Tulsa Law Review

Volume 58
Numbers 2 & 3

Spring 2023

The War Powers Clause: What is it Good For?

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THE WAR POWERS CLAUSE: WHAT IS IT GOOD FOR?

I. INTRODUCTION

At the height of the Vietnam War, Edwin Starr recorded a hit song that asked a simple question about war: "what is it good for?"[1] The same question could be asked of the War Powers Clause: what is it good for?[2] Recent history shows that the answer is, unfortunately, identical to Edwin Starr's in *War*: absolutely nothing.[3] The War Powers Clause vests the power to "declare War" in Congress alone, yet the United States has

1. EDWIN STARR, WAR (Motown Records 1970).
2. *See* U.S. CONST. art. I, § 8, cl. 11.
3. STARR, *supra* note 1.

engaged in combat across the globe for decades without a single declaration of war by Congress.[4] This inconsistency between what the Constitution says and what the government does is gravely consequential, particularly as the American military reels from the recent debacle in Afghanistan and the war in Ukraine threatens to escalate.[5] The War Powers Clause has never been more important than now, and, as this Comment will show, it is worth far more than "absolutely nothing."[6]

Thomas Jefferson famously celebrated that the Constitution gives "one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body . . . ."[7] Times have changed, however, and the United States has set loose "the Dog of war" for decades without any congressional declaration of war.[8] The inconsistency between the War Powers Clause and government action can largely be attributed to a poor understanding of what, exactly, is meant by "War" in the Constitution. This Comment begins by explaining how wars in recent decades are "small wars," the likes of which have ample historical precedent. Next, this Comment looks to the Founders' original understanding and argues that the term "War," as used in the Constitution, clearly encompasses a variety of state-sponsored combat—from small war to total war. Finally, this Comment discusses how the War Powers Clause has become obsolete in practice since World War II and argues that the Supreme Court should exercise its interpretive power to determine whether Congress must declare war before the United States engages in foreign conflicts.

Part II of this Comment defines the term "small war" using recent scholarship and historical examples dating back to the Classical era. Based on these sources, this Comment defines small war as a violent contest over distinct political goals where the two belligerents are asymmetric in their traditional military capabilities. This definition can also be understood from the perspective of Clausewitz's trilogy of policy, chance, and violence.[9] Under Clausewitz's theory, war is best understood through (1) its "political object," (2) the potential for military effort, and (3) the "gamble" inherent in human affairs.[10] This heuristic further associates each element of the trilogy with a particular actor: policy with the state, military effort with the people, and the gamble with the army and commander.[11] Under Clausewitz's trilogy, small wars are conflicts where at least one belligerent has a weak or nonexistent state, and that weakness is compensated by the direct and energetic involvement of the people.[12] Using Clausewitz's trilogy is particularly useful because it reflects the thinking of a man only one generation removed from the

4. U.S. CONST. art. I, § 8, cl. 11; *About Declarations of War by Congress*, U.S. SENATE, https://www.senate.gov/about/powers-procedures/declarations-of-war.htm (last visited Mar. 13, 2023).

5. Nicole Gaouette et al., *The last US military planes have left Afghanistan, marking the end of the United States' longest war*, CNN (Aug. 31, 2021, 2:19 PM), https://cnn.it/42VCpFe; Francis P. Sempa, *America Sleepwalks Into War with Russia*, REAL CLEAR DEFENSE (Feb. 3, 2023), https://bit.ly/42S5W2M.

6. STARR, *supra* note 1.

7. Letter from Thomas Jefferson to James Madison (Sept 6, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON 392, 397 (Julian P. Boyd ed., 1958).

8. *Id.*; *About Declarations of War by Congress*, *supra* note 4.

9. CARL VON CLAUSEWITZ, ON WAR 89 (Michael Howard & Peter Paret eds. & trans., 1976) (1830).

10. *Id.* at 81, 85.

11. *Id.* at 89.

