness, excess, and arbitrariness in the exercise of power that is unlikely to be adequately disciplined by reasoned deliberation through internal mechanisms alone.[414]

An alternative strand of thought looks towards external political mechanisms to more reliably yield presidential participation in a deliberative constitutional order for war. One version along these lines leans heavily on the political process of election, asking the public to select statesmen who are guided by a deep understanding of the norms of a system of separated institutions sharing power. Jack Goldsmith, for example argues that "our constitutional democracy will not be preserved by better laws and institutional structures…in the permanent emergency we face, the best hope for preserving both our security and our liberty is to select leaders who will be beholden to constitutional values when they are forced to depart from constitutional traditions…who have checks and balances stitched to their breasts"[415] However, while ostensibly an external mechanism of constraint, such a view ultimately—and dubiously—depends upon on the *internal* character of the person chosen to inhabit the presidency remaining stable despite a new institutional context with unique powers and pressures.

Ultimately, it can be safely said that presidents will most likely engage in public deliberations on the use of military force when it is in their own self-interest to do so. That is, the likelihood that presidents robustly develop and explicate their war

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[414] Griffin, *Long Wars and the Constitution*, 242.
[415] Goldsmith, *The Terror Presidency*, 216.

aims and plans is tied to the extent that the participation of the other branches, or at least an absence of their active resistance, is needed achieve executive purposes and garner the glory that accords with military success. Stephen Griffin's recent study, for example, comes to the "surprising conclusion that a chief purpose of inter-branch deliberation is to ensure that the executive branch makes decision for war based on a sound interagency process."[416] Presidents are most likely to organize the national security elements of their administrations so as to facilitate deliberation within the executive when reliably subject to external oversight that compels it to express its views publically. However, while the most obvious mechanism for deliberatively disciplining executive propensity to independently initiate military force is through statutory framework legislation designed to set clear limits on the use of force without formal authorization and to require that presidential consultation occurs early and often, the history of the War Powers Resolution has shown that when such regulation relies primarily on juridical means to for enforcement it can work counter to its purported purposes. The next section discusses the role that the judiciary might have in promoting the rule of law as an element of a deliberative political process for war. The subsequent section engages with the role for Congress in a deliberative constitutional order, focusing on how its authority to provide the means upon which warmaking depends can be used to bolster its authority to regulate their use through

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[416] Griffin, *Long Wars and the Constitution*, 256, emphasis in original. One of Griffin's underlying purposes is to explain to partisans of broad executive power (who would be most surprised by this conclusion) why constructing the warmaking order to include robust interbranch practices such as regular Congressional hearings is in the best interest of presidents (not to mention everyone else effected by his decisions).

formal means and compel the executive to make its case for war. As we will see, the particular contours of these external political mechanisms matter greatly to their efficacy as deliberative constraints on the use of force—for Congressional regulation and supervision to truly influence presidential behavior, they must have real bite on executive capacity to wage war.

The Judiciary

Under a thick conception of political constitutionalism, the judicial branch of government should express its distinctive institutional viewpoint on matters of war in distinctive institutional fashion. Where many treatments of the role of courts in wartime either ask judges to leave the question of the ambits of institutional authority regarding the use of force wholly as a political question to be decided by the interaction of Congress and presidents outside the Courts,[417] or to settle it once and for all,[418] a judiciary acting in accordance with the norms of political constitutionalism will instead actively promote the rule of law and the protection of individual liberties as an important constitutional principle while enforcing that perspective in its own circumscribed, *legal*, sphere of action. As the earlier discussion of the *Korematsu* case highlighted, when judges understand their rulings to be the last word on constitutionality, the security arguments from the executive branch can lead to precedents that are in stark tension with the principles of the rule of law and individual liberty at the core of its purpose as an institution. Instead of attempting to settle constitutional disputes relating to the proper institutional boundaries of power

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[417] Tushnet, "Political Constitution of Emergency Powers," 1468.
[418] Adler, "The Judiciary and Presidential Power in Foreign Affairs."

