

Spring 2015

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### Recommended Citation

Jeremy D. Bailey, *It's the War Power, Again*, 50 *Tulsa L. Rev.* 649 (2015).

Available at: <http://digitalcommons.law.utulsa.edu/tlr/vol50/iss2/6>

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## IT'S THE WAR POWER, AGAIN

Jeremy D. Bailey\*

FRED I. GREENSTEIN, *PRESIDENTS AND THE DISSOLUTION OF THE UNION: LEADERSHIP STYLE FROM POLK TO LINCOLN* (2013). Pp. 188. Hardcover \$ 24.95.

STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* (2013). Pp. 362. Hardcover \$ 39.95.

ANDREW J. POLSKY, *ELUSIVE VICTORIES: THE AMERICAN PRESIDENCY AT WAR* (2012). Pp. 445. Hardcover \$ 29.95.

MARIAH ZEISBERG, *WAR POWERS: THE POLITICS OF CONSTITUTIONAL AUTHORITY* (2013). Pp. 276. Hardcover \$ 29.95.

The war power is perhaps the governmental power least amenable to constitutional government. Constitutional government presupposes a limited government, which means that certain objects are placed beyond the power of government itself; yet the power presupposes that all such limits are secondary to the war itself. The designers of the Constitution of 1787 attempted to surmount this problem by way of separation of powers and by dividing the war power against itself. In Thomas Jefferson's words, the Constitution created a "check to the Dog of war, by transferring the power of letting him loose from the executive to the Legislative body, from those who are to spend to those who are to pay."<sup>1</sup> But as political scientists since Woodrow Wilson have documented, there are consequences to separation of powers, and some of these consequences are not so desirable with respect to the war power. In particular, the dividing of the war power contributes to a lack of accountability and to gridlock. When the party of peace and the party of war share control over the presidency, the House, and the Senate, the partisan questions of war and peace become entangled with constitutional questions of authority. The problem is this: because the Constitution creates, as Edward S. Corwin put it, an "invitation to struggle" over foreign affairs, the Constitution itself exacerbates the tension between constitutional government and the war power.<sup>2</sup>

In the United States, these kinds of tensions are not resolved by constitutional conventions. In this, James Madison won the debate he had with his lifelong ally, Thomas

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1. MERRILL D. PETERSON, *THOMAS JEFFERSON: WRITINGS* 964 (1984).

2. EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1957, HISTORY AND ANALYSIS OF PRACTICE AND OPINION* 171 (4th ed. 1957).

Jefferson, who preferred to have a new constitutional convention for every generation—or at least whenever a separation of powers crisis resulted in deep constitutional confusion.<sup>3</sup> Instead of conventions—or even formal amendments—most constitutional change in the twentieth century has been accomplished by Supreme Court opinion. Whether it is the commerce power or the non-delegation doctrine, the Equal Protection Clause, or the right of privacy, the Constitution of 2015 is different than the Constitution of 1787. This is true of the war power too. Today, it is widely held that presidents must decide whether the country will start a war, yet, for early Americans, it was universally held that only Congress had this power. This was a fundamental change, and, like the others, it happened without a constitutional convention. However, unlike the others, it also happened without a Supreme Court decision. In this, the change is even less “formal” than the others.

This development makes for unusually awkward politics. Not only does separation of powers contribute to partisan arguments about who holds the authority for war, but the development of a “new understanding” of the war power also allows critics of the president to claim the mantle of the original Constitution. Likewise, presidents benefit from the presumption that they get to decide whether to wage war or not, but they lack a clear formal change to the original constitution to justify what they take for granted. This uncertainty about constitutional authority is further muddled when the claims shift according to control of the presidency.

Over the last several decades, the most vocal defenders of congressional prerogatives have been members of the political party that does not control the presidency. If these crosscutting and ever changing claims that result are bad for politics, they are good for scholarship in the sense that they offer much to be explained. There is always the question of who really has the power under the Constitution. But on top of that, there is the question of how did we get here? And there is the question, is the current practice good for war and good for constitutional government? Does it work better than the old way? Or would an alternative path be better than them both?