12. *Id.*

Founders.[13]

Part III uses scholarship and historical records to show that the term "war" in the War Powers Clause includes the types of wars defined in Part II as "small wars." Specifically, military theorists and British experiences in the eighteenth century support the idea that the Founders considered asymmetric or guerilla activity to be war in the same sense that the American Revolution or the British wars on the Indian subcontinent were wars.[14] Accordingly, this Comment argues that small wars are included in the war powers of the Constitution.[15]

Part IV describes the increasing obsolescence of the War Powers Clause over the last half-century and argues that the judiciary has the constitutional authority and precedent to resuscitate it. The judiciary has an interpretive power like no other branch, and the political question doctrine should not be a barrier to using this power in regard to matters of war and peace.

Finally, Part V of this Comment reexamines the arguments for including small wars in the War Powers Clause. Part V concludes by demonstrating that the Supreme Court can exercise its power of judgment in this area and is not bound to hiding meekly behind the political question doctrine or ignoring the issue altogether.

II. SMALL WARS ARE VIOLENT CONFLICTS WHERE THERE IS A DISPARITY IN TRADITIONAL MILITARY CAPABILITY

The Constitution draws clear lines on how power is distributed during times of war—the power to "declare War" is vested in Congress, the power to end war by "mak[ing] Treaties" is shared by Congress and the President, and the powers of "Commander in Chief" are held exclusively by the President.[16] What the Constitution means by "War" itself is less clear.[17] Does "War" in the Constitution include phenomena like the recent conflicts in Iraq and Afghanistan? The first step in answering this question is defining what, exactly, a conflict like Iraq or Afghanistan is. Part II of this Comment considers a broad swath of military theory and concludes that phenomena like Iraq and Afghanistan fit an ancient mold of combat, one recognized for centuries and defined in this Comment as "small war." This Part defines small war as violent conflict where there is a disparity in traditional military capabilities. Part II concludes by further clarifying small war using Clausewitz's heuristic of war.[18]

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13. Phillip S. Meilinger, *Busting the Icon: Restoring Balance to the Influence of Clausewitz*, 1 STRATEGIC STUD. Q. 116, 117 (2007) (noting that Clausewitz was a participant in the Napoleonic Wars, which occurred only a few decades after the American Revolutionary War).

14. Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1611–12 (2002).

15. The War Powers Clause is one part of the constitutional war power, but it is not exhaustive. The power to declare, wage, and end war are distributed between the Executive and Legislative Branches. U.S. CONST. art. I, § 8, cl. 11 (granting Congress the power to "declare War"); *id.* art. II, § 2, cl. 2 (granting the President the authority to "make Treaties" on the advice and consent of the Senate); *id.* art. II, § 2, cl. 1 (entrusting the President with the power of "Commander in Chief"). *See also* discussion *infra* Section III.B. For the purposes of this Comment, the term "war power" includes all of the constitutional provisions related to war, whereas the "War Powers Clause" refers specifically to Article I, Section 8, clause 11 of the Constitution.

16. U.S. CONST. art. I, § 8, cl. 11; *id.* art. II, § 2, cl. 2; *id.* art. II, § 2, cl. 1.

17. *See id.* art. I, § 8, cl. 11.

18. CLAUSEWITZ, *supra* note 9, at 89.

A. War is not Limited to Combat Between Organized States

War is often conceived as a violent competition between organized states, but this conception belies the fact that war and combat predate the formation of traditional states by many millennia.[19] Historical examples abound of cultures in which all males lived in a constant state of either combat or preparation for combat.[20] This state of ubiquitous low-intensity conflict is at least as old, and far more common, than conventional modes of battle—where two governments deploy organized armies against one another.[21] This historical reality underscores the psychology of combat which, in its essence, involves "a series of quick decisions and rather precise actions carried out in concert with ten or twelve other men."[22] This elemental combat—warfare stripped down to its basic components—is not limited to great power wars; it reveals itself in every small, unnamed, and unrecorded instance of violence between competing groups.[23]

Thinkers, generals, and statesmen have recognized the existence of a non-traditional mode of war since at least the Classical era.[24] This different kind of war, the kind involving something other than conflict between two organized armies, is as old as the hills, and its essential features "have barely changed since the days of the Romans and Persians."[25] The Classical Greek historian Thucydides, considering "the treacherous armistice" between Sparta and his native Athens, considered the absence of organized conflict between the two city-states as the furthest thing from peace.[26] Calling such a situation "peace," he argued, was absurd considering the ongoing guerilla activity and proxy wars between subordinate city-states.[27]

