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Adam Heder

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THE POWER TO END WAR: THE EXTENT AND LIMITS OF CONGRESSIONAL POWER

ADAM HEDER*

* J.D., *magna cum laude*, J. Reuben Clark Law School, Brigham Young University; B.A., Political Science, *cum laude*, Brigham Young University.

I. INTRODUCTION

Imagine the following situation: The United States, concerned about the threat that a certain rogue regime poses to regional stability, begins military operations to oust the regime. Despite the public's initial enthusiasm for the war and the military's continuing success, the public is growing weary as the war becomes increasingly costly. On the one hand, the President would like to ensure the completion of his foreign policy goals in the theater and, thus, remains committed to the war's goals. On the other hand, Congress, subject to more frequent elections and shifts in leadership, feels the pressure to cut its losses and end the conflict. Emboldened by recent intense public opposition to the war, Congress attempts to terminate military involvement by passing a resolution that orders the President to end all military involvement in the country within three months. The President vigorously contends that this congressional effort to force his hand in the situation usurps his power as Commander in Chief. Congress, certain that the President is wrong in his assertion, overrides the veto with a two-thirds majority and the bill becomes law. Whether the law is constitutional, however, remains unanswered. This Article aims to answer the twofold question presented by this hypothetical: First, what powers does Congress actually have to deauthorize a war or otherwise effectively end a war? And second, what limits, if any, are there on Congress's exercise of those powers?[1]

This hypothetical situation obviously is neither speculative nor

1. The question of the constitutional limits of Congress's power to control the parameters of or effectively end a war remains both unanswered and important. For example, in response to NATO's campaigns in Yugoslavia, several members of Congress brought a suit against President Clinton, seeking to enjoin U.S. involvement in the conflict. Though the D.C. Circuit Court of Appeals ultimately dismissed the case because the plaintiffs lacked standing, whether members of Congress could have prevailed on the merits is still unsettled. Campbell v. Clinton, 203 F.3d 19, 19 (D.C. Cir. 2000). Currently, the United States finds itself fighting two wars, and public support for these wars has been far from consistent. *See* Jeffrey M. Jones, *In U.S., More Optimism About Iraq, Less About Afghanistan*, GALLUP, Mar. 18, 2009, http://www.gallup.com/poll/116920/Optimism-Iraq-Less-Afghanistan.aspx (showing declining public support for the Afghanistan War and increasing support for the Iraq War). The President and Congress, therefore, have to balance the political demands of successfully completing a war against the political demands to bring troops home. In the event the President and Congress disagree about the course a war should take, they would find themselves vying for the legal authority to control its disposition.

improbable.[2] In 2006, Democrats regained control of Congress on a promise to end the war in Iraq.[3] Such campaign promises prompted President Bush to respond that when it comes to Iraq, "I'm the decision maker."[4] Eventually their dispute came to a head when Congress passed a bill that aimed to cut troop levels and ultimately end major military operations in Iraq.[5] President Bush vetoed the bill, and Congress was unable to garner enough votes to override his veto.[6] Although the United States remains in Iraq, the Republicans paid a heavy price in both the 2006 and 2008 elections.[7] A more recent example of this issue occurred in May

2. Such disputes have arisen most notably in connection with U.S. involvement in Vietnam and Yugoslavia and, more recently, regarding Iraq. The Vietnam War marked the high point of congressional and executive collisions over the administration of a war. These disagreements led to the enactment of the War Powers Resolution. *See generally* PETER M. SHANE & HAROLD H. BRUFF, SEPARATION OF POWERS LAW 837, 845–50 (2d ed. 2005) (noting the general history and debate over the War Powers Resolution and examining related legislative documents). The Iraq War has brought a whole new set of challenges. For example, in response to President Bush's assertions that he had the final authority over operations in Iraq, Senator Arlen Specter stated the President "[is] not the sole decider." Michael Abramowitz, *Bush, Congress Could Face Confrontation on Issue of War Powers*, WASH. POST, Feb. 16, 2007, at A5, *available at* 2007 WLNR 3013686. Senator Carl Levin commented, "[Congress] will be looking at a modification of [the Iraq War] authorization in order to limit the mission of American troops . . . ." *Dems Continue Attack of Bush's War Powers*, CHI. TRIB., RedEye Edition, Feb. 19, 2007, at 3, *available at* 2007 WLNR 3320803.

3. John M. Broder, *United Against Bush's Plan, but Divided on a Solution*, N.Y. TIMES, Oct. 27, 2006, at A10, *available at* 2006 WLNR 18645512 ("Representative Nancy Pelosi of California . . . call[ed] for immediate steps to begin to remove American forces, with all of them out of Iraq by the end of 2007."); Carl Hulse & Thom Shanker, *Democrats, Engaging Bush, Vow Early Action over Iraq*, N.Y. TIMES, Nov. 11, 2006, at A1, *available at* 2006 WLNR 19599242 (reporting Senator Harry Reid's statement that "'the first order of business' when Democrats formally take over . . . will be to reinvigorate Congressional scrutiny of the executive branch, with a focus on Iraq").

4. Michael Abramowitz & Jonathan Weisman, *Bush Defies Lawmakers to Solve Iraq; Gates Says Doubts Bolster Enemy*, WASH. POST, Jan. 27, 2007, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/01/26/AR2007012600653.html.

5. H.R. 1591, 110th Cong. § 1904(c), (e) (2007).

6. *See* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 693 n.2 (2008) (noting H.R. 1591 was vetoed "in part on the ground that 'it purports to direct the conduct of the operations of the war in a way that infringes upon the powers vested in the Presidency by the Constitution, including as Commander in Chief of the Armed Forces'" (quoting and citing Message to the House of Representatives Returning Without Approval the "U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007," 43 WEEKLY COMP. PRES. DOC. 560 (May 1, 2007))).

7. *See* Adam Nagourney, *Obama: Racial Barrier Falls in Decisive Victory*, N.Y.

2009, when members of Congress threatened to withhold funds for the Afghanistan war effort from President Obama if he could not turn the situation around within one year.[8]

The vast majority of scholarship on the issue, up to this point, has addressed the Declare War Clause, i.e., who has the right to take the country to war.[9] This Article does not aim to answer this question, but instead seeks to answer the bookend question of whether Congress has the power to end or limit a war once it already has begun. Section II considers the text of the Constitution and what conclusions may be drawn from it. Section

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TIMES, Nov. 5, 2008, at A1, *available at* 2008 WLNR 21107287 (characterizing the victory of Obama and the Democrats as "a repudiation of . . . [the Republicans'] economic and foreign policies"); Robin Toner, *A Loud Message for Bush*, N.Y. TIMES, Nov. 8, 2006, at A1, *available at* 2006 WLNR 19359043 (stating the Republicans lost big in the 2006 midterm election because of voters' opposition to the Iraq War).

8. Brian Faler, *House Passes War Bill Amid Criticism of Obama Policy*, BLOOMBERG.COM, May 14, 2009, http://www.bloomberg.com/apps/news?pid=20601087&sid=a_sJT3FrgY_o&refer=worldwide ("House Appropriations Committee Chairman David Obey . . . said the administration has one year to show its plan to send 21,000 additional troops to Afghanistan is enough to turn around the seven-and-a-half-year-old conflict.").

9. *See, e.g.*, Raoul Berger, *War-Making by the President*, 121 U. PA. L. REV. 29, 29 (1972) (discussing "whether the original constitutional distribution of powers can be restored by statute in order to insure congressional participation in war-making policy"); Louis Fisher, *Unchecked Presidential Wars*, 148 U. PA. L. REV. 1637, 1637 (2000) (stating the Framers deliberately "created a structure to prevent presidential wars" but now "[t]hat constitutional system is in tatters"); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 174 (1996) ("The Framers established a system which was designed to encourage presidential initiative in war, but which granted Congress an ultimate check on executive actions."); *see also* William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 696–98 (1997) ("The roster of scholars engaged in the controversy over the original understanding of the warmaking power reads like a who's who of constitutional scholars and scholars of foreign affairs. On one side of the debate—the pro-Congress side—are such academics as Raoul Berger, Alexander Bickel, John Hart Ely, Louis Fisher, Harold Koh, Leonard Levy, Charles Lofgren, Arthur Schlesinger, Jr., and William Van Alstyne. They have argued that the original understanding was that, except for a limited power to repel sudden attacks, the President could not commit troops to combat without congressional authorization. They believe that modern constitutional law should reflect that understanding. In contrast, other scholars have adopted a pro-Executive stance. These include Phillip Bobbitt, Robert Bork, Edward Corwin, Henry Monaghan, Eugene Rostow, Robert Turner, W. Michael Reisman, and John Yoo, among others. The pro-Executive scholars have argued either that the power to declare war was intended to be a very limited power—conferring on Congress the power to classify a conflict as a war for purposes of international law, . . . or that, for reasons unique to the War Powers Clause, original understanding is irrelevant to resolution of modern controversies." (citations omitted)).