in war, a task to which it is decidedly ill suited, when a relevant case or controversy comes before the bar the priority of the courts should be to make clear *what the law is*, to argue on behalf of the rule of law, and to enforce well-formed ordinary law on a case-by-case basis. The judicial role within the deliberative constitutional order would thus be to alert the other branches and the public when it becomes aware that government has acted in transgression or in the absence of ordinary law while also inducing Congress to express its unique institutional perspective in clear statutory language.[419]

In short, and to restate a central conclusion of chapter three, Congress will be more likely to pass clear and narrowly tailored laws if the courts reliably refrain from "cleaning up" those that are too ambiguous and instead chastise Congress by making clear to the public its view of the *political* stakes in the law, particularly for the rule of law and individual rights, while enforcing that view in its own legal sphere of action. Presidents will be more likely to seek formal Congressional authorization for the use of force and Congress is more likely to formally state (declare) its perspective on prospective or ongoing hostilities if the judiciary reliably takes up relevant disputes to make clear to the public whether the use of force has been legally authorized, while also emphasizing it is up to Congress and the public to judge and sanction *lawless* acts. While most treatments of the war powers debate that propose a role for the judiciary argue for the Court to be means to sound the alarm over actions by the executive, here the role of the Court expands to also signal *Congressional* malfeasance and to suggest that the legislature ought to clearly express itself through

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[419] "A clear statement approach enables political controls even though it does not impose them." Tushnet, "The Political Constitution of Emergency Powers," 279.

law. Under the rubric of political constitutionalism, the court should thus engage in what has been called "deliberation-inducing judicial review"[420] that can influence Congressional and presidential claims and behavior alike. But to function as such, juridical mechanisms must understood as merely one element of the 'cycle of accountability' around which a deliberative constitutional order for war turns.

Congress

From the lens of political constitutionalism, Congress at its best will have a view towards providing the material and legal basis only for those military actions it judges necessary to public protection as well, towards oversight to ensure the actual use of the military accords with the terms upon which such support began and might continue, and towards the frustration and sanction of military engagements to which it objects. A 'cycle of accountability' centered on Congress would begin with the expression of its perspective, through statutory framework legislation, of clear limits on the use of military force without its formal and specific authorization given the particularities of the contemporary security context. Such legislation should also clearly state that transgression of the limits on warmaking that it sets is only acceptable with specific additional authorization from Congress or in exceptional circumstances where the pursuit of prior authorization is wholly untenable.[421]

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[420] Eskridge Jr. and Ferejohn, *A Republic of Statutes*.

[421] As Benjamin Kleinerman argues, "if pressing necessity forces the executive to overrun those limits, then the executive must defend these actions to Congress and to the people….a discretionary executive allows Congress and the people to remain constitutionally vigilant, judging, through both reelection and impeachment, the one person who the Constitution can hold responsible for departing from it." Kleinerman, "In the Name of National Security," 108.

Congressional review ideally will begin when the executive seeks its formal authorization prior to the start of military conflict beyond which is outlined in the statutory framework legislation. During an ongoing military operation, Congressional review should center on hearings to investigate and judge whether the use of force was conducted in accordance with terms of the statutory framework and additional authorizing legislation, how well it is achieving the war aims and using the expected means articulated by the president while seeking authorization, and whether any transgression of either statutory restriction or appropriations was necessitated by exceptional circumstances. And to give the processes of authorization and review bite, the Congressional response to the use of military force should center on appropriations, and if necessary, impeachment.

Though Congressional capacities for investigation, appropriation, and impeachment are constitutionally ascribed powers, their contours can be constructed to vary widely in terms of frequency and substance that have real consequence for the deliberative quality of the patterns of politics that comprise the warmaking order.[422] One area for further scholarly inquiry is into how Congress could restructure its internal committees to more directly connect its deliberations on foreign affairs, intelligence, armed services, and appropriations, and to ensure those deliberations are regular, robust, and visible.[423] Reliable post-hoc investigations by Congress have the

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[422] Ackerman and Hathaway, "Limited War and the Constitution"; Tulis, Jeffrey K., "Impeachment in the Constitutional Order."