Thucydides was not the only Greek historian to note such non-traditional warfare in his time. The historian and philosopher Plutarch, writing five-hundred years after Thucydides, praised the Roman general Fabius Maximus as an early practitioner of non-traditional warfare and worthy of inclusion in his biographies of great Greeks and Romans.[28] Fabius Maximus was general and dictator during Hannibal's infamous invasion of the Italian peninsula.[29] Fabius, facing a superior Carthaginian army, "set forth to oppose Hannibal, not with intention to fight him, but with the purpose of wearing out and wasting the vigour of his arms by lapse of time."[30] Fabius' policy of nonconfrontation

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19. JOHN KEEGAN, A HISTORY OF WARFARE 3 (1993).

20. *Id.*

21. JOHN A. NAGL, LEARNING TO EAT SOUP WITH A KNIFE: COUNTERINSURGENCY LESSONS FROM MALAYA AND VIETNAM 15–16 (2002). *See also* CLAUSEWITZ, *supra* note 9, at 586–94.

22. SEBASTIAN JUNGER, WAR 120 (2010).

23. NAGL, *supra* note 21, at 15–16.

24. *See* 1 PLUTARCH, PLUTARCH'S LIVES, *Fabius* 238 (Arthur Hugh Clough ed., John Dryden trans., Modern Library ed. 2001) (c. 106 A.D.) (describing how Fabius, dictator of Rome during Hannibal's invasion, "set forth to oppose Hannibal, not with intention to fight him, but with the purpose of wearing out and wasting the vigour of his arms by lapse of time . . . .").

25. NAGL, *supra* note 21, at 16.

26. THUCYDIDES, THE LANDMARK THUCYDIDES: A COMPREHENSIVE GUIDE TO THE PELOPONNESIAN WAR 316 (Robert B. Strassler ed., Richard Crawley trans., Free Press rev. ed. 1996) (c. 411 B.C.).

27. *Id.*

28. *See generally* PLUTARCH, *supra* note 24.

29. *Id.* at 238.

30. *Id.*

proved effective, for Hannibal soon "discerned . . . that the Carthaginians, unable to use the arms in which they were superior, and suffering the continual drain of lives and treasure . . . would in the end come to nothing."[31] Fabius' generalship was effective in saving the Roman Republic, so much so that he was remembered by Plutarch as a "common father" to the Romans.[32] Thus, two famous Classical historians recognized and, in the case of Plutarch, praised a non-traditional and evasive mode of war. But war in the absence of two standing armies was not limited to the Classical world. Small wars continue into the Modern era, with the Napoleonic Wars, the First World War, and Vietnam providing ready examples.[33]

Modern thinkers have dedicated an enormous amount of time defining and understanding non-traditional war. Colonel C.E. Callwell, writing at the end of the Colonial era, sought to systematize his decades of colonial combat experience into a unified theory.[34] Callwell theorized that the British experiences fighting in Africa, Asia, and the Indian subcontinent could best be termed "small wars."[35] These small wars, according to Callwell, were "campaigns . . . where organized armies are struggling against opponents who will not meet them in the open field."[36] Callwell left his definition intentionally broad and acknowledged that the term "small war" has no actual bearing on the scale of the war being fought.[37] A small war could refer to any operation, large or tiny, where regular forces oppose irregular "or comparatively speaking irregular forces."[38] Writing two decades after Callwell, T.E. Lawrence contemplated his own celebrated campaign fighting alongside Arab tribesmen against the Turkish army in World War I.[39] Lawrence concluded that in an "irregular war" the "largest resource" for the insurgents is the people, and that "with them dispersal [is] strength."[40] More recently, John Nagl's account comparing the British experience in Malaya with the United States in Vietnam classifies the non-traditional mode of warfare as "asymmetric."[41]

The common thread uniting these experiences and theories is combat between forces whose traditional military capability is entirely unequal. Thucydides acknowledged, among other examples, such a dynamic in the Athenian campaign against the much smaller Corcyra as a corollary to the larger conflict with Sparta in the Peloponnesian War.[42] Later,

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31. *Id.*

32. *Id.* at 256.