III looks at the historical evidence on the subject. Section IV examines structural arguments. Section V outlines Congress's affirmative limits on the President during war. Section VI concludes by detailing the judiciary's influence on the question. This Article explains that, while Congress has several explicit and robust powers to terminate a war, the power to statutorily order the President to end all hostilities is not one of them. Even if Congress could legitimately claim such a power, however, it would be left to its own—often inefficient—devices to enforce that power. The judiciary, invoking the Political Question Doctrine, simply will not step in and adjudicate this issue in favor of Congress. Therefore, Congress should be aware that it may accomplish its goals in this area only via its political tools.

II. THE TEXT OF THE CONSTITUTION

The natural starting point for any discussion on the war powers shared between Congress and the Executive is the text of the Constitution itself. Article I spells out Congress's war powers:

> The Congress shall have Power To . . . declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.[10]

Given this list of broad enumerated powers, Congress no doubt plays a role in the execution of a war.

The text of the Constitution provides arguably less guidance on the role of the Executive in war. The constitutional text on the Executive's war powers is limited to two phrases: "The executive Power shall be vested in a President,"[11] and "The President shall

10. U.S. CONST. art. I, § 8, cls. 1, 11–16.

11. *Id.* art. II, § 1, cl. 1.

be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several states, when called into the actual Service of the United States."[12]

The text of the Constitution, while explicitly delegating to Congress the right "[t]o declare War," makes no such similar provision for the right to "end war" or "declare peace."[13]

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12. *Id.* art. II, § 2, cl. 1.

13. The interplay and dynamic of these constitutional provisions have been major sources of both litigation and academic debate. *See supra* note 9 and accompanying text (addressing pro-Executive versus pro-Congress scholars). The *Steel Seizure Cases* and the latest line of Guantanamo cases are just a few examples of the complexities of war powers, as well as the sharp divisions of opinion on the matter. *See* Boumediene v. Bush, 128 S. Ct. 2229, 2259, 2262 (2008) (holding habeas corpus privileges extend to alien enemy combatants held at Guantanamo Bay but refusing to hold that "the political branches have the power to switch the Constitution on or off at will"); Hamdan v. Rumsfeld, 548 U.S. 557, 594–95 (2006) (discussing the effect of Congress's Authorization for Use of Military Force (AUMF) on the President's war powers and stating the Constitution and law of war circumscribe the "general Presidential authority to convene military commissions in circumstances where justified"); Hamdi v. Rumsfeld, 542 U.S. 507, 518–33 (2004) (acknowledging the AUMF gives the President the authority to detain its own citizens as enemy combatants "for the duration of the particular conflict in which they were captured," but limiting this authority by holding "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision-maker"); Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 582, 587–88 (1952) (deciding the President's order to seize steel mills, for the purpose of preventing a production stoppage amid a heightened need for war materials, was not constitutional); *Youngstown*, 343 U.S. at 641–44 (Jackson, J., concurring) (stating the President's authority is limited to that which is allowed by an act of Congress or the Constitution and that the President "has no monopoly of 'war powers'.... While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army or navy to command"). Relying largely on the Commander in Chief and Vesting Clauses of the Constitution, President Bush and his legal team advised that he had a unilateral right to commit armed forces to the conflict in Iraq with or without congressional approval. *See, e.g.*, Authority of the President Under Domestic and International Law to Use Military Force Against Iraq, 26 Op. Off. Legal Counsel 1, 7 (2002) ("We have consistently advised that the Constitution grants the President unilateral power to take military action to protect the national security interests of the United States."). President Bush, however, was not the first President to make this claim. *E.g.*, *id.* at 8 ("Presidents have long undertaken military actions pursuant to their constitutional authority as Chief Executive and Commander in Chief and to conduct U.S. foreign relations."). Nor have only Republican presidents asserted such authority. *See id.* (noting Presidents Clinton and Truman initiated "unilateral exercises of military force grounded solely in the President's constitutional authority"); *see also* PETER M. SHANE & HAROLD H. BRUFF, SEPARATION OF POWERS LAW 837 (2d ed. 2005) ("From the [E]xecutive's point of view these questions are academic, because every President since World War II has asserted at one time or another that he had the authority to commit the Armed Forces to conflict without the consent of Congress."). Though scholars might disagree with the President's conclusions, presidents have done it nonetheless and the

Nevertheless, the text of the Constitution makes it clear that Congress has the ultimate power to end a war through its appropriation power.[14] Professor John Yoo—one of the nation's preeminent pro-Executive wartime scholars—vigorously argues the appropriation power is Congress's major war power and the major limit on the President's war powers.[15] Thus, even the most pro-Executive scholars recognize Congress has the ultimate veto power in wartime—the appropriation power.[16]

Additionally, Congress has the power "[t]o raise and support Armies,"[17] which carries the implicit power to "unraise" an army or dissolve an army.[18] Supreme Court precedent bolsters this argument. The Court, in the landmark decision *Ex parte Milligan*,[19] stated that Congress's enumerated powers carry implied "subordinate and auxiliary powers" and that each enumerated power "includes all authorities essential to its due exercise."[20] Undoubtedly, the power to dissolve an army is "subordinate and auxiliary" to the power to raise an army.

Congress can end a war, therefore, through use of the appropriation power or by dissolving the army.[21] However, Congress

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debate has remained alive.

14. *See* U.S. CONST. art. I, § 8, cl. 12 (giving Congress the power "[t]o raise and support" an army, yet also providing that Congress can refuse to fund such an army because appropriations are within Congress's exclusive control).

15. *See* John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 265–69 (1996) ("[T]he executive could not wage war without the support of Congress, which could employ its appropriations power to express its disagreement and, if necessary, to terminate or curtail unwise, unsuccessful, or unpopular wars.").

16. *See id.* at 174 ("The Framers established a system which was designed to encourage presidential initiative in war, but which granted Congress an *ultimate check* on executive actions. Congress could express its opposition to executive war decisions only by exercising its powers over funding and impeachment." (emphasis added)).

17. U.S. CONST. art. I, § 8, cl. 12.

18. *See, e.g.*, John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 268 (1996) (inferring Congress's appropriation power allows Congress to unraise (or dissolve) an army by not funding it).

19. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866).

20. *Id.* at 139 (Chase, C.J., concurring) ("The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise.").

21. Through exercise of one of its other enumerated powers, Congress also can exercise marginal control of the armed forces. For instance, Congress makes rules for the administration of the armed forces and issues letters of marque, just to name a few. *See* U.S. CONST. art. I, § 8 (describing Congress's powers).. However, this Article focuses only on those powers that would allow Congress to end or limit a war once it has begun.

routinely shirks the exercise of its appropriation power, likely for political purposes. Few members of Congress would want to cut funding for a war effort, which could endanger the lives of their soldier constituents and lead many to label the legislators as defeatists.[22] This was no more evident than in the later stages of the Vietnam War. Disapproving of the war effort generally, and of the President's handling of it more specifically, Congress repealed the Gulf of Tonkin Resolution, which had been its initial authorization for war.[23] Nevertheless, Congress could not muster the political will to cut appropriations for the war effort until years later.[24] A more recent example occurred in May 2009, when Congress approved funding bills for President Obama's proposed troop buildup in Afghanistan, even while some members of Congress expressed doubts that the plan would work.[25] In a stark illustration of Congress's unwillingness to flex its appropriation-power muscles, House Appropriations Committee Chairman David Obey stated, "I frankly have very little faith that it will work;" he nonetheless voted for the appropriations bill.[26]

Moreover, Congress's appropriation power may not be an altogether effective or efficient tool with which to limit or end a war. Professor Louis Fisher strenuously makes this point. He points out that, despite Congress's best efforts to ensure otherwise, the Reagan Administration secured financing for the Nicaraguan Contras for many years before it finally was forced to stop.[27]

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22. Former Democratic presidential candidate John Kerry learned this lesson all too well when his refusal to vote for increased funding for the troops' body armor in Iraq provoked criticism in the 2004 campaign against President Bush. *See* FactCheck.org, Did Kerry Vote "No" on Body Armor for Troops? (Mar. 18, 2004), http://www.factcheck.org/article155.html ("Bush-Cheney '04 launched a new attack ad against Kerry in West Virginia on March 16, calling him 'wrong on defense' because he voted against last year's $87-billion supplemental appropriation to support military operations and reconstruction in Iraq and Afghanistan.").

23. Gulf of Tonkin Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964) (repealed 1971); DaCosta v. Laird, 448 F.2d 1368, 1369 (2d Cir. 1971) (per curiam).

24. *See DaCosta*, 448 F.2d at 1369–70 (noting Congress continued to appropriate funds for the military action in Vietnam and extend the Selective Service Act, even after repealing the Gulf of Tonkin Resolution).

25. *See* Brian Faler, *House Passes War Bill Amid Criticism of Obama Policy*, BLOOMBERG.COM, May 14, 2009, http://www.bloomberg.com/apps/news?pid=20601087&sid=a_sJT3FrgY_o&refer=worldwide ("The U.S. House passed a $96.7 billion war spending bill that includes money for President Barack Obama's troop buildup in Afghanistan, a strategy some Democrats said they doubted would work.").