[423] As Stephen Elkin argues "Lawmakers must be seen to deliberate, which to some degree is in tension with actual deliberation insofar as it cannot be usefully be carried out through the whole chamber meeting in floor debate. Thus, the real task of leaders is to see that deliberation occurs in committees, where it is both easier to prompt and more fruitful in result, and to make the course and outcome of those deliberations

potential to affect the deliberations and decisions of president before and during the course of conflict.[424] Such inquiry should also include a consideration of how to ensure that Congressional intelligence capacities are developed so as to prevent presidents from monopolizing the information necessary to evaluate the contemporary national security context, any emerging threat, and the proper American response to them.[425] The inherently periodic nature of appropriations has perhaps the greatest potential to serve as a deliberation-inducing or deliberation-forcing element of the cycle of accountability on matter of war. As Banks and Raven Hansen put it, "The power of the purse supplemented the Declaration-of-War Clause by allowing Congress to control war powers by specifying spending objectives or otherwise restricting spending *ex ante*. It also compensated for the possible failure of antecedent controls by giving Congress the *ex post* power…to determine how long U.S. participation in war could continue….The annual cycle of appropriations [thus] affords regular opportunities for Congress to express its disapproval of executive

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available to anyone willing to pay modest attention." Elkin, *Reconstructing the Commercial Republic*, 172.

[424] Peter Shane recently argued that "what we need is a genuine congressional commitment *after* strike operations to an intensive and independent factual post-mortem regarding every military deployment. The knowledge that Congress is reliably committed to such investigations would help assure that, in planning even strike operations, the executive branch would truly confront and question the key assumptions underlying its proposed initiatives, test the information available to it, force key executive policy makers to address seriously the disagreements among them, and engage in intrabranch debate sufficiently open and receptive to dissent to merit public confidence in the decisions ultimately reached." Shane, "Learning McNamara's Lessons," 1303–1303.

[425] Scheppele, "Exceptions That Prove the Rule: Embedding Emergency Government in Everyday Constitutional Life," 144.

practice."[426] However, presidents in the contemporary era have become adept at pressuring Congress to continue to fund uses of military force through "emergency" supplemental appropriations, and thus avoiding the deliberative political constraint that regular processes of appropriations can provide. To combat this, Bruce Ackerman and Oona Hathaway recently proposed a framework by which appropriations to continue an ongoing war would be directly tied to requirement for formal Congressional authorization. While such an ordering of appropriations would seemingly permit executive discretion to use existing appropriations to fund the use of force, its post-hoc bite would induce presidents to make a candid and convincing case for war to Congress and the public, both in advance and while war is underway, as it provides Congress with the capacity to compel presidents to wind down the war without facing the charge of stranding soldiers in the field.[427]

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[426] Banks and Raven-Hansen, *National Security Law and the Power of the Purse*, 3, 118.

[427] "We do not aim to oust the president from a central position in defining war objectives. The new rules simply respond to escalating institutional transformations that threaten to push Congress onto the periphery. Our over-riding aim is reestablish Congress's traditional constitutional role by restoring its effective use of the power of the purse. If the new regime is successful, it will simply require the president to regularly renew democratic support for his war policies in an age of limited war. If, despite his strategic advantages, he can't gain congressional support, this is a decisive sign that the war has lost the support required in a constitutional democracy." Ackerman and Hathaway, "Limited War and the Constitution," 506; "To the extent that a public debate over the defense budget occurs, a measure of control and participation by the civilian population is introduced into a policy area that is often otherwise closed." Giraldo, "Defense Budgets, Democratic Civilian Control, and Effective Governance," 108.