33. *See* NAGL, *supra* note 21, at 16 (guerilla warfare in the Peninsular Campaign); KEEGAN, *supra* note 19, at 7 (describing Cossack actions against Napoleon's army on the Russian Front); *see generally* T.E. LAWRENCE, REVOLT IN THE DESERT (Tauris Parke 2011) (1927) (documenting combat between Arab rebels and the Turkish army in World War One); *and* STANLEY KARNOW, VIETNAM: A HISTORY 20–21 (1983) (describing the travails of well-armed Americans against an impoverished but redoubtable enemy in Vietnam).

34. C.E. CALLWELL, SMALL WARS: THEIR PRINCIPLES & PRACTICE 21 (Bison Books 1996) (1896).

35. *Id.* at 21–24.

36. *Id.* at 21.

37. *Id.* at 21–24.

38. *Id.* at 21.

39. *See generally* LAWRENCE, *supra* note 33 (T.E. Lawrence's personal historical account doubles as a vehicle for understanding what an insurgency against an organized army looks like from the inside).

40. *Id.* at 16, 76.

41. NAGL, *supra* note 21, at 15 (John Nagl posits that asymmetric warfare has two elements: avoiding the enemy's strength and striking at outposts and logistical support from unexpected directions).

42. *See* THUCYDIDES, *supra* note 26, at 195–99.

powerful Napoleonic armies spent years fighting unsuccessfully against tiny insurgent forces in Spain and irregular Cossacks in the Ukraine.[43] The British Empire spent decades "in all parts of the world . . . struggling against opponents who [would] not meet them in the open field."[44] Similarly, all of the theoretical systems advanced since Callwell recognized that these phenomena are, in sum, combats between mismatched military forces.[45] Whether the preferred term is small war, insurgency, revolutionary war, or asymmetrical warfare, the result is the same. The subject of this Comment is the ancient phenomenon of combat between mismatched military forces—in short, small wars.

B. Small Wars are Cognizable Using Clausewitz's Trilogy

Few military writers escape the drafting board without considering the theories of Clausewitz, and this Comment is no exception. Carl von Clausewitz, a nineteenth-century Prussian military and political theorist, is most famous for his argument that "war is merely the continuation of policy by other means."[46] Clausewitz's conception of warfare as a trilogy, though less renowned, is extremely useful in understanding small wars. The Clausewitzian trilogy of policy, violence, and chance is an excellent tool for understanding what differentiates a small war from a traditional one.[47] Understanding this trilogy requires consideration of the dialectic in Clausewitz's treatise *On War*.[48] Clausewitz is often misunderstood because he begins his treatise with an idealized theory of war.[49] Only halfway through *On War* does Clausewitz deal with actual war as it exists for the soldier on the ground—a position he would have been readily familiar with based on his experiences fighting Napoleon's armies.[50] Clausewitz uses these two conceptions in a dialogue for a better understanding of the nature of war.[51]

For Clausewitz, ideal war is a passionate competition of force which, by the strictest logic, will always force both parties "to extremes."[52] In practice, however, neither side typically comes anywhere near "maximum effort," because practical and material considerations begin pulling actors on each side away from the brink, and "reality takes over."[53] In the rush of preparation and action, only one thing remains unchanged—"the political object" or "the original motive for the war" that constitutes, in Clausewitz's phraseology, policy.[54] Policy is the political end that will guide the use of martial violence

43. NAGL, *supra* note 21, at 15; KEEGAN, *supra* note 19, at 7.

44. CALLWELL, *supra* note 34, at 21.

45. *Id.* (small war is used here to refer to operations of regular forces against irregular "or comparatively speaking, irregular forces"); LAWRENCE, *supra* note 33, at 128–29 (noting that modern "Western ideas of gun power and weight" were not adequate for a war involving tribes who fought the same way they had for centuries); NAGL, *supra* note 21, at 15 (asymmetric warfare requires avoiding direct combat with an enemy whose traditional military power is superior).