26. *Id.*

27. *See* Louis Fisher, *How Tightly Can Congress Draw the Purse Strings?*, 83 AM. J.

Congress not only denied the President any appropriations for the operations, but also held hearings to ensure the President was not securing funding from other sources.[28] While arguing that the President's arguments and actions were unconstitutional, Fisher points out that the Administration was able to accomplish its goals for some time even in the absence of properly appropriated funds.[29] Indeed, he points out in a later article that at any given time a President has "billions of dollars in previously appropriated funds" and always can reallocate money from other accounts to achieve his purposes.[30] Assuming the President and Congress disagree about how and whether a war ought to be concluded, Congress's appropriation power is not always an effective limit on the President's powers.[31]

As noted, Congress also could exercise its constitutional power to dissolve the armed forces under the rationale that the power to raise an army includes the subordinate power of dissolving an army.[32] However, given the dominant political role of both the United States and its armed forces throughout the world, this exercise would be even more impractical and politically unpopular than cutting off funds.

Being averse to such negative political consequences, Congress would prefer to claim a more robust authority to end a war—one

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INT'L L. 758, 758–61 (1989) (detailing the Reagan Administration's somewhat successful efforts to secure financing for its clandestine operations in Nicaragua and Honduras despite Congress's denial of funds).

28. *Id.* at 758–59.

29. *Id.* at 758–61.

30. Louis Fisher, *Unchecked Presidential Wars*, 148 U. PA. L. REV. 1637, 1667–68 (2000).

> This statement [that a war can be ended simply through exercise of the appropriations power] ignores the amount of money available to the President in the money pipeline: billions of dollars in previously appropriated funds that had yet to be obligated or expended. The President may also exercise statutory authority to transfer funds from one appropriations account to another and invoke emergency authority, such as the Feed and Forage Act, to incur obligations in advance of an appropriations. A war initiated by the President can proceed for quite a period of time, independent of fresh appropriations granted by Congress.

Id.

31. *Id.*

32. *See* John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 268–69 (1996) (commenting that under some scholars' interpretation of the Declare War Clause, Congress theoretically can terminate the Executive Branch's power to make war by declaring war not to exist).

that would not necessarily require the use of the appropriation power. Instead of cutting funds and being forced to bear responsibility for the outcome of the war, Congress would rather shift responsibility to the President. It could do this by somehow requiring the President to make the costly decisions while allowing itself to tell the public that it is doing all it can to end the war. Congress sought to do exactly this in 2007, when it confronted President Bush on Iraq.[33] Instead of cutting off funds for Iraq or dissolving the army, Congress attempted to pass a bill that would have limited troop numbers in Iraq while redefining the mission to one that was essentially nonmilitary.[34] It would have effectively tied appropriations to Congress's specific conditions, namely that the mission in Iraq be radically altered.[35] At one point, Congress even considered repealing its initial 2002 authorization of the Iraq War and replacing it with a more limited one.[36] Thus, Congress sought to limit the war through means other than the mere use of its appropriation power—means that likely would not suffer the practical and political consequences of a denial of funds.

The plain text of the Constitution gives Congress the absolute right to deny all funds for a war as well as the right to create and dissolve armies.[37] Nobody seriously questions this. The more important question is whether Congress has the implied constitutional authority to limit or end a war through means other than those explicitly enumerated in the Constitution. Thus, if Congress attempts to statutorily limit the war effort as it did in 2007, whether the President would be constitutionally required to obey such a statute remains unanswered.

III. HISTORICAL EVIDENCE

The historical evidence sheds further light on the issue of who has the legal authority to end war. Though ultimately inconclu-

33. *See supra* text accompanying notes 2–8 (noting recent examples of the war-power-sharing issue).

34. H.R. 1591, 110th Cong. § 1904(c), (e) (2007).

35. *Id.*

36. *Dems Continue Attack of Bush's War Powers*, CHI. TRIB., RedEye Edition, Feb. 19, 2007, at 3, *available at* 2007 WLNR 3320803.

37. *See* U.S. CONST. art. I, § 8, cl. 12 (enumerating Congress's powers "[t]o raise and support Armies" and to appropriate funding for those purposes); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 139 (1866) (holding that Congress has "subordinate and auxiliary powers" besides its enumerated powers).

sive, the historical evidence suggests the Framers did not prefer Congress to have powers to terminate or limit a war above and beyond what the Constitution explicitly gives it.[38]

Much has been written about the Framers' decision to change the phrase "make war" to "declare war."[39] However, a different development at the Convention sheds significant light on the question of who has the power to terminate war. Pierce Butler suggested at the Convention that the phrase "and peace" be added after Congress's power to "declare war."[40] The Convention delegates flatly rejected this proposal.[41] Such a phrase, at least arguably, would have given Congress the formal right either to terminate or deauthorize a war. When presented with that option, however, the Framers not only declined to give this power to Congress but also declined to mention it in the Constitution at all.[42] Such an explicit omission is informative. While the Framers gave Congress the appropriation power to effectively terminate a war, they did not take the additional step and give Congress the explicit authority to statutorily (or otherwise) terminate a war. The logical inference is that if the Framers purposely provided no specific guidance in the Constitution on a point, then subsequent disagreements about that point ought to be resolved by appeal to channels other than the Constitution. Thus, in choosing not to explicitly grant this power in the Constitution, the Framers preferred complex questions surrounding the termination of a war to be resolved politically rather than through appeal to the Constitution.[43]

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38. *See, e.g.*, Avalon Project, Madison Debates, Aug. 17, 1787, http://avalon.law.yale.edu/18th_century/debates_817.asp (last visited Mar. 30, 2010) (demonstrating that delegates to the Constitutional Convention contemplated adding "power of peace" language to the Constitution, none of which made it into the final draft).

39. *See, e.g.*, LINDA R. MONK, THE WORDS WE LIVE BY 53 (2003) (noting the implications of this change on the debate about the Declare War Clause); Leonard C. Meeker, *The Legality of United States Participation in the Defense of Viet-Nam*, 54 DEP'T ST. BULL. 474, 484 (1966) (recalling the argument made at the Constitutional Convention that this change would make it easier for the President to take the country to war).

40. Avalon Project, Madison Debates, Aug. 17, 1787, http://avalon.law.yale.edu/18th_century/debates_817.asp

41. *Id.*

42. *See* U.S. CONST art. I, § 8 (listing the enumerated powers of Congress, which do not expressly include the power to terminate a war).

43. Of course one might infer that the Framers simply neglected to include this. But an explicit rejection would suggest otherwise. And at any rate, the Framers' rejection of the phrase "and peace" is not dispositive. It is only one piece of evidence to suggest this

Based on comments by James Madison, others might draw different conclusions from the historical evidence. In debating President George Washington's proclamation of neutrality on the war between Great Britain and France, Madison stated, "Those who are to *conduct a war* cannot in the nature of things, be proper or safe judges, whether *a war ought* to be *commenced, continued,* or *concluded.*"[44] It seems Madison was suggesting the President did not, or ought not, have the authority to end a war. By implication, Congress ought to have some robust authority to tell the President when, and in what manner, a war should be concluded. In the end, however, Madison's statements came after the ratification of the Constitution, not during its drafting.[45] Thus, while his statements may be informative, they do not lead to concrete conclusions. It is just as likely that Madison could have been restating those constitutional provisions that give Congress the appropriation power. Alternatively, Madison may have been advocating his own political belief rather than some authoritative interpretation of the Constitution. Moreover, Madison argued vigorously during the Convention itself to eliminate all presidential involvement in peace treaties, which would have given Congress exclusive power to declare peace.[46] But Madison lost that debate.[47] Article II, Section 2 of the Constitution was left to read: "He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . ."[48] Perhaps, then,

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power is not constitutionally delegated to any single branch. However, Supreme Court precedent is consistent with this Article's proposition here. *See infra* text accompanying notes 122–25 (discussing limits on Congress's powers concerning war).

44. 6 JAMES MADISON, THE WRITINGS OF JAMES MADISON 148 (G. Hunt ed., 1906).

45. *See id.* at viii–ix, 148 (listing a chronology of Madison's writings including this letter, which he composed in 1793, after the ratification of the Constitution).

46. John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 266 (1996).

47. *See* U.S. CONST. art. II, § 2, cl. 2 (giving treaty-making power to the President).

48. *Id.* This fact led Professor Yoo to conclude:

> The Framers believed that [only] a peace treaty, signed by the President and ratified by two-thirds of the Senate, formally could terminate a war, and that the President's role as protector and representative of the nation prevented Congress from ending war without his consent. It is telling that the Framers did not give Congress the sole authority to terminate a war . . . .

John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of*

Madison merely was arguing for a position he knew he had decisively lost at the Convention. More important, Madison's defeat at the Convention suggests the drafters wanted to make sure that both political branches had a part to play in drafting treaties and formally ending war.