Conclusion

Reconstituting the war powers requires a full embrace of the inherently political nature of the question of the proper boundaries of institutional power on matters of war, a view towards leveraging and guiding the interminable war powers debate towards a more fully deliberative ends. While the executive is often said to be the prospective branch on matters of war while Congress and the judiciary are the retrospective branches,[428] the view from political constitutionalism makes clear that all three branches help to construct the context—legal, structural, and rhetorical—in which the decision for war is made and in which it is judged politically. The construction of a deliberative and effective warmaking order in line with the norms of political constitutionalism must account for and address the institutional preconditions for achieving those standards over time, a view towards the capacities and motivation of the branches to reliably engage in forms of recurrent interactions to which it aspires. At its best, the political constitution is the framework for an ongoing inter-branch relationship that is a form of public deliberation on ends and means on multiple levels: the core values of democratic political order represented and weighed within a given decision on the use of military force as well as in the reconstruction of the warmaking order that structures such decisions in light of the contemporary security context. A broadened perspective on the political constitution points our view towards the political modes that help shape the behavior of the primary institutions of government both from the inside *and* the outside.[429] Subsequent scholarship on the

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[428] Bessette and Tulis, Jeffrey K., "On the Constitution, Politics, and the Presidency."
[429] Stephen Elkin succinctly articulates the essential theoretical frame upon which the further analysis should proceed: "A constitutional theory concerns not just the

war powers should thus look towards the underlying political foundations of a self-reflective political order, where the exercise of power is reliably disciplined by principled deliberation within, about, and around the constitutional order. The project briefly explores such an expanded view towards the political foundations of a deliberative constitutional system for war in the postscript.

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framework of government and how its major institutions are to work; it also requires a political sociology, a foundation in self-interest." Elkin, *Reconstructing the Commercial Republic*, 38, 92. In a review of Stephen Griffin's earlier work on American constitutional theory, Jeffrey Tulis states the point a bit differently: "constitution making includes the constitution of 'society' as well as of government." Tulis, "On the State of Constitutional Theory," 712; Griffin, *American Constitutionalism: From Theory to Politics*.

Postscript

The Political Foundations of a Deliberative Constitutional System for War

> *The constitutional theory of a republican regime focuses on a reflexive process: lawmakers aim at securing the constitutive institutions defined by the public interest; and, in doing so, they shape the political patterns that affect how they themselves make law.*[430]
>
> *Constitutional theory includes the politics that are given form by the workings of institutions including those that animate it, surround it, and operate within it…. It must also concern itself at a minimum with mores, virtues, social divisions, and statesmanship…. These modes are the means through which the orders are created and maintained*.[431]
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> *The excellence of the citizen must be an excellence relative to the constitution.*[432]
>
> *Much, even most, of what determines whether the Constitution is respected stems from the accumulation of ordinary policies.*[433]

Towards a Self-Reflective Deliberative System

The preceding discussion sought to reconstitute the war powers debate, leading the conventional contemporary emphasis on the formal entrenchment of a particular interpretation of the written constitution back to a focus on the institutional forms called into being by the written constitution and the norms of constitutional politics that can be derived from them. This more political understanding of constitutionalism clarifies that though the distinctive characters and interrelationship of the legislature, executive, and judiciary are in many ways framed by the written

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[430] Elkin, *Reconstructing the Commercial Republic*, 143.
[431] Elkin, "Constituting the American Republic," 224–225.
[432] Murphy, *Constitutional Democracy*, 342, in reference to Aristotle's *Politics*.
[433] Ceaser, "Restoring the Constitution," 33.

constitution, their practical contours are not inherently fixed but are subject to variation through processes of constitutional construction or deterioration. The reliability and quality of institutional deliberation over particular uses of force, as well as the over the contours of the national security order within which such decisions are made, rest upon on the capacities and motivations of political actors working through the respective branches of government that can change over time. The conclusion pointed towards further research on intra-institutional and inter-institutional design to more reliably yield distinctive prospective institutional perspectives and retrospective judgments on matters of war. Additional inquiry into the political constitution of the war powers should also extend the analysis of the constitutional development of the warmaking system beyond political changes internal to the system of separated institutions sharing power—that is, the elements that comprise the deliberative core of the constitutional order—and to the constitutive political modes that undergird it.[434] A broadened perspective on the political constitution points our view towards the political modes that help shape the behavior of the primary institutions of government both from the inside *and* the outside.[435]