46. CLAUSEWITZ, *supra* note 9, at 87.

47. *Id.* at 89.

48. *See generally* Meilinger, *supra* note 13, at 118 (noting the "unusual dialectic" that Clausewitz used).

49. *Id.*

50. *Id.*; MICHAEL ELIOT HOWARD, CLAUSEWITZ: ON WAR 11 (1997).

51. Meilinger, *supra* note 13, at 118.

52. CLAUSEWITZ, *supra* note 9, at 77.

53. *Id.* at 79.

54. *Id.* at 81.

and provide the standard by which military operations are judged.[55] Besides policy and martial violence, there is a third element of war which makes it a "gamble" of sorts—the "element of chance, guesswork, and luck."[56] The Clausewitzian trilogy thus comprises the elements of (1) policy, (2) military violence, and (3) chance.[57] Clausewitz further clarifies the trilogy by associating each element with its primary actor: policy with the state, violence with the people, and chance with the commander and army.[58]

In the context of the Clausewitzian trilogy, small wars are conflicts where at least one side has a weak or nonexistent state, and that weakness is compensated by the direct and energetic involvement of the people.[59] In other words, at least one side in a small war makes up for what it lacks in policy with increased capacity and appetite for violence. This Clausewitzian formulation holds true across the spectrum of small wars. For example, T.E. Lawrence reflects on the fervor and "nervous enthusiasm" shared by the disparate Arab tribes during their revolt against the Turks.[60] The Arab tribes had little unifying political structure outside of the rare personality who could unite them.[61] The Arabs' policy arm of the Clausewitzian trilogy was weak, and generally limited to evicting the Turkish Army from Arabia.[62] However, the Arabs' "largest resources" were the native peoples of the desert, who provided knowledgeable soldiery and superior military intelligence.[63] In the Clausewitzian trilogy, the Arabs' strongest asset was the people; their enthusiasm, in Lawrence's memorable phrase, "would set the desert on fire."[64] Similarly, the efforts of Spanish insurgents in the Peninsular Campaign left an indelible imprint on the history of small wars by coining the term "guerilla."[65] In that campaign, lightly armed and loosely organized Spanish units took advantage of "difficult terrain" and a "proud people" to defeat a far more organized and prepared French army.[66] In terms of the Clausewitzian trilogy, the Spanish employed the support of the people to compensate for their comparative lack of policy and political direction.

The United States' recent campaign in Afghanistan fits neatly in the Clausewitzian analysis of small war. The policy arm of Al-Qaeda and the Taliban leadership was all but destroyed within two months of the initial invasion by a dramatically superior American military force.[67] The United States, using an advanced policy arm and a small but very effective military force, appeared to have achieved total victory.[68] The support of the

55. *Id.* at 87.
56. *Id.* at 85.
57. CLAUSEWITZ, *supra* note 9, at 89.
58. *Id.*
59. *Id.* (containing a concise summary of the Clausewitzian trilogy).
60. LAWRENCE, *supra* note 33, at 40.
61. *Id.* at 33–39.
62. *Id.* at 16–17.
63. *Id.* at 76, 157.
64. *Id.* at 16.
65. NAGL, *supra* note 21, at 15.
66. *Id.*
67. PETER BERGEN, THE LONGEST WAR: THE ENDURING CONFLICT BETWEEN AMERICA AND AL-QAEDA 80–84 (2011).
68. Capt. Brett Friedman, *Creeping Death: Clausewitz and Comprehensive Counterinsurgency*, MILITARY REV., Jan.–Feb. 2014, at 87.

Afghan People, however, was never consolidated—and the Taliban quickly capitalized on this critical mistake.[69] American forces and their NATO allies eventually attempted to drum up popular support for their cause among the people of Afghanistan, but the Taliban had a head start and, one decade into the war, were increasing their popular support while being welcomed as liberators in many Afghan communities.[70] The American and NATO forces were so effective in defeating the military and policy arms of the Taliban that they delayed the crucial work of converting the people to their cause. As history makes clear, this is nearly always a fatal mistake.