Historical analysis focuses more on the debate that occurred at the Convention, not on later political debates. Were it not so, modern political debates about the extent of the branches' war powers would do just as much to shape the meaning of the Constitution as the debates of the drafters did. On the issue of terminating or limiting a war once it has begun, the minutes of the Convention suggest the Framers purposefully left the Constitution silent, except for the specific enumerated powers already mentioned.[49] The Constitution gives Congress the power to limit war through its appropriation power and through its drafting of an army.[50] It gives the President power to execute a war through the Commander in Chief Clause.[51] And finally, it gives the President and the Senate the power to make peace treaties.[52] Beyond these explicitly enumerated tools of the two branches, the Constitution is silent, and the historical evidence does not suggest any greater implied authority for either branch to somehow terminate a war.[53] Thus, whether Congress may limit or end a war through means other than its enumerated powers depends on whether there is some compelling reason to imply such a power.[54]

War Powers, 84 CAL. L. REV. 167, 265 (1996).

49. *See* Avalon Project, Madison Debates, Aug. 17, 1787, http://avalon.law.yale.edu/18th_ century/debates_817.asp (illustrating instances during the meeting when delegates contemplated adding "power of peace" language to the Constitution, none of which made it into the final draft).

50. U.S. CONST. art. I, § 8, cl. 12.

51. *Id.* art. II, § 2, cl. 1.

52. *Id.* art. II, § 2, cl. 2.

53. *Id.* art. I, § 8 (listing the enumerated powers of Congress, which do not expressly include the power to terminate a war); *id.* art. II, § 2, cl. 1 ("The President shall be Commander in Chief ...."); Avalon Project, Madison Debates, Aug. 17, 1787, http://avalon.law.yale.edu/18th_ century/debates_817.asp (illustrating instances during the meeting when delegates contemplated adding "power of peace" language to the Constitution, none of which made it into the final draft).

54. *Cf. Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 139 (1866) (holding that Congress has "subordinate and auxiliary powers" that enable it to carry out its enumerated powers).

IV. STRUCTURAL CONSIDERATIONS

Given the textual and historical silence on the issue of whether Congress may claim statutory authority to terminate a war, this Article considers structural arguments to determine whether such a power is implied. Two basic structural principles of the Constitution are the system of checks and balances and the separation of powers.[55] These principles ensure a balanced system in which no branch has overwhelming authority. Any development that would tilt the scales too heavily in favor of one branch, therefore, would violate these fundamental structural principles.

As noted, Congress and the Executive share the war powers.[56] While Congress has the power to raise an army,[57] delegate funds,[58] and declare war,[59] the President has the authority to conduct the war effort.[60] Accordingly, the Constitution creates a power-sharing regime in which Congress and the Executive cooperate, at least to some degree, in the prosecution of war. Likewise, Congress's appropriation power and the President's power to command the armies as he sees fit ensure that neither branch has final authority in all matters related to the prosecution of war. Thus, whether Congress has the more robust power to legally terminate a war, apart from its appropriation power, hinges in large part upon whether the exercise of such a power would be consistent with the principles of the system of checks and balances

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55. *See* PETER M. SHANE & HAROLD H. BRUFF, SEPARATION OF POWERS LAW 3 (2d ed. 2005) ("The feature that distinguishes our national government from all those that had gone before is its structure. Our system of separated powers with checks and balances is accepted by Americans with more faith than understanding.").

56. *See supra* Section I (discussing the Constitution's division of war powers between Congress and the President).

57. U.S. CONST. art. I, § 8, cl. 12.

58. *Id.*

59. *Id.* art. I, § 8, cl. 11.

60. *Id.* art. II, § 2, cl. 1; *see also* United States v. Sweeny, 157 U.S. 281, 284 (1895) (noting that the Commander in Chief Clause "vest[s] in the president the supreme command over all the military forces[]—such supreme and undivided command as would be necessary to the prosecution of a successful war"); Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850) ("As commander-in-chief, [the President] 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."); LINDA R. MONK, THE WORDS WE LIVE BY 53 (2003) ("[I]n the end, the framers decided to split the war powers between the Congress and the president. Congress declares war, and then the president as commander-in-chief makes the necessary military decisions.").

and the separation of powers.

This Article first considers the Treaty Clause.[61] As with other provisions of the Constitution, the Treaty Clause erects a power-sharing scheme between the elected branches. Endowing one branch with unilateral power to terminate war would contradict such a structural scheme. As noted above, the Constitution gives the President the right to make treaties, which includes the power to make peace treaties.[62] Thus, the President's power to make treaties presumably includes the power to formally end a war. However, the Clause does not give all treaty power to the President. It stipulates the President may make a treaty, "*provided* two thirds of the Senators present concur."[63] The process of formally declaring peace or formally ending a war, therefore, is a political process in which the President negotiates with the Senate to come up with a satisfactory solution.[64]

The point is that neither branch has ultimate authority. Rather, the political branches must cooperate in ratifying peace treaties. Such a scheme is consistent with a system in which the two political branches share war powers. Indeed, the two branches are *expected* to cooperate in order to draft a peace treaty. Instead of Congress having authority to unilaterally order the President to cease military operations, one would expect the two branches to engage each other politically to work toward a solution.

Notwithstanding the power-sharing scheme reflected in the Treaty Clause and the war-power-sharing structure of the Constitution, other structural considerations could militate in favor of a robust implied congressional power to statutorily terminate a war. In accordance with the separation of powers principle,

61. U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . .").

62. *See supra* text accompanying notes 44–47 (discussing the Constitutional Convention disagreements over the war powers of the President and Congress).

63. U.S. CONST. art. II, § 2, cl. 2 (emphasis added).

64. Admittedly, the Senate's role has largely been read out of the Treaty Clause in modern settings. *See* PETER M. SHANE & HAROLD H. BRUFF, SEPARATION OF POWERS LAW 644 (2d ed. 2005) ("[T]he President is now regarded by all branches of government as having exclusive power to establish (or break) diplomatic relations with other nations." (citing EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787–1957, at 177–93 (4th ed. 1957))). Nevertheless, this Article points to the Treaty Clause as evidence of the Constitution's inherent structure of separation of powers and shared war powers between the political branches.

Congress has the legislative power[65] and the President has the executive power.[66] Congress, having the legislative power either to declare war or pass a resolution authorizing war,[67] has the implied legislative power, some might argue, of repealing such authorization. Under this argument, Congress would have the more robust power to end a war through means other than its appropriation power. Congress's enumerated powers carry with them "subordinate and auxiliary" powers.[68] The power to "declare war," therefore, assumes the lesser power to legislatively "undeclare" war. Congress did this during the Vietnam War, when it repealed the Gulf of Tonkin Resolution,[69] and considered similar action in 2007 regarding the Iraq War.[70] Whether Congress's attempts were or would have been constitutionally appropriate and legally binding upon the President remains largely unanswered because courts generally refused to adjudicate challenges to the constitutionality of the Vietnam War.[71] Nevertheless, Congress has tried this avenue and likely will

65. U.S. CONST. art. I, § 1.

66. *Id.* art. II, § 1, cl. 1.

67. A declaration of war is technically different from a resolution authorizing war. *See, e.g.*, Louis Fisher, *Unchecked Presidential Wars*, 148 U. PA. L. REV. 1637, 1652–55, 1663–64 (2000) (comparing authorizations and declarations of war). The specific differences are not important other than to note that for international law purposes, the implications of a declaration of war are different from those of a mere resolution authorizing force. *See* John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 242 (1996) (explaining that Congress's power to declare war merely serves as a formality of international law to legitimize hostile actions).

68. *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 139 (1866) ("The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise."); *see also supra* text accompanying notes 19–20 (addressing Congress's implied powers).

69. *See* Act of Jan. 12, 1971, Pub. L. No. 91-672, § 12, 84 Stat. 2053 (repealing the Gulf of Tonkin Resolution); DaCosta v. Laird, 448 F.2d 1368, 1368–70 (2d Cir. 1971) (per curiam) (explaining that, in response to Congress's repeal of the Gulf of Tonkin Resolution, the Executive Branch was attempting to wind down the conflict).

70. *See Dems Continue Attack of Bush's War Powers*, CHI. TRIB., RedEye Edition, Feb. 19, 2007, at 3, *available at* 2007 WLNR 3320803 (describing attempts by congressional Democrats to restrict the President's authority to engage troops in combat missions in Iraq by limiting an authorization of force to allow the President to conduct only support missions).

71. *See* JEAN EDWARD SMITH, THE CONSTITUTION AND AMERICAN FOREIGN POLICY 136–37 (1989) (discussing courts' avoidance of adjudicating the constitutionality of the Vietnam War due to the Judicial Branch's lack of competence in military issues and because reviewing the issue potentially violated the Political Question Doctrine).

attempt it again.

Indeed, Congress routinely repeals laws and resolutions it has passed.[72] Congress, under its vested legislative power, simply could repeal its original declaration or authorization of war, thereby legally binding the President to cease major military operations.[73] There are two responses to this argument. To understand these responses, however, one must first understand the two sides of the Declare War Clause debate.