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[434] A view towards the constitutive political economy and political sociology of the warmaking order can be found throughout the history of constitutional thought and in select contemporary scholarship. See Aristotle, *The Politics*; Machiavelli, *The Prince*; Machiavelli, *Discourses on Livy*; Madison, "Universal Peace"; Holmes, "Lineages of the Rule of Law"; Murphy, *Constitutional Democracy*, 342–396; Deudney, *Bounding Power*; Ferejohn and McCall Rosenbluth, "Warlike Democracies"; Issacharoff, "Political Safeguards in Democracies at War"; Bobbitt, *The Shield of Achilles*; Thorpe, *The American Warfare State*.

[435] Stephen Elkin succinctly articulates the essential theoretical frame upon which the further analysis should proceed: "A constitutional theory concerns not just the framework of government and how its major institutions are to work; it also requires a political sociology, a foundation in self-interest." Elkin, *Reconstructing the Commercial Republic*, 38, 92. In a review of Stephen Griffin's earlier work on

Additional research on constitutional war powers should thus integrate a view towards the underlying political foundations of a self-reflective political order, where the exercise of power is reliably disciplined by principled deliberation within, about, and around the constitutional order. This dissertation concludes with a brief sketch of two prospective lines of inquiry related to this expanded conception of a deliberative constitutional system for war.

The International Security Context as Constitutive Foundation

One notable element often missing in broad treatments of constitutional war powers worthy of further study and integration is the interrelationship of the political constitutions of the international political order and domestic political orders.[436] Security, the restraint of violent power, can be imposed by one of two means: the material context of the political regime, such as the presence of oceans for defense or technological superiority over adversaries, or by its political practices and structures, for example elections, the separation of powers, and the rule of law.[437] These two sources of restraint on violence have always been in dynamic interaction, for as scientific and technological progress has improved human capabilities for violence,

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American constitutional theory, Jeffrey Tulis states the point a bit differently: "constitution making includes the constitution of 'society' as well as of government." Tulis, "On the State of Constitutional Theory," 712; Griffin, *American Constitutionalism: From Theory to Politics*.

[436] For an essential analysis of the increasingly interdependent political constitutions of domestic and global security, see Deudney, *Bounding Power*.

[437] Ibid., 27. This is where his term 'bounding power' comes from, as it highlights the increasing powers of destruction throughout history (bounding upwards), and the need to conceive of new political forms to restrain them (bounding down).

the political structures have had to adapt to restrain such emerging threats.[438] The escalating threat of external harm pushes states to adopt hierarchical internal political forms wielding great power, which if unchecked may lead to domestic tyranny or imperial conquest.[439] The worry then is that domestic republican political arrangements may become deformed when external security threats emerge. Increasingly powerful resources are developed and mobilized to create a favorable material security context while authority over them is centralized to provide the means for an efficient and effective defense; appearing an absolute necessity for the survival of the regime, such political developments may instead represent a fundamental change in the political regime.

One response to this development is to understand it as one of the many problems associated with globalization whose solution requires a shift in focus away from the primacy of the state and toward international and even global forms of governance. Under this view the increased violence interdependence of the contemporary international context takes causal precedence in the development of the increasingly unrestrained capacity for military force characteristic of the national security state.[440] Accordingly, the best and likely only means to address this development is to alleviate the security pressures that drive such domestic

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[438] Ibid., 28.

[439] Deudney calls this the 'hierarchy-restraint problematique.' Ibid., 46.

[440] It is important to note that while the problems inherent in globalization are often claimed to reveal the weakness, withering, and even future irrelevance of the state, it is particularly on questions of national security where states continue to reassert their strength and highlight their sovereignty. This is not to deny that inter-state cooperation on security matters is both a reality and a necessity, but rather to emphasize the concern at issue in this project—*increasingly autonomous*, and therefore *deliberatively unconstrained*, executive power of the state.

constitutional degeneration in contemporary democratic republics, through a transformation the global political context via the creation of new international political forms.[441] This version of republican security theory calls for the same logic present at the founding of the federal government of the United States to now require the formation of a federal-republican world government. This would entail higher levels of political restraints on violence that can provide a security milieu in which domestic republican forms could be securely reconstituted.