Clausewitz's conception of war is releveant to this discussion because he was a thinker only one generation removed from the writing of the Constitution.[71] Clausewitz's theory offers a window to how thinkers of that era conceived of war and military matters. The next Part of this Comment concerns how the Founders understood war in terms of the War Powers Clause, and keeping Clausewitz in mind will aid in understanding the Founders' conception of war.

III. THE FOUNDERS UNDERSTOOD SMALL WARS TO BE INCLUDED IN THE WAR POWERS CLAUSE WHEN THEY DRAFTED THE CONSTITUTION

Part II used historical examples and Clausewitz's theory of war to define small war: combat between forces of disparate traditional military capability or, in Clausewitzian terms, combat where one side compensates for a weak policy arm by the direct and energetic involvement of the people.[72] The question remains, does "War" in the Constitution encompass small war?[73] This Part argues that eighteenth-century political theory and British practice defined war very broadly, that America's Founders agreed with this definition, and concludes that the War Powers Clause encompasses small wars.[74]

A. War was Broadly Understood in 1787 to Include Small Wars

Early political scientists whose ideas influenced the Founders held a broad view of war that included small wars.[75] Samuel Johnson's 1755 dictionary defined war as "the exercise of violence under a sovereign command" and defined "command" as no more than a "limit[ing] authority."[76] Michael Ramsey concludes that, overall, the term "war" in

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69. SETH G. JONES, IN THE GRAVEYARD OF EMPIRES: AMERICA'S WAR IN AFGHANISTAN xxii–xxv (2010).

70. *In Quotes: Excerpts from NATO report on Taliban*, BBC NEWS (Feb. 1, 2012), https://www.bbc.com/news/world-asia-16829368.

71. CLAUSEWITZ, *supra* note 9, at 18–19 (noting that Clausewitz was serving as a staff officer in the Prussian Army during the 1812 and 1813 campaigns).

72. *Id.* at 89.

73. U.S. CONST. art. I, § 8, cl. 11.

74. *See* Ramsey, *supra* note 14, at 1609–12 (explaining the expansive definition of war in the eighteenth century); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2058 n.33 (2005) (observing that the first three Presidents all understood small wars to be encompassed by the War Powers Clause). *Cf.* John Mikhail, *The Original Federalist Theory of Implied Powers*, 46 HARV. J.L. & PUB. POL'Y 57–68 (2023) (demonstrating that the Founders, and the Federalists in particular, intentionally designed the Constitution to vest implied powers necessary for the good functioning of government, the law of nations, and the Constitution's overall purpose as stated in the Preamble).

75. Ramsey, *supra* note 14, at 1609–12.

76. SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE, *War, n.s.* (1755), https://johnsonsdictionaryonline.com/1755/war_ns.

the eighteenth century meant "little more than violent conflict, with the usual connotation of sovereign approval."[77] The requirement of "sovereign approval" in these definitions is less obvious in a small war, but this element is satisfied because even small war belligerents have the minimal political authority of a common policy goal, such as driving the Turkish Army from Arabia or the French from Iberia.[78] Political thinkers of the day were willing to be even more generous than Johnson in their definitions of war. Richard Lee, a highly influential seventeenth-century Virginian, considered war to be "the state or situation of those . . . who dispute by force of arms."[79] Across the Atlantic, European theorists thought of war as "the state of those, who try to determine their differences by force"[80] and, most broadly, "violent contest with another."[81] A small war involving mismatched traditional military power, where the capacity of the people compensates for a relative dearth of policy, fits these broad definitions of war. Accordingly, the thinkers who influenced America's Founders included small war in their definition of war.

Beyond bare definitions of war, the finer points of eghteenth-century military theory comported with the small war concept.[82] Clausewitz, whose work bridged the eighteenth and nineteenth centuries, was the intellectual heir of a robust generation of political and military thinkers.[83] In addition to Clausewitz, earlier authors saw war on a spectrum between "perfect" war, "imperfect" war, and "reprisals."[84] For example, Grotius considered "perfect" war to involve nations fighting after formal declarations of war.[85] "Imperfect" wars, on the other hand, involve the mere "violent Prosecution of [the nation's] Right[s]" and, most tellingly, lack official declarations.[86] Burlamaqui added the concept of "reprisals" to Grotius' theory of "imperfect" war.[87] Burlamaqui defined reprisals as an "imperfect kind of war" where a nation "seiz[es] the persons or effects" of another "that refuseth to do [them] justice."[88] In other words, Burlamaqui saw the mere seizure of foreign goods and persons to be within the definition of war itself. "Seizing" is the critical verb in Burlamaqui's definition;[89] the contemporary definition was "to take possession of," "to take forcible possession of by law," or "to make possessed."[90] Military