Earlier, this Article noted the Declare War Clause was the focus of substantial academic scholarship.[74] There are two major theories on the Clause. The first group of scholars argues, generally, that the Declare War Clause gives Congress only the formal right to declare a conflict a "war" for purposes of international law (the pro-Executive scholars).[75] A second group of scholars argues that Congress's power to declare war means, generally, the broader power to authorize most, if not all, military conflicts (the pro-Congress scholars).[76] Under either theory, an

72. Moreover, it is generally recognized that Congress can repeal a treaty. *See* Head Money Cases, 112 U.S. 580, 598–600 (1884) (reasoning Congress has the authority to repeal treaties, specifically because Congress's ability to declare war already potentially can destroy or suspend an existing treaty); *see also* JEAN EDWARD SMITH, THE CONSTITUTION AND AMERICAN FOREIGN POLICY 110 (1989) (discussing decisions by the Supreme Court that grant Congress the authority to modify and abrogate treaties, even when such action is implicit through the enacting of a law that conflicts with a previously ratified treaty).

73. Congress's ability to enforce this power would depend, of course, on its ability to get the challenge properly before an Article III court. The case law has not resolved which members of the public would have standing to bring such a claim. *See, e.g.*, Campbell v. Clinton, 203 F.3d 19, 19 (D.C. Cir. 2000) (considering whether members of Congress had standing to challenge the President's directive sending U.S. forces into Yugoslavia); Anthony Clark Arend & Catherine B. Lotrionte, *Congress Goes to Court: The Past, Present, and Future of Legislator Standing*, 25 HARV. J.L. & PUB. POL'Y 209, 212–13 (2001) (noting the post-Vietnam rise in suits that members of Congress have brought "against the President, other Executive Branch officials and agencies, and even their own House of Congress," with the D.C. Circuit Court of Appeals "left to . . . develop a jurisprudence on legislator standing"). Nevertheless, assuming there is a party with proper standing and that party's challenge to the constitutionality of the President's wartime actions is vindicated by an Article III court, then presumably the President would be forced to comply with the court's decree.

74. *See supra* note 9 (discussing the pro-Executive versus pro-Congress viewpoints).

75. *See* John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 242 (1996) (arguing the primary function of the Declare War Clause was "to trigger the international laws of war, which would clothe in legitimacy certain actions taken against one's own and enemy citizens"). For a list of pro-Executive scholars, see *supra* note 9.

76. *See* Louis Fisher, *Unchecked Presidential Wars*, 148 U. PA. L. REV. 1637, 1657

analysis of the above-mentioned argument produces the same result.

If one has adopted the pro-Executive view of the Declare War Clause, then the power to declare war means only the power to give a conflict a formal international legal label.[77] Accordingly, the power to "undeclare" war would mean, at most, only a reversal of that international legal label. Thus, assuming Congress has the power to "undeclare" war, that power would mean very little under the pro-Executive theory. But even then, these scholars would point out the Constitution explicitly gives the formal power to remove the "war" label from a conflict to the President and the Senate in the Treaty Clause.[78] Under this theory, therefore, Congress would not have any more robust implied power to terminate, limit, or redefine a war.

If, however, one accepted the pro-Congress view of the Declare War Clause, then the power to declare war is, at its core, the exclusive power to authorize the President to engage in most conflicts.[79] The power to "declare war," the pro-Congress scholars would argue, must include the lesser power of deauthorizing most conflicts.[80] Congress, having authorized the

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(2000) (asserting there is unusual agreement among scholars that the Framers of the Constitution "vested in Congress the sole power to initiate hostilities against other nations"); *see also* HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 69 (1990) (explaining that outside the realm of exclusive Executive powers, "governmental decisions regarding foreign affairs must transpire within a sphere of concurrent authority . . . bounded by the checks provided by congressional consultation"); Cass R. Sunstein, *The 9/11 Constitution*, NEW REPUBLIC, Jan. 16, 2006, at 21, 24 (demonstrating the intention of several founding fathers to vest the power of authorizing war in the hands of the legislature (reviewing JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2005)).

77. *See, e.g.*, John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 246 (1996) ("[A] declaration of war announced Congress'[s] judgment that a *legal* state of war exists between the United States and another country.").

78. *See supra* text accompanying notes 57–64 (analyzing the power-sharing between Congress and the President).

79. Even most pro-Congress scholars have recognized the President still would have the right to defend the country without a declaration of war and to engage in small skirmishes without congressional authorization. *See, e.g.*, Raoul Berger, *War-Making by the President*, 121 U. PA. L. REV. 29, 82 (1972) ("[T]he Constitution conferred virtually all of the war-making powers upon the Congress, leaving to the President only the power 'to repel sudden attacks' on the United States.").

80. *See supra* text accompanying notes 17–20 (showing this theory is consistent with the *Milligan* rationale that the power to deauthorize is subordinate or auxiliary to the

Iraq and Afghanistan wars, therefore, could deauthorize those missions and effectively require the President to end hostilities there.[81] Congress attempted exactly this when it repealed the Gulf of Tonkin Resolution and, in 2007, when it considered repealing the 2002 authorization for the Iraq War.[82]

This argument assumes that congressional authorizations of war act like any other statute and, thus, are subject at any time to congressional repeal. There are differences, however, between Congress's ability to repeal garden-variety statutes and its ability (or inability) to repeal a declaration or authorization for war.

The power of Congress to make law, it is assumed, does not conflict with other constitutional clauses in most cases. Congress has the power to make all laws "necessary and proper" in fulfilling one of its enumerated constitutional powers.[83] The Bill of Rights acts as an independent limit on those broad and plenary powers.[84] Likewise, Congress's power to pass laws in the normal course might be affected by another constitutional provision, say the Commander in Chief Clause, which acts as a limit on Congress's otherwise plenary powers.[85] The Executive, like Congress, also has plenary power over its enumerated provisions.[86] So if

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power to declare); *see also, e.g.*, *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 139 (1866) (stating that because "Congress has the power ... to declare war," it consequently holds "the power to provide by law for carrying on war"); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 268 (1996) (inferring Congress's appropriation power allows Congress to unraise (or dissolve) an army by not funding it).

81. Of course, cynics would argue that the President simply could ignore the valid congressional act and persist in the war. Though there is always a danger that any branch of government at any time might stop adhering to the rule of law, American democracy proceeds on the assumption that all branches and individuals are bound to it. President Nixon's decision to turn over the Watergate tapes and President Bush's decision to adhere to the Supreme Court's decision in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), are two stark examples of this.

82. *See supra* text accompanying notes 23–24, 33–36 (noting Congress's dissatisfaction with the wars in Vietnam and Iraq).

83. U.S. CONST. art. I, § 8; *see also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413–19 (1819) (discussing the meaning of the phrase "necessary and proper").

84. *See id.* amends. I–X (setting limits on the government's powers).

85. *Compare* U.S. CONST. art. II, § 2, cl. 1 (naming the President the Commander in Chief of the nation's armed forces), *with* U.S. CONST. art. I, § 8 (enumerating Congress's broad powers).

86. This conclusion flows from the same logic that the Supreme Court employed in its *McCulloch* decision, where it stated that Congress has plenary power in those areas expressly delegated to it. *McCulloch*, 17 U.S. at 420–21. Indeed, this proposition is not seriously challenged.

Congress's repeal of a law somehow intruded into the plenary powers contained in the Commander in Chief Clause, Congress's attempts to repeal that law would be unconstitutional.

Congressional attempts to repeal an authorization for war, in fact, would conflict with the President's plenary powers contained in the Commander in Chief Clause. The Commander in Chief Clause, if it means anything, means the power to prosecute a war.[87] As noted, the structure of the Constitution splits the war powers between the two elected branches. Giving Congress the unilateral power to legally end, limit, or redefine a conflict would, no doubt, deter the President from executing a war in the way he sees fit. If the President's goals or strategies diverge from those of Congress, then Congress would have an incredibly robust veto power over the President—one that would not suffer the extreme political or practical consequences that a use of the appropriation power would. Consequently, knowing that Congress is always looking over his shoulder, the President likely would not conduct the war as he deems fit; he would conduct the war more consistently with Congress's strategies.[88] Such a scheme would tilt the scales heavily in favor of Congress and run afoul of the basic power-sharing scheme of the Constitution, wherein neither branch has some unilateral right to effectively control all major aspects of a war.[89]

The following example illustrates the point that if Congress had

87. *See supra* text accompanying notes 57–60 (addressing the war powers of Congress and the President).

88. Given the two-year terms for members of the House of Representatives, their strategies and vision of a war have the potential of being extremely short-sighted and ill-advised.

89. *See* Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850) ("As commander-in-chief, [the President] 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."). More important, the Supreme Court stated in *United States v. Sweeny* that the Commander in Chief Clause "vest[s] in the president the supreme command over all the military forces,—such supreme and undivided command as would be necessary to the *prosecution of a successful war.*" United States v. Sweeny, 157 U.S. 281, 284 (1895) (emphasis added). Taken together, these two statements stand for the proposition that the power to wage war is the power to wage war successfully. Were Congress simply to repeal its authorization for war, such a move undoubtedly would hinder the President's ability to "successfully" execute a war and accomplish the stated goals. So while Congress can repeal its own laws in virtually any setting, there is something fundamentally different about Congress's power to undeclare war; it intersects with the President's power to wage war and to wage war successfully.

the legal authority to unilaterally limit, terminate, or redefine a war, then the exercise of such power likely would infringe the President's Commander in Chief powers.