However, such a widespread international arrangement would be a dramatic change unlikely in any foreseeable future. Indeed, a primary advocate for this vision laments the "tragedy of American global diplomacy" which highlights the unlikelihood of implementing such a global transformation. He writes, "[i]n amassing enough power to transform its international context, the United States has been transformed into a polity much less interested in changing its international context."[442] National security elites are unlikely to favor the creation of global forms of governance that would not only transfer their power but would also undermine the very reason for their elite status. The national security state, which is problematic according to republican security theory for its concentrated and autonomous power, is also a political regime that will inhibit the creation of an international political solution to the root causes of its development. Additionally, even if the United States did make the creation of a republican world government its top priority, the question

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[441] Deudney, *Bounding Power*, chapters 8–9.
[442] Ibid., 189.

remains of whether any global political order of that sort is desirable, or even possible.[443]

The Sinews of War: The Citizenry as Constitutive Foundation

While contemporary treatments of constitutional war powers have rightly focused on the faltering of the rule of law and separation of powers as mechanisms of deliberative constraint and direction of the use of military force in the heightened international security environment that followed the Second World War,[444] they have largely lacked an account of the citizenry in the constitutional politics of war essential to any analysis.[445] A complete study of the political constitution of the war powers must include a view towards how developments in the political economy of warfare have had important consequences for the political sociology of warfare, impacting citizens and lawmakers in ways critical to the further political construction and functioning of the institutional warmaking order and the politics of the decision to use military force.

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[443] Manent, *A World Beyond Politics?*.

[444] Fisher, *Presidential War Power*; Koh, *The National Security Constitution*; Posner and Vermeule, *The Executive Unbound*; Griffin, *Long Wars and the Constitution*.

[445] While Yoo does describe the widespread founding era view towards structural constraints on executive discretion such as citizen participation in the militia and antipathy to standing armies, he emphasizes that though such matters were formally delineated in some early state constitutions they were not so expressly articulated in the Constitution of the United States. The underlying formalism of his approach to constitutional theory allows Yoo to elide an evaluation of the normative consequences of a changing democratic political economy of warfare for a well-functioning constitutional system for war. Yoo, *The Powers of War and Peace*, 67–69.

The idea that the citizenry can and should be constituted to serve as a critical deliberative structural constraint on the use of martial power is firmly grounded in the history of political thought and can provide important leverage on the deliberative deficit in on matters of national security.[446] For example, though advocating distinctive conceptions of the citizenry whose excellence must be understood in relation to the ordering of the regime as a whole, Aristotle and Machiavelli both argued that citizen service in the defense of the political order is a salutatory mechanism for disciplining the decision for war.[447] When a regime depends on its own people for its defense it both empowers and constrains the political elites in whose hands the decisions to use of martial force resides while the politically empowering the citizenry. A citizenry that is well connected to the use of military force yields a greater likelihood of both prudent warmaking and a greater likelihood of having the means necessary to a successful military effort. These views towards the popular foundations of a well-functioning warmaking order were important antecedents to the attention given to the political economy of warmaking at the American founding by both proponents and critics of the new constitution.[448]

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[446] "Not only does foreign policy virtually escape popular control, but it will be difficult, and perhaps even impossible, to rectify this enormous democratic failure." Dahl, "Democracy Deficits and Foreign Policy," 110.

[447] Aristotle, *The Politics*; Machiavelli, *The Prince*; Machiavelli, *Discourses on Livy*; Machiavelli, *Art of War*.