The four books under review confirm that the scholarship on the war power is still vibrant even if the political debate on the war power has grown rather predictable. Of those four, Stephen M. Griffin’s *Long Wars and the Constitution* and Mariah Zeisberg’s *War Powers: The Politics of Constitutional Authority* are concerned with understanding the authority for the war power. The other two, Andrew J. Polsky’s *Elusive Victories: The American Presidency at War* and Fred I. Greenstein’s *Presidents and the Dissolution of the Union: Leadership Style from Polk to Lincoln*, are more concerned with understanding the basis for presidential success and failure. The first two seek to understand how the Constitution works, while the second two seek to explain the secrets of executive leadership.

In *Long Wars and the Constitution*, Tulane law professor Stephen Griffin argues that there is a new constitutional order with respect to the war power. This new order began in 1945, under the administration of Harry S. Truman, and it has been continued by presidents and Congresses of both parties to this day. In short, presidents since Truman have consistently denied that “the Constitution require[s] authorization by Congress before the

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3. JACK N. RAKOVE, JAMES MADISON: WRITINGS (1999).

U.S. engages in war,” and they have consistently affirmed that “the Constitution grant[s] the power to the president to initiate war independent of Congress.”<sup>4</sup> This is, to be sure, not a new argument, but Griffin aims to show that it is “more correct” than its original defenders originally conceived.<sup>5</sup> It is more correct because that constitutional order was both made possible by an emergent US foreign policy and military capability, but it was also *required* by that new foreign policy.<sup>6</sup>

Before I turn to laying out this argument, I should note that Griffin never mentions or cites Robert Scigliano’s 1998 argument that there is a new understanding of the war power.<sup>7</sup> Like Griffin, Scigliano points to the emergence and evolution of lists of military actions that did not include congressional declarations,<sup>8</sup> lists that were compiled and disseminated by advocates of a new understanding that the president may take the country from a state of peace to a state of war. And, like Griffin, Scigliano argues that this shift in the new understanding was brought about by a new understanding in foreign policy, specifically, one that casts the United States as the protector of peace loving nations.<sup>9</sup> Had he come across Scigliano’s argument, Griffin might have had to wrestle with Scigliano’s claim that the first such list actually happened not under Truman but, rather, in 1933 under FDR.<sup>10</sup> If correct, this would potentially muddle Griffin’s bright line, grouping FDR with the presidents of the old constitutional order. However, if FDR were the founder of the new way, then that would be a powerful precedent for the defenders of presidential war powers.

Griffin argues that the new policy that demanded the new order was the doctrine of containment, a policy that connected presidential administrations throughout the Cold War. In Griffin’s analysis, it is this foreign policy that is key to understanding the change in the understanding of constitutional authority. In his view, “we should analyze war powers in terms of the fundamentals of foreign policy rather than occasional presidential statements.”<sup>11</sup> Importantly, the new view, started by Truman and continued by Eisenhower, blurred the distinction between war and peace while it relied on a distinction between nuclear and covert action on the one hand and conventional military authority on the other.<sup>12</sup> That is, while presidents and Congresses may have debated the extent to which Congressional authority was necessary for the use of conventional authority, no one argued that the Congress would have to authorize nuclear and covert actions. Nuclear and covert actions were potentially necessary, because the nation was not actually at peace. Griffin’s argument is compelling: complaining about the imperial presidency is not enough; rather, we have to understand its foundation in historical development.<sup>13</sup>

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4. STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* 34 (2013).

5. *Id.* at 32.

6. *Id.*

7. ROBERT SCIGLIANO, *The New Understanding of the President's War Power*, in *LIBERTY UNDER LAW: AMERICAN CONSTITUTIONALISM, YESTERDAY, TODAY AND TOMORROW* 129, 129-46 (Kenneth L. Grasso & Cecilia Rodriguez Castillo, eds., 1998).

8. *Id.*

9. *Id.*

10. *Id.*

11. GRIFFIN, *supra* note 4, at 99.

12. Readers familiar with Stephen F. Knott’s work will wonder why Griffin did not address Knott’s claim that covert action has been important since the early republic. See STEPHEN F. KNOTT, *SECRET AND SANCTIONED: COVERT OPERATIONS AND THE AMERICAN PRESIDENCY* (1996).