As noted above, Congress has the extreme power of dissolving the army, which it can exercise indiscriminately, though it likely will not for fear of political retribution. Consequently, Congress will attempt to do something less by ordering troop withdrawals or redefining the scope of the mission, as Congress did in 2007. The military has a special term for periods of troop withdrawal: retrograde. An Army field manual states that because of the increased psychological and tactical stress during a troop withdrawal phase, "[r]etrogrades require firm control and risk management," and "[a] disorganized retrograde in the presence of a strong enemy invites disaster."[90] Accordingly, the military approaches retrograde with caution, employing particular defensive measures.[91] In other words, times of retrograde require the specific expertise of the Commander in Chief. When Congress attempts to limit or rearrange troop numbers or redefine troops' mission mid-war, it interferes with the Commander in Chief's discretion in deciding how to best prosecute the war or, as the Supreme Court stated, "subdue the enemy."[92]

Had Congress succeeded in 2007 in passing a bill that both ordered troop withdrawals and redefined the scope of the Iraq War, its attempts likely would have infringed the President's Commander in Chief powers by essentially commandeering the troops' ground strategy. Similarly, Congress's attempts to repeal authorizations for war would require the President to engage prematurely in retrograde with all of its attendant harms and risks. Though Congress can force the President's hand by denying funds, thereby accomplishing the same end, it would be doing so consistent with explicit constitutional powers. To allow Congress to force the President's hand by less dramatic means would fail to vindicate any explicit constitutional provision and infringe the President's Commander in Chief powers.

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90. DEP'T OF THE ARMY, OPERATIONS FIELD MANUAL No. 3-0 ¶ 8-33 (2001).

91. *See id.* (explaining the measures commanders should use to "manage risk during retrogrades"). Moreover, the Field Manual also states, "Removing part of a service's or nation's force structure may make it unbalanced and make it fight in a way not supported by its doctrine and training." *Id.* ¶ 2-76.

92. *See supra* note 89 (analyzing Supreme Court precedent bolstering the argument against giving Congress too much power to control war involvement).

Therefore, the two major theories on the meaning of the Declare War Clause produce the same result in the context of ending a war. Under the pro-Executive theory, the power to declare war would include only the subordinate power of removing the legal label "war" from a conflict; it would not amount to a unilateral power to order a cessation of all hostilities. But even then, the Constitution gave the formal power to end a war to the President and the Senate in the Treaty Clause. Under the pro-Congress theory, Congress also does not have the power to deauthorize a conflict. Congress's broad legislative powers, which would include repealing an authorization for war, thereby deauthorizing it, are limited in this respect because repealing an authorization of war would conflict with the President's plenary Commander in Chief powers. Such a scheme would conflict with basic structural principles inherent in the Constitution.

Given the dire political consequences of exercising the appropriation power, Congress will not be apt to use it. Allowing Congress to simply end the war by repealing authorization of it would allow Congress to have its cake—giving the war-weary public what it wants by ending the war—and eat it too—not having to make the politically unpopular decision to cut funding for the troops. Such a scheme would leave only the President with the politically costly decisions and accord Congress an elevated role in war planning. Such a result seems absurd and inconsistent with both the Constitution's delegation of the Commander in Chief powers to the President and the structure of the Constitution, which conceives of a power-sharing regime between Congress and the President.[93] Moreover, the Treaty Clause, as outlined above, establishes a structure in which the two branches must work out a solution politically. Some unilateral implied constitutional right for Congress to deauthorize a war, therefore, would violate

93. And as then-D.C. Circuit Justice Scalia argued:

> What makes [our government] work, what assures that those words [in the Bill of Rights] are not just hollow promises, is the structure of government that the original Constitution established, the checks and balances among the three branches, in particular, so that no one of them is able to "run roughshod" over the liberties of the people . . . .

Nomination of Judge Antonin Scalia, to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 99th Cong. 32 (1987) (statement of Antonin Scalia, J., D.C. Cir.).

structural constitutional principles on multiple fronts.

In the absence of explicit constitutional authority for Congress to legislatively terminate a war and where such an implied power would violate basic structural principles of the Constitution, courts and scholars alike simply ought not infer such a power.

V. OTHER CONGRESSIONAL POWERS TO LIMIT WAR

Textual, historical, and structural considerations suggest Congress ought not have any powers to terminate a war above and beyond what the Constitution explicitly grants. The concern with this is that the President, in the absence of any more robust powers for Congress, could be too powerful in wartime. Having declared or authorized a war, Congress has no way of then ending a war that drags on too long, short of exercising its politically unpopular and impractical appropriation power. In other words, Congress's checks on the President's war powers are simply insufficient. Several factors, however, mitigate such concerns. As noted already, Congress can "undeclare" war for international law purposes, dissolve the army, and cut off funding for a war at any given time. These do not mark the extent of Congress's power.

First, Congress may limit and define the scope of a war at its outset. The Supreme Court read this layer of meaning into the Declare War Clause in the landmark cases *Little v. Barreme*[94] and *Bas v. Tingy*.[95] These cases stand for the proposition that Congress may limit its initial authorization for war.[96] In *Barreme*, the Court held that, where Congress had authorized the interception of ships bound *to* French ports, the President could not construe such language to grant himself the added authority to intercept ships bound *from* French ports.[97] Additionally, in *Tingy*, the Court went to some effort to note Congress had authorized only a limited war against France, "confined in its nature and

94. Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804).

95. Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800).

96. *See* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 734 (2008) ("To like effect, Congress's power to 'declare War' has been interpreted to encompass the lesser included power to limit the scope and nature of hostilities in which U.S. armed forces may engage." (citing *Tingy*, 4 U.S. at 43 (opinion of Chase, J.))).

97. Little v. Barreme, 6 U.S. (2 Cranch) 170, 177–79 (1804).

extent; being limited as to places, persons, and things."[98] Thus, consistent with the Declare War Clause, Congress may limit its initial authorization for war as a means of trying to control the Executive's administration of a war.[99] Not surprisingly, Congress rarely has opted to limit the scope of a war at its outset, recognizing both the complexities of wartime decisions and the favorability of a strong, unitary Executive in charge during wartime.[100] Nonetheless, Congress retains the power to limit its authorization of war.

Second, Congress can, of course, exercise its impeachment power (extreme though it may be) to coerce the President into following its desired course of action.[101] Though Congress rarely uses its impeachment power, the power is available nonetheless. Impeachment represents perhaps the strongest weapon in Congress's arsenal against the President during wartime, even if it

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98. *Tingy*, 4 U.S. at 40 (opinion of Washington, J.).

99. Of course, some scholars might challenge the soundness of the Supreme Court's decisions in *Little* and *Tingy* and argue that the President does not need congressional approval in the first place to go to war. Nevertheless, the Supreme Court spoke in fairly strong language, and both cases remain good law. It should be noted, however, that *The Prize Cases* make clear that the President will retain the power to defend the country against invasion or surprise attack, notwithstanding a limited directive from Congress. The Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635, 668 (1862) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force . . . without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be '*unilateral.*'"). Thus, the Constitution does not tie the President's hands too much.

100. President Nixon summed up this conundrum in his veto of the War Powers Resolution:

> The proper roles of the Congress and the Executive in the conduct of foreign affairs have been debated since the founding of our country. Only recently, however, has there been a serious challenge to the wisdom of the Founding Fathers in choosing not to draw a precise and detailed line of demarcation between the foreign policy powers of the two branches.
>
> The Founding Fathers understood the impossibility of foreseeing every contingency that might arise in this complex area. They acknowledged the need for flexibility in responding to changing circumstances. *They recognized that foreign policy decisions must be made through close cooperation between the two branches and not through rigidly codified procedures.*

H.R. DOC. NO. 93-171, at 1 (1973) (emphasis added).

101. *See* U.S. CONST. art. I, § 2, cl. 5 ("The House of Representatives . . . shall have the sole Power of Impeachment."); U.S. CONST. art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments.").

is rarely used.[102]

Third, the President's domestic wartime powers, generally speaking, are subject to domestic congressional statutes.[103] The Supreme Court held as much in its famous *Youngstown*[104] decision, where it held President Truman did not have the inherent executive authority to disregard congressional statutes and seize a steel mill to support the Korean War effort.[105] Though this opinion—and, more specifically, Justice Jackson's seminal concurrence in it[106]—has become the focus of much debate,[107] the intricacies of the debate do not change the outcome of this Article's thesis. Rather, it is sufficient to point out the near-universal consensus that the President's domestic powers are bound by statute even in wartime.[108]

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102. *See* John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 174 (1996) ("Congress [can] express its opposition to executive war decisions only by exercising its powers over funding and impeachment."); *see also* Campbell v. Clinton, 203 F.3d 19, 23 (D.C. Cir. 2000) (noting that, where Congress disagrees with the President's handling of a war, "there always remains the possibility of impeachment should a President act in disregard of Congress'[s] authority on these matters").