[448] Madison, Hamilton, and Jay, *The Federalist Papers*; Madison, "Universal Peace"; Storing, *What the Anti-Federalist Were For*. The scholarly literature on "democratic peace" often sets Immanuel Kant's essay "Perceptual Peace," published in 1795 as its touchstone for discussion of regime type and propensity for war. Madison's "Universal Peace" was published in 1792, and both were a continuation of a line of theorizing that included works by Abbé de Saint-Pierre, Montesquieu, and Rousseau. For a comparison between a somewhat different interpretation of a "Machiavellian"

The emphasis on the constitutive implications of the relationship of the citizenry to war during the conception and infancy of the United States highlights a critical difference in the contemporary political constitution of the warmaking system—an attenuated connection between the citizenry and the use of military force—underemphasized in recent scholarship.[449] Following the Second World War the United States moved away from a mass mobilization model of warmaking and instead has maintained a large standing professional military, increasingly reliant on technological prowess over manpower, whose exercise has been funded through international financing rather than contemporaneous taxation. These changes were the result of an interrelated mix of domestic choices by lawmakers, advances in military technology, and developments in the international security context,[450] and they have

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democratic political economy of warmaking and such a "Kantian" model, see Ferejohn and McCall Rosenbluth, "Warlike Democracies."

[449] The focus here on the citizenry as deliberative constraint on discretionary executive military power sidelines another critical consideration in constitutional design: reliable civilian control of the military. See Murphy, *Constitutional Democracy*, chap. 11; Mark E. Brandon, "War and Constitutional Change," n. 4; Jeanne Kinney Giraldo, "Legislatures and National Defense: Global Comparisons," 60–61; Now classic treatments of civil-military relations include Huntington, *The Soldier and the State: The Theory and Politics of Civil-Military Relations.*; Janowitz, *The Professional Soldier*. The initiation of military force without authorization from *either* legislative or executive branches would, however, be the most extreme case of the loss of civilian control short of an outright military coup d'état. It is thus far less likely a problem in the United States than the oft-noted increase in executive discretion over the use of force. Civil-military relations are discussed here from a perspective inverse of typical treatments: a consideration of how developments in the organization of the military in relation to society have undermined of the political foundations of a mode of democratic constraint on discretionary executive war power—a form of constitutional change that might be best understood as a constitutive degeneration.

[450] The examples of the development of nuclear weapons and the Cold War arms and space races put a sharp edge on this point. An essential discussion can be found in, Deudney, *Bounding Power*.

important consequences for the decision process for the use of force as well as for further reconstruction of the warmaking order. An attenuated connection between citizens and warmaking is a key change in a social force relied upon to animate the deliberative core—separated institutions sharing power—of the American constitutional warmaking order.[451] As the provision of a public good like security becomes increasingly inconspicuous in a constitutional order, requiring diminishing participation and sacrifice of the citizenry and eliding popular awareness through covert operations and the capture of public discourse by experts,[452] a key political foundation of the deliberative constitutional system for war—of the principled constraint of discretionary power—is eroded.[453]

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[451] "The constitutional position of Congress has deteriorated for a number of reasons. One is the volunteer army….As Joseph Califano has noted, an all-volunteer army "relieves affluent, vocal, voting Americans of the concern that their children will be at risk of going into combat." "Second, military technology now enables Presidents to wage wars with few casualties. During the four days of bombing Iraq in December 1998, not a single U.S. or British casualty resulted from seventy hours of intensive air strikes involving 650 sorties against nearly one hundred targets. The following year, President Clinton waged war for eleven weeks against Yugoslavia without a single NATO combat casualty." Devins and Fisher, *The Democratic Constitution*, 125. Citing Joseph A. Califano Jr., "When There's No Draft," *Washington Post*, Nov. 19, 1998, 1.

[452] Russett, *Controlling the Sword*.

[453] A reduction in the overt and contemporaneous demands made on the citizenry is likely to be broadly popular, in line with the individual self-interest, narrowly understood. For a discussion of Alexander Hamilton's positive view towards the relationship between "inconspicuous government" and expansive centralized power, see Edling, *A Revolution in Favor of Government*; or related discussions that focus on contemporary issues of secrecy and complexity in security policy and democratic governance, see Loader and Walker, *Civilizing Security*, 195–233; Sagar, *Secrets and Leaks*; Lofgren, "Anatomy of the Deep State." Two recent works highlight how inconspicuous government benefits the wealthy and powerful by disproportionately obscuring their (disproportionate) influence over and benefits from state action. See Mettler, *The Submerged State*; McCormick, "Machiavellian Democracy."