13. GRIFFIN, *supra* note 4, at 264-69.

Griffin thus intends to explain how the constitutional order came about, and in this, he explicitly rejects presidentialist alternatives.<sup>14</sup> First among these are the use of various lists compiled by administrations to show that historical precedents can provide guidance even where the Constitution is unclear. Here, Griffin points to the various lists provided by defenders of presidential war powers. He emphasizes one in particular, published in 1945 by former assistant secretary of state James Grafton Rogers.<sup>15</sup> Rogers “assembled a list of 149 instances in which the U.S. had used armed force abroad” and “[o]f these, he claimed at least 100 occurred solely on the basis of executive order without authorization from Congress.”<sup>16</sup> As Griffin points out, later presidentialists would employ updated versions of this list in order to justify presidential control of the war power, but the problem is that the foreign policy surrounding many of the events on the lists were “imperial[]” adventures “in service of frankly racist ideas of white supremacy . . . .”<sup>17</sup> In his view, it would be inappropriate for presidents to point to precedents for constitutional guidance if the foreign policy behind the precedent was not especially praiseworthy.<sup>18</sup> I am not sure this is altogether persuasive as a matter of constitutional authority, but it is perceptive with respect to the potential political awkwardness for claims of presidential authority.

He also dismisses John Yoo’s alternative argument.<sup>19</sup> For Yoo, there is no need for talk about a new constitutional order, because the Constitution of 1787 is more than sufficient for modern war.<sup>20</sup> In Yoo’s view (and to my knowledge, Yoo was the first to make this argument): confusion over the war power can be traced to a misreading of the “declare war” clause.<sup>21</sup> Specifically, that clause should be read as giving Congress the power to recognize that war exists, and should not be read as giving Congress the authority to decide whether there would be war or not.<sup>22</sup> Yoo cleverly points out that the framers could have easily used a word for authorize, but they did not.<sup>23</sup> And, in the minds of the Framers, declarations were closer to parchment barriers, so the real power to limit war came in the form of Congress power over the purse. So, for Yoo, the Framers’ choice to say “declare war” rather than “authorize war” was an important one and can relieve the disjunction between modern practice and original text.<sup>24</sup>

One problem with Yoo’s account is that there is no real evidence that any early American—not even Alexander Hamilton—actually believed it. As Griffin puts it, “the most serious problem with Yoo’s argument is that he is unable to find a single person in the Convention or ratification debates who advocated the kind of presidential war-initiation power he favors.”<sup>25</sup> Yoo does not see that as a problem because, according to his understanding of originalist methodology, statements by early Americans amount to little

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14. *Id.*

15. *Id.* at 81.

16. *Id.* at 82.

17. *Id.* at 83.

18. *Id.* at 84.

19. *Id.* at 269.

20. JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005).

21. *Id.* at 144-52.

22. *Id.* at 145.

23. *Id.*

24. *Id.* at 149.

25. GRIFFIN, *supra* note 4, at 45.

more than mere intellectual history.<sup>26</sup> As Griffin notes, in Yoo's view, the surer approach is understanding the movement from British and colonial practice to the text of the Constitution itself.<sup>27</sup> As a result, Yoo's focus on "original understanding" rather than subsequent practice allows Yoo to understate the importance of the shift that happened after World War II. For Griffin, the important point is that there was continuity from 1787 through 1945, and that continuity rested on the assumption that only Congress may authorize war. "Far from being a 'formality,' there was an awareness of the constitutional rule as establishing a framework for decisionmaking that governed how the nation went to war."<sup>28</sup>

Griffin's point about the assumption that there was a shared understanding about a process for decision-making serves as the foundation for the second half of his argument. Not only is there a new constitutional order in his view, this constitutional order is deeply flawed in that it was never well thought out. Since it was not well thought out, it has "destabilized the constitutional system and deranged policymaking."<sup>29</sup> In particular, and as the Vietnam War demonstrated, the new order lacked the ability to "generate the public support for the kind of military action implied by the premise of that order."<sup>30</sup> That is, for Griffin, the problem was not so much that Kennedy and LBJ never explained the objective in Vietnam; rather, the problem was that they were not forced to. Likewise, Griffin traces George H. W. Bush's reelection difficulties to Bush's unwillingness to engage in "an adequate round of interbranch deliberation,"<sup>31</sup> which resulted in his not having forged a "lasting meaning" for the war against Iraq, which, in turn, meant that he could not campaign on its limited victory.<sup>32</sup>

This point about deliberation is at the heart of Michigan political theorist Mariah Zeisberg's award winning book *War Powers*. She also seeks to revise our understanding of the historical practice of war powers; however, her main objective is to clarify the way we evaluate arguments made about war powers.<sup>33</sup> That is, Zeisberg not only wants more deliberation in constitutional politics, she aims to show readers to how to distinguish good deliberation from the bad. She does not seek to explain political behavior as much she seeks to engage in normative defense or criticism of that behavior. Her primary goal is to show readers how to assess the authoritativeness of a constitutional claim made during deliberation.