103. For an exhaustive study on the existence of congressional constraints on the President's authority to conduct war, see David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008), and David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008). In addition, the watershed case *Youngstown Sheet & Tube Co. v. Sawyer* explained that the President could not claim his executive power as a means of disregarding domestic statutory law. *Youngstown Sheet & Tube Co. v. Sawyer* (*Steel Seizure*), 343 U.S. 579, 587–88 (1952). Certainly, Justice Jackson's famous concurrence conceives that the President's power is at its "lowest ebb" when he acts in disregard of congressional mandate. *Id.* at 637 (Jackson, J., concurring). These findings illustrate that, among other things, the President likely is bound by domestic statute even in wartime.

104. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579 (1952).

105. *Id.* at 587–88.

106. *Id.* at 634–55 (Jackson, J., concurring).

107. The latest line of Guantanamo cases is one example of this debate. *See infra* note 109 (listing relevant holdings in the Guantanamo cases). The debates surrounding the Bush administration's wiretapping practices provide another example.

108. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 593–94, 624–25 (2006) (holding rules governing the conduct of military commissions were illegal due to the lack of authorization by Congress within the Authorization for Use of Military Force, the Detainee Treatment Act, or the Uniform Code of Military Justice); Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (proclaiming that in times of war, the President is not given a "blank check" to infringe the rights of the nation's citizens, an action that "most assuredly" requires participation by all three branches of government (citing Mistretta v. United States, 488 U.S. 361, 380 (1989); *Youngstown*, 343 U.S. at 587; Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426 (1934))); *see also Hamdan*, 548 U.S. at 686–87

Fourth, the recent line of Guantanamo cases demonstrates the President may not claim unlimited authorization in wartime to disregard essential liberties, or at least liberties guaranteed by the Bill of Rights.[109] Admittedly, the habeas corpus issues tied up with the Guantanamo line of cases are much more complex than this simple proposition. Nevertheless, for purposes of delineating effective checks on the President's wartime powers, it is sufficient to note merely that the Court will balance the President's power against citizens' essential liberties.[110]

Finally, the most important check on the President's wartime powers is the nation's electorate and its frequent elections. Indeed, one cannot ignore this "check" in light of the Democrats' overwhelming victories in 2006 and 2008. The American public disapproved of President Bush's and, more generally, the Republicans' handling of the war and, thus, voted them out of office.[111] So while it may seem alarming that Congress's powers are limited and, at times, seem impractical, the ultimate power to

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(Kennedy, J., concurring) (summarizing an analysis of the laws affecting the conduct of military commissions by noting that "domestic statutes control this case"); *cf.* Boumediene v. Bush, 128 S. Ct. 2229, 2262, 2275 (2008) (holding the Constitution's Suspension Clause applied to detainees at Guantanamo Bay and, therefore, a provision in Congress's Military Commissions Act denying detainees the right to seek writs of habeas corpus was unconstitutional).

109. *See Hamdi*, 542 U.S. at 532 ("Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad."). *See generally Boumediene*, 128 S. Ct. at 2244, 2246, 2275 (explaining the Framers of the Constitution viewed the writ of habeas corpus as a "vital instrument" in securing individual liberty, taking care in drafting the Suspension Clause to specify limited grounds on which suspension of the writ is proper and concluding detainees at Guantanamo Bay were still entitled to seek the writ); *Hamdan*, 548 U.S. at 593 & n.23 (clarifying the President's power to invoke military commissions as one that is not "a sweeping mandate" for the President to use "when he deems them necessary" but one that is subject to the "limitations that Congress has, in proper exercise of its own war powers, placed on his powers").

110. Or perhaps even noncitizens in light of the Court's decision in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

111. *See* Roger Aronoff, *Why Did the Republicans Lose?*, MEDIA MONITOR, Dec. 11, 2006, http://www.aim.org/media-monitor/why-did-the-republicans-lose/ ("[T]he national exit poll found that 68 percent of voters considered the war in Iraq to be extremely or very important to their vote. A total of 59 percent thought the war had not improved the security of the United States, and 56 percent disapproved of it. Fifty-five percent wanted a withdrawal of some or all of our troops.").

check and disapprove of the Executive's conduct of a war lies with the general public.

Thus, Congress has several options in limiting the execution of war. Congress may limit the scope at the outset of the war, dissolve the army, or use its appropriation power. It may also impeach the President. Domestic statutes, the Court's strong protection of essential liberties, and the democratic process further check the President's power. Short of these, however, neither the Constitution nor subsequent case law gives Congress any definitive power to end or effectively limit the President's ability to conduct a war. Congress gets its "bite at the apple" at the outset of a war either by refusing to authorize war or by limiting its authorization of war. Though some might argue this list is too short and limited, the text of the Constitution and subsequent case law simply do not give any other explicit powers to Congress. In the face of constitutional and precedential silence, courts have deferred to the political process for resolution of these questions.[112]

VI. PRACTICAL LIMITS ON CONGRESS'S POWER

Absent the exercise of one of the above-mentioned powers, Congress has no other legal tool to effectively terminate, limit, or redefine a war. Consequently, if dissatisfied with these powers, Congress may resort only to the political arena. If either Congress or the President attempts to end a war in a way that goes above and beyond that branch's mentioned powers, then courts should, and most likely will, refuse to adjudicate such issues on political question grounds.

The Political Question Doctrine allows courts to reject adjudication of a matter on the ground that certain issues are better left to the political branches.[113] For example, the President

112. *See infra* note 113 (addressing the Political Question Doctrine).

113. The Supreme Court offered perhaps the most comprehensive definition of this doctrine in the landmark case *Baker v. Carr*:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a

may decide to spend a weekend with Kim Jong-Il and normalize diplomatic relations with North Korea. Though his decisions likely would be politically costly, courts would not second-guess his politically weighed decisions. Rather, courts would refuse to adjudicate a challenge to the President's actions on political question grounds. This is an obvious example; the contours of the doctrine are much less clear and are the source of significant debate.[114]

Courts apply the doctrine most aggressively in the area of foreign affairs, where they accord a heightened degree of discretion to the political branches.[115] This has led to frustration for many scholars and commentators.[116] In the Vietnam Era, the Supreme Court declined to hear a number of challenges to the

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court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962).

114. *See* JEAN EDWARD SMITH, THE CONSTITUTION AND AMERICAN FOREIGN POLICY 133 (1989) ("[T]he doctrine is often criticized and somewhat formless in its dimensions . . . ."). *See generally* Michael J. Glennon, *Foreign Affairs and the Political Question Doctrine*, 83 AM. J. INT'L L. 814 (1989) (analyzing the Political Question Doctrine while strongly criticizing the Court's utilization of the doctrine). The Court has historically avoided getting involved in the political aspects of foreign affairs. *See, e.g.*, Holtzman v. Schlesinger, 414 U.S. 1304, 1314 (1973) (Marshall, J., in chambers) (vacating a stay that the district court had imposed on the bombings in Cambodia "[i]n light of the uncharted and complex nature of the problem," a problem that included "[l]urking . . . questions of standing, judicial competence, and substantive constitutional law which go to the roots of the division of power in a constitutional democracy"); Mora v. McNamara, 389 U.S. 934, 934 (1967) (denying a writ of certiorari to the Supreme Court on a case that would have presented the Court with an opportunity to pass on the constitutionality of the Vietnam War, giving rise to strong dissents from Justices Stewart and Douglas). For a discussion on the judiciary's reluctance to adjudicate war issues, see also PETER M. SHANE & HAROLD H. BRUFF, SEPARATION OF POWERS LAW 841–44 (2d ed. 2005), and THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? 31–60 (1992), which delve deeply into this question and, although critical of courts' reluctance to hear these problems, nevertheless acknowledge that courts rarely adjudicate wartime or national security issues.

115. *See Baker*, 369 U.S. at 217 (defining the Political Question Doctrine).

116. *See, e.g.*, Michael J. Glennon, *Foreign Affairs and the Political Question Doctrine*, 83 AM. J. INT'L L. 814, 814 (1989) ("The unevenness of congressional oversight, the proclivity of executive foreign affairs agencies for violating the law and the traditional responsibility of the courts as the last guardians of the Constitution—all point to the propriety of an active role for the judiciary in ensuring governmental compliance with the law. Specifically, courts should not decline to resolve foreign affairs disputes between Congress and the President because they present 'political questions.'").

constitutionality of the war.[117] After the Court denied certiorari to a case involving a group of draftees who had challenged the constitutionality of the Gulf of Tonkin Resolution, Justice Douglas offered a particularly acute dissent.[118] At its core, Justice Douglas's dissent emphasizes that there are arguments to be made that the Declare War Clause was specifically incorporated to constrain the impulse to involve the armed forces in a conflict.[119] As questions remained over how the President and Congress had applied such constraints, Justice Douglas noted, judicial refusal to adjudicate the issue would fail to vindicate important constitutional values.[120]

This Article, however, discusses whether Congress has some implied power to legislatively or statutorily limit, redefine, or terminate a war. For several reasons, leaving resolution of this issue to the political branches does not implicate the concerns expressed by Justice Douglas and countless other commentators.