77. Ramsey, *supra* note 14, at 1611.

78. LAWRENCE, *supra* note 33, at 16–17; NAGL, *supra* note 21, at 15.

79. RICHARD LEE, A TREATISE OF CAPTURES IN WAR 1 (W. Sandby, 1759).

80. JEAN JACQUES BURLAMAQUI, 2 THE PRINCIPLES OF NATURAL AND POLITIC LAW 223 (Thomas Nugent trans., 2d rev. ed. 1763) (1751).

81. CHRISTIAN WOLFF, 2 JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM 311 (Joseph H. Drake trans., Clarendon Press 1934) (1764).

82. Charles A. Lofgrent, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 691–93 (1972).

83. Meilinger, *supra* note 13, at 117 (noting that Clausewitz's ideas were "not new," and had been floating around in the ether for quite some time before he was able to distill it into words using his experience in the Napoleonic Wars).

84. Lofgrent, *supra* note 82, at 692–93.

85. HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 540 (J. Barbeyrac trans., 1738).

86. *Id.*

87. BURLAMAQUI, *supra* note 80, at 258.

88. *Id.*

89. *Id.*

90. SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE, *Seize, v.a.* (1755), https://johnsonsdictionaryonline.com/1755/war_ns.

combat is not necessary for such a verb. Accordingly, thinkers who were highly influential on the Founders did not consider intense combat necessary for war; any state of combat, regardless of intensity, would do.[91]

Likewise, British practice at the time showed that the power to enter a "state of war" included small wars. British theories of war and politics were "quite relevant" to early Americans, including those who drafted the War Powers Clause.[92] British practice in the seventeenth and eighteenth centuries was to "mak[e] war or peace" at the whim of the king, preferably accompanied "by parliamentary advice."[93] In short, the British king held the "prerogative" for declaring and directing war.[94] The king's prerogative was put to regular use in the various wars of the eighteenth century.[95] Most importantly, this regal prerogative was employed for numerous campaigns in the Indian subcontinent—where highly organized, well-equipped British troops battled larger, ill-equipped indigenous forces.[96] The First Mysore War (1766–1769), First Maratha War (1779–1782), and Second Mysore War (1780–1783) were fought immediately before, during, and after the Revolutionary Period.[97] Notably, the Second Mysore War occurred only a few years before the Constitutional Convention.[98] Americans were aware of these conflicts;[99] the Mysore wars were particularly appealing to them as an Indian corollary to their revolt against Britain.[100] Clearly, both sides of the Atlantic recognized that the British king's ability to declare war extended to small wars. The next Section will consider how America's founding fathers consciously incorporated this understanding of war powers in the Constitution.

B. The Constitutional War Powers Include Small Wars Because Eighteenth-Century Theory and British Practice Assumed Such Wars

The British war power was the progenitor of the American constitutional war power. Alexander Hamilton recognized as much in *Federalist No. 69*, where "Publius" describes the difference in war powers between the British king and the American president.[101] Specifically, Hamilton explained how the Constitution divides the unitary British war

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91. *See* MATTHEW HALE, 1 HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN 162 (S. Emlyn ed., 1736) (agreeing with Burlamaqui's formulation on reprisals); *see also* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 30 n.ll (1967) (noting that "Hale was a particularly well-known and attractive figure" to the American founders).

92. Lofgrent, *supra* note 82, at 697–99.

93. HALE, *supra* note 91, at 159.

94. Lofgrent, *supra* note 82, at 698.

95. R. ERNEST DUPUY & TREVOR N. DUPUY, THE ENCYCLOPEDIA OF MILITARY HISTORY: FROM 3500 B.C. TO THE PRESENT 630–37 (1977) (for the War of the Austrian Succession); *id.* at 617–27 (for the War of Spanish Succession).