Zeisberg's most interesting and controversial claim is that the Constitution does not have a precise meaning with respect to the war power.<sup>34</sup> She disagrees with both Yoo and his critics who intend to proclaim whether the president or the Congress ultimately has "the" authority under the Constitution.<sup>35</sup> These accounts, which she labels "settlement theory," fail to recognize the indeterminacy of the Constitution with respect to the war

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26. YOO, *supra* note 20, at 28-29.

27. GRIFFIN, *supra* note 4, at 41-45.

28. *Id.* at 49.

29. *Id.* at 4.

30. *Id.* at 132.

31. *Id.* at 175-76.

32. *Id.* at 179.

33. MARIAH ZEISBERG, *WAR POWERS: THE POLITICS OF CONSTITUTIONAL AUTHORITY* (2013).

34. *Id.* at 41-53.

35. *Id.*

power, and in their place, she proposes a “relational” account.<sup>36</sup> By this relational account, the Constitution structures debates and processes about authority in a way that does not determine the outcome. This does not mean that anything goes. Rather, following work done in the growing literature on departmentalism, it means that there are good and bad arguments under the Constitution. In her words, “[t]he relational conception . . . asks us to engage a set of decidedly political and contextual questions about institutional performance in developing meaning for constitutional vocabulary.”<sup>37</sup>

The implication is that what matters is not whether Congress has voted to authorize war, but rather whether deliberation about the war is done the proper way and for the right reason. What is important, then, is the quality of the deliberation, not the presence of agreement.<sup>38</sup> This means, for Zeisberg, that it is possible that Congress authorizes war incorrectly, such as when, as in the case of the Mexican War, congressional deliberation has been subverted by executive secrecy. Likewise, presidents may act without Congress if they do so by using the constitutional resources of the presidency and the “distinctive governing capacities of the executive branch.”<sup>39</sup> Thus, Zeisberg’s relational approach can do what “common intuition” can do but settlement theory cannot: praise Kennedy’s handling of the Cuban missile crisis yet condemn Nixon’s expansion of the war into Cambodia.<sup>40</sup> Likewise, Zeisberg credits the Congress that was complicit in creating the very constitutional order Griffin criticizes: “legislative participation in the construction of the Cold War security order was authoritative because the legislature combined strong support and a consensus politics with developed criticism from a wide spectrum of policy and constitutional positions.”<sup>41</sup>

Zeisberg thus intends to offer a normative methodology for assessing authoritativeness that can enable constitutional scholars to move beyond the insurmountable paradoxes caused by the dominant settlement approaches. Why is it, for example, that Congress’s authorization of force in 2002 remains so unsatisfactory for thinking about the authority to invade Iraq in 2003? In place of positivist accounts of whether or not Congress legally authorized a conflict, “[t]his method enables a normative analysis of constitutional politics in light of constitutional ideals.”<sup>42</sup> To Zeisberg’s credit, she does not back down from the implications of this novel argument. As she herself claims, her relational theory aims to substitute unsettlement for settlement and thus is directly antithetical to the judicial presumption that precedent matters.<sup>43</sup> In place of “precedent-based reasoning,” the “relational conception prioritizes good judgment in the particular context over and above consistency across cases.”<sup>44</sup> In this, she is inspired by Robert Jackson’s famous typology in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>45</sup> but she moves beyond it and improves it. Whereas Jackson wanted to find agreement between the

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36. *Id.*

37. *Id.* at 145.

38. *Id.* at 129.

39. *Id.* at 183.

40. *Id.*

41. *Id.* at 143.

42. *Id.* at 223.

43. *Id.* at 222-24.

44. *Id.* at 251.

45. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952).

political branches,<sup>46</sup> Zeisberg wants to know if that agreement is properly authoritative.<sup>47</sup>

In my view, Zeisberg's ambitious account offers a potentially exciting first step toward rethinking the war power, but it is not a successful one. The problem is that she makes the same mistake she ascribes to proponents of settlement theory in that she assumes that the meaning of the Constitution is fixed with respect to "distinctive institutional capacities" of Congress and the president.<sup>48</sup> As a cursory reading of scholarship in American Political Development reveals, these institutional capacities are far from fixed. Indeed, they are often changed by the very controversies that they are supposed to solve. For example, at some point presidents began making the claim that they are "representative" of the people and even that they are more representative than Congress.<sup>49</sup> Likewise, the ability of presidents to gather information by way of the executive apparatus has changed over time, moving from being tethered to partisan politics to becoming more administrative in nature.<sup>50</sup> More precisely, her argument strangely fails to see that what is constitutionally distinctive is likely to be different from Polk to FDR to Reagan. Although Zeisberg wishes to liberate war powers from settled theories of the meaning of the Constitution, her argument nonetheless judges constitutional actors by how they act according to a rather "determinate" and flat script.

If the first two books are about the authority to make war, the next two are more about the extent to which presidents are good at it. Put somewhat differently, if the first two books can be seen as part of the formalist school of Edward S. Corwin, the next two are better classified as belonging to the informal approach associated with Richard Neustadt.<sup>51</sup> The latter are more interested in success and leadership than in the Constitution.

Fred I. Greenstein's slender *Presidents and the Dissolution of the Union* includes Neustadt in its dedication, and its explicit focus is the leadership style of the presidents from Polk to Lincoln.<sup>52</sup> Using secondary literature, Greenstein evaluates each president according to the following skills: public communication, organization capacity, political skill, policy vision, cognitive style, and emotional intelligence.<sup>53</sup> Readers puzzled by the last category will note that the book is also dedicated to James David Barber. Greenstein also aims to determine if the presidency mattered, particularly in the events leading to the Civil War.<sup>54</sup> Pointing to Michael Louis Beck's "funnel of causality,"<sup>55</sup> Greenstein concludes that the presidency did matter: "the men who occupied the White House in the Civil War era and what they did while there made a difference."<sup>56</sup> Very little of this little

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46. ZEISBERG, *supra* note 33, at 253-61.

47. *Id.*

48. *Id.* at 185.

49. For a discussion of the literature on this subject, see Jeremy D. Bailey, *Opposition to the Theory of Presidential Representation: Federalists, Whigs, and Democrats*, in *PRESIDENTIAL STUDIES QUARTERLY* NO. 44, 50-71 (2014).

50. SIDNEY M. MILKIS, *THE PRESIDENT AND THE PARTIES: THE TRANSFORMATION OF THE AMERICAN PARTY SYSTEM SINCE THE NEW DEAL* (1993).

51. RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN* (1990).

52. FRED I. GREENSTEIN, *PRESIDENTS AND THE DISSOLUTION OF THE UNION* (2013).

53. *Id.*

54. *Id.* at 11.

55. *Id.* at 124.

56. *Id.* at 123.



book will be of interest for specialists, but it is a useful and quick summary for those unfamiliar with the period.

Andrew J. Polsky's hefty *Elusive Victories* is worth the attention of non-specialists and specialists alike. According to the author, the book was originally conceived as a "liberal lament" on "the excesses of executive authority," but it instead became a book about the limits of presidential power.<sup>57</sup> In short, although presidents are very successful in taking the country to war, they often fall far short of their goals. So, for Polsky, the most important puzzle is not who has the authority to take the country to war, or even why Congress gave that power away.<sup>58</sup> Rather, what cries out for explanation is why victory remained elusive for so many presidents. If starting a war is so easy, why is winning it so hard? Polsky breaks this question into several further inquiries. First, why is it that the separation of powers has failed in curtailing presidential war power? Second, why does the commander-in-chief so often "struggle to find an effective approach to achieve the national objectives they have established . . . ?"<sup>59</sup> Third, why do presidents often fail to plan for the aftermath of war? Fourth, why do wartime presidents fail with respect to their domestic agenda? Fifth, "why do presidents find themselves bereft of strategic options," even and especially when fighting wars against weaker enemies?"<sup>60</sup>

To solve these puzzles, Polsky examines the presidencies of Lincoln, Wilson, FDR, Johnson, Nixon, George W. Bush, and Obama—though the latter examination is necessarily short. The case studies reveal that there is sometimes no single set of best practices for wartime presidents.<sup>61</sup> Consider the question of managing the military effort itself: should the president be hands-on or hands-off? Unsuccessful presidents such as Johnson were hands-on, but so were the more successful presidents such as Lincoln (at least until he found Grant) and FDR. Consider also the puzzle of securing the peace. Lincoln failed to articulate a post war vision (and even "failed to seize the moment" when offered).<sup>62</sup> Thus, Reconstruction was in some sense doomed from the start. By contrast, Wilson was very clear in his post war plan for peace, but the ambition of the plan sparked opposition to wartime and domestic policies.