While one response might be to push for a return to military conscription to reestablish the important tie between the people and their defense,[454] the professional and technological development of the military is likely essential to meeting the demands of the international security environment and their dramatic alteration would be resisted by the both the military establishment and the citizenry. Lawmakers are unlikely to have the incentive to increase the costs of warfare on their constituents for the sake of bolstering the spirit of the citizenry towards a greater demand for responsiveness from Congress and the executive alike on matters of war. Indeed, the transition to a professional, all-volunteer, military not only has direct consequences for the relationship of the general population to the use of force but also for the representatives in government themselves. In a recently published study of the political effects of the postwar military-industrial complex, Rebecca Thorpe shows that "many rural and semirural areas became economically reliant on defense-sector jobs and capital, which gave the legislators representing them powerful incentives to press for ongoing defense spending regardless of national security circumstances."[455] Additionally, the likelihood that lawmakers will have previously served in the

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[454] Devins, "Bring Back the Draft?".

[455] This aspect of the political development of the political constitution may be particular to the United States. As Jeanne Kinney Giraldo argues, "Indeed in most countries other than the United States…the defense budget is not a source of pork, because they either do not have domestic defense industries or these industries are geographically concentrated in small areas, and decisions affecting their operation are outside the purview of the legislature. As a result, every additional dollar spent on defense is one less dollar spent on local constituencies." Thorpe, *The American Warfare State*; Giraldo, "Defense Budgets, Democratic Civilian Control, and Effective Governance," 192.

military decreases, with a corresponding result on their interests, expertise, and perspective on matters of war.[456]

One prospective avenue for addressing this change in the constitutive foundations of the deliberative system may be found in recent innovations in contemporary democratic theory. The 'deliberative turn' in democratic theory can be interrogated to see if it can offer an adequate political mechanism to balance the need for efficiency and execution on matters of national security with democratic deliberation and political participation required to politically constitute democratic responsibility for the actions of the government abroad. While many aspects of the debate over democratic deliberation remain firmly in the realm of the ideal, there have been practical experiments such as citizen assemblies,[457] deliberative polling,[458] and even more contestatory models in the vein of Machiavelli such as "accountability

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[456] Devins, "Bring Back the Draft?," 1110; Where the sons of political elites once sought leadership positions in the military in accordance with a pretense of aristocratic virtue, they are now more likely to avoid service altogether or arrange to serve in roles least likely to see combat. Instead of an education through military service, public officials are now much more likely to have been trained in law schools, a point directly relevant to the pervasive view towards legal constitutionalism discussed earlier.

For a related discussion of, and jeremiad against, the constitutional education offered by law schools, whose dispersion throughout both elite and popular culture has a deleterious constitutive effect, see Elkin, *Reconstructing the Commercial Republic*, 156; Levinson, "Still Complacent After All These Years"; Levinson, "Why I Do Not Teach *Marbury* (Except to Eastern Europeans) and Why You Shouldn't Either". For a modest rejoinder, see Graber, "Establishing Judicial Review: *Marbury* and the Judicial Act of 1789."

[457] See Warren and Pearse, *Designing Deliberative Democracy*.

[458] See Fishkin, *When the People Speak*; Fishkin, "Deliberative Democracy and Constitutions"; Alterman, *Who Speaks for America?*.

agencies"[459] that may offer some prospect of connecting the public to warmaking in the contemporary era. While a complete study of the political constitution of the war powers would still begin with the perennial debate over constitutional interpretation, transform it into a debate over the institutional forms and norms of constitutional practices, it would conclude with a consideration of a necessarily constitutive element in a constitutional democracy—the citizen.[460]

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[459] Przeworski, Stokes, and Manin, *Democracy, Accountability, and Representation*; McCormick, "Machiavellian Democracy"; Blaug, "Direct Accountability at the End."
[460] Levine and Soltan, *Civic Studies*.

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