First, the text of the Constitution itself provides no clear answers on this question. Though Article I gives Congress the power "[t]o declare War," the Constitution does not give Congress or any other branch the opposite power to "end" or "terminate" war or to "declare peace." Thus, if called upon to adjudicate a question of who has the right to end war, courts simply cannot resort to the plain text of the Constitution.

Second, the Framers explicitly left the phrase "and peace" out of the Constitution's grant to Congress of the power "[t]o declare War." They not only declined to give such power to declare peace to Congress, but they went the further step and left it out of the

117. *See, e.g.*, *Holtzman*, 414 U.S. at 1313–14 ("[A]lthough there have been numerous lower court decisions concerning the legality of the War in Southeast Asia, this Court has never considered the problem, and it cannot be doubted that the issues posed are immensely important and complex."); *Mora*, 389 U.S. at 934 (providing a specific instance where the Supreme Court denied certiorari for a case challenging the Vietnam War).

118. *Mora*, 389 U.S. at 935–39 (Douglas, J., dissenting).

119. *See id.* at 935–37 (presenting conflicting views on the role afforded Congress by the Declare War Clause—including the view of Thomas Jefferson that it served as an "effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body"—to illustrate the difficulty posed by the question of whether the President possessed the authority to conduct the Vietnam War).

120. *See id.* at 939 (stating the fact that the issue raised in *Mora*—the legality of being drafted and sent to fight in Vietnam—involves a political question "is not decisive" and that the petitioners at least should be told whether their case is subject to judicial scrutiny).

Constitution altogether. From this omission, one may infer that the Framers declined to give this power to any branch because any solution for properly ending a war would be too complex to codify into the Constitution. Instead, the elected branches would be able to work this out as a political question without fear of judicial meddling. One of the assumptions upon which American democracy proceeds is the idea that the Constitution and other laws of the land passed by our representatives represent the American people's value judgments. And because the Constitution remains silent on issues of declaring peace, ending war, or deauthorizing war, one may safely infer that delegation of these powers simply was not a value judgment reflected in the Constitution.

This constitutional silence invokes Justice Rehnquist's oft-quoted language from the landmark "political question" case, *Goldwater v. Carter*.[121] In *Goldwater*, a group of senators challenged President Carter's termination, without Senate approval, of the United States' Mutual Defense Treaty with Taiwan.[122] A plurality of the Court held,[123] in an opinion authored by Justice Rehnquist, that this was a nonjusticiable political question.[124] He wrote: "In light of the absence of any constitutional provision governing the termination of a treaty, ... the instant case in my view also 'must surely be controlled by political standards.'"[125] Notably, Justice Rehnquist relied on the fact that there was no constitutional provision on point. Likewise, there is no constitutional provision on whether Congress has the legislative power to limit, end, or otherwise redefine the scope of a war. Though Justice Powell argues in *Goldwater* that the Treaty Clause and Article VI of the Constitution "add support to the view that the text of the Constitution does not unquestionably commit the power to terminate treaties to the President alone,"[126] the

121. Goldwater v. Carter, 444 U.S. 996 (1979).

122. *Id.* at 997–98 (Powell, J., concurring).

123. Though this was only a plurality, its precedential effect has been much greater as lower courts consistently have relied on it. Furthermore, it has become the seminal case on the Political Question Doctrine. *See, e.g.*, JEAN EDWARD SMITH, THE CONSTITUTION AND AMERICAN FOREIGN POLICY 137 (1989) ("The *Goldwater* decision has been cited with regularity by lower courts dismissing other appeals against executive action in foreign relations.").

124. *Goldwater*, 444 U.S. at 1002–03 (Rehnquist, J., concurring).

125. *Id.* at 1003 (quoting Dyer v. Blair, 390 F. Supp. 1291, 1302) (N.D. Ill. 1975)).

126. *Id.* at 999 (Powell, J., concurring).

same cannot be said about Congress's legislative authority to terminate or limit a war in a way that goes beyond its explicitly enumerated powers. There are no such similar provisions that would suggest Congress may decline to exercise its appropriation power but nonetheless legally order the President to cease all military operations. Thus, the case for deference to the political branches on this issue is even greater than it was in the *Goldwater* context.

Finally, the Constitution does not imply any additional powers for Congress to end, limit, or redefine a war. The textual and historical evidence suggests the Framers purposefully declined to grant Congress such powers. And as this Article argues, granting Congress this power would be inconsistent with the general war-powers structure of the Constitution. Such a reading of the Constitution would unnecessarily empower Congress and tilt the scales heavily in its favor. Moreover, it would strip the President of his Commander in Chief authority to direct the movement of troops at a time when the Executive's expertise is needed.[127] And fears that the President will grow too powerful are unfounded, given the reasons noted above.[128] In short, the Constitution does not impliedly afford Congress any authority to prematurely terminate a war above what it explicitly grants.[129]

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127. *See supra* text accompanying notes 89–91 (considering the risks that would result from giving Congress power to unilaterally limit, terminate, or redefine war).

128. *See supra* Section IV (discussing Congress's power to limit war other than its power-sharing arrangement outlined in the Constitution).

129. Conversely, there are compelling reasons that the judiciary does not get involved. Most obvious are the problems associated with an unelected judiciary making important policy decisions. Indeed, national security concerns are often the most important policy concerns. Thus, if judicial meddling can be avoided in such sensitive political matters, it ought to be. In *Allen v. Wright*, Justice O'Connor, quoting Judge Robert Bork, summed up this sentiment:

> All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.

Allen v. Wright, 468 U.S. 737, 750 (1984) (quoting Vander Jagt v. O'Neill, 699 F.2d 1166, 1178–79 (D.C. Cir. 1983) (Bork, J., concurring)). Furthermore, judicial cognizance of these issues likely would require the courts to commandeer the President's war efforts. Courts are neither prepared for nor interested in such a task. In a number of cases, the Supreme Court has restated its position that it gives the President utmost deference, especially in military affairs. *See, e.g.*, Dep't of the Navy v. Egan, 484 U.S. 518, 530 (1988)

Declaring these issues nonjusticiable political questions would be the most practical means of balancing the textual and historical demands, the structural demands, and the practical demands that complex modern warfare brings. Adjudicating these matters would only lead the courts to engage in impermissible line drawing—lines that would both confuse the issue and add layers to the text of the Constitution in an area where the Framers themselves declined to give such guidance.

VII. CONCLUSION

This Article returns now to its original hypothetical situation. Having been passed by a two-thirds congressional majority, the bill requiring the President to end the war becomes law. The President, however, refuses to enforce the bill, relying on the argument that the legislation improperly infringes his authority as Commander in Chief. A party with proper standing challenges the President's actions, and a court is finally called upon to adjudicate the matter. This Article argues first that Congress simply has no right to pass such a statute. Rather, Congress was free to limit the war at its outset, dissolve the army, or cut funding. Short of one of these powers, however, Congress has no implied constitutional authority to terminate a war. But even if it did, Congress cannot rely on the courts to enforce that power because of the Political Question Doctrine. If Congress does not want to go through the process of cutting off funds for the war, dissolving the army, or impeaching the President, it may resort only to politics to end the war. In this hypothetical situation, therefore, the case would be dismissed and the President and Congress would be left to fight out the details in the political arena.

(acknowledging the reluctance of the courts to "intrude" upon the President's authority in military affairs (citing Chappell v. Wallace, 462 U.S. 296 (1983); Schlesinger v. Councilman, 420 U.S. 738, 757–58 (1975); Gilligan v. Morgan, 413 U.S. 1, 10 (1973); Burns v. Wilson, 346 U.S. 137, 142 (1953); Orloff v. Willoughby, 345 U.S. 83, 93–94 (1953))); United States v. Nixon, 418 U.S. 683, 710 (1974) ("As to [military and diplomatic] duties the courts have traditionally shown the utmost deference to Presidential responsibilities."); *cf. Burns*, 346 U.S. at 142 ("[W]hen a military decision has dealt fully and fairly with an allegation raised in [a habeas corpus case], it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence." (citing Whelchel v. McDonald, 340 U.S. 122 (1950))). Given the textual silence and the compelling reasons for courts not to interfere, it makes more sense for courts to simply refuse adjudication on political question grounds.

Similarly, if the Democrats' attempt in 2007 to statutorily redefine the mission in Iraq, limit troop numbers, and ultimately force the President to withdraw[130] had been challenged in court, courts ought to have refused adjudication. Not surprisingly, it appeared the issue had worked itself out politically when the Democrats took control of the White House and both houses of Congress. Nevertheless, Congress's continued frustrations with President Obama's Afghanistan plan and the possibility of increased agitation with the war in Iraq suggest that courts may be confronted with this issue again. In that event, courts should remember that the political process—not the judiciary—will more appropriately resolve the situation.

130. *See* H.R. 1591, 110th Cong. § 1904(c), (e) (2007) (proposing both the redeployment of U.S. Armed Forces from Iraq and limitations on the purposes for maintaining forces in Iraq after redeployment).