The answer that emerges in Polsky's account owes more to Stephen Skowronek than it does to Neustadt.<sup>63</sup> Presidents will not be more likely to succeed if given better or more resources; thus, the problem is not one of persuasion or command. "No increase in the size of the military, no new weapons system, no assertion of a new executive prerogative can alter the wartime power paradox. It boils down to this: the kind of power that presidents command does nothing to preserve their freedom of action over time."<sup>64</sup> This is to say, then, that "[i]n war, time is a president's true enemy," because presidents inevitably find that one decision inevitably narrows the range of action for later decisions.<sup>65</sup> Every choice

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57. ANDREW J. POLSKY, *ELUSIVE VICTORIES: THE AMERICAN PRESIDENCY AT WAR* 363 (2012).

58. *Id.* at 6-11.

59. *Id.* at 9.

60. *Id.* at 10-11.

61. *Id.* at 30.

62. *Id.* at 72.

63. STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH* (1993).

64. POLSKY, *supra* note 57, at 352.

65. *Id.*

comes at a consequence and reversing course becomes more and more difficult. The successful wartime president, therefore, is torn between preserving freedom of action and the imperatives of articulating the objectives of war and peace. On top of this, freedom of action is narrowed by political development. For example, Lincoln and Wilson were able to curtail the expression of dissent in way that more recent presidents could not. These points seem to be a compelling and a much needed corrective to the aphorisms of wartime presidential leadership we often see in textbooks.

Polsky's book is impressive, if only for his attempt to accomplish what most presidency scholars are unwilling to try. Namely, whereas most presidency scholars do scrutinize the actual military tactics of wartime presidencies, Polsky confidently assesses the military judgment of the presidents in his case studies. This clearly required a great deal of work, and likely a lot of self-education on Polsky's part. To be clear, this goes well beyond the competence of this reader. From the footnotes, it appears that Polsky has relied on—and weighed—the judgments of leading military historians, so readers more familiar with these accounts will find much to glean from Polsky's analysis of presidential decision-making.

This reader noticed one error worth mentioning. In his discussion of Lincoln and prerogative, Polsky writes that Lincoln admitted in his special message of 1861 that his measures in that summer violated the letter of the Constitution.<sup>66</sup> Lincoln did no such thing in that speech. More broadly, Polsky's account of Lincoln and prerogative relies on the histories by David Donald and James McPherson and lacks the subtlety of the more recent—and very large—literature on Lincoln and the Constitution, which he strangely omits (see, for example, the work of Benjamin Kleinerman).<sup>67</sup> This led me to wonder if Polsky over relied on the military historians in the other case studies, but I leave that to other readers to determine.

Although Polsky does not himself make this connection, his book forces us to ask if we really want the kind of deliberation Zeisberg, and in some sense, Griffin recommend. If wartime success is ultimately a matter of preserving freedom of action, the problem might be that deliberation is one of those parts of constitutional politics that narrows and limits presidential decision-making. To be sure, all four authors note that more deliberation would better serve presidents in terms of clarifying the objective and in terms of preparing for the post-war peace, but Polsky's account also reminds us that the objectives of war and peace remain in flux, that the reasons for war and the strategies for preserving the peace are likely to change over time.

Zeisberg might respond that these changes can be addressed in deliberation arising from the respective qualities of the two branches. And, somewhat paradoxically, she may have accurately cobbled together the best statement of the original understanding of the contested war power. Even if she has, we still need to ask if the original understanding of constitutional design can help us understand how presidents and members of Congress understand themselves. Indeed, answering this question requires still more work about the Constitution and Founders of 1787, but it also requires more work on the founders who have changed the Constitution over time.

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66. *Id.* at 33.

67. BENJAMIN A. KLEINERMAN, *THE DISCRETIONARY PRESIDENT: THE PROMISE AND PERIL OF EXECUTIVE POWER* (2009).