96. *Id.* at 665, 699–702.

97. *Id.* at 700–01.

98. *Id.*

99. Pradeep P. Barua, *Maritime Trade, Sea Power, and the Anglo-Mysore Wars, 1767–1799*, 73 HISTORIAN 1, 23, 29 (Spring 2011).

100. Blake Smith, *Revolutionary Heroes*, AEON (Dec. 7, 2016) (Sam Haselby ed.), https://aeon.co/essays/why-american-revolutionaries-admired-the-rebels-of-mysore.

101. THE FEDERALIST No. 69 (Alexander Hamilton) (Issac Kramnick ed., 1987) (hereinafter FEDERALIST No. 69).

power into two parts: declaration and conduct.[102] Hamilton obviously saw the War Powers Clause of the American Constitution as a direct descendant of its British counterpart, and the wars being waged by the British king in India at the time were certainly included in that power.[103]

Consequently, the first three Presidents considered war to include small wars. George Washington understood that no expeditions or offensives against Native American tribes could be attempted without Congressional approval under the constitutional war power.[104] Similarly, John Adams avoided engaging in the Quasi-War with France in the 1790s due to apprehension about Congress' possession of the power to declare a war.[105] Thomas Jefferson publicly acknowledged the requirement of Congressional approval before responding to pirate attacks in the Atlantic, although his actual conduct, as discussed below, ignored that constitutional prerogative.[106] All three of these examples fit neatly within the definition of a small war. Warfare with Native American tribes had become, by the late-eighteenth century, famously asymmetrical and technologically one-sided.[107] The Quasi-War with France was a quintessential war of "reprisals"[108] rather than a technical small war; however, the war illustrated the point that even conflict with extremely low-intensity combat was considered war during the period.[109] Thomas Jefferson's conflict with the Barbary Pirates will be discussed at length in the next Section; needless to say, it provides a classic example of war between a resourceful, weaker party and a more technologically advanced adversary.[110]

Conscious changes made between the Articles of Confederation and the Constitution demonstrate a broad understanding of war. The original Articles of Confederation lacked the presidential office, and executive power was allocated to Congress—including the war-making power.[111] Specifically, the Articles gave Congress "the exclusive right and power of determining on peace and war" with a narrow exception for states' self-defense.[112] Essentially, the thirteen colonies invested the entire war-making power of the British king with the legislative body of the Continental Congress.[113] The Framers of the Constitution eventually divided this unitary vestment of the war power, and the power to conduct war was granted to the executive while the power to declare war and approve treaties was vested in Congress.[114]

The Framers of the Constitution realized that the war power was best split between a deliberative body and a decisive body—i.e., the legislative and executive branches.

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102. *Id.*
103. Smith, *supra* note 100.
104. Bradley & Goldsmith, *supra* note 74, at 2058 n.33.
105. *Id.*
106. *Id.*
107. DUPUY, *supra* note 95, at 609–12.
108. BURLAMAQUI, *supra* note 80, at 258.
109. DUPUY, *supra* note 95, at 725–26.
110. *Id.* at 609–12.
111. ARTICLES OF CONFEDERATION of 1781, art. IX; *id.* art. IV; *id.* art. I (note the absence of a Presidential office).
112. *Id.* art. VI; *id.* art. IX.
113. Michael Stokes Paulsen, *The War Power*, 33 HARV. J.L. & PUB. POL'Y 113, 115 (2010).
114. U.S. CONST. art. II, § 2, cl. 1; *id.* art. I, § 8, cl. 11; *id.* art. II, § 2, cl. 2.

Alexander Hamilton argued in *Federalist No. 25* that splitting the war power was the best way to ensure it was not abused.[115] Notably, Hamilton used warnings of Indian, British, and Spanish hostilities to make his point; thus, he implied that conflict with any of these entities qualified as war for the purposes of the constitutional war power.[116] Given that a conflict with any of the Indian nations of the time would have constituted a small war, Hamilton clearly considered small war to be part and parcel to the war power itself. Other key players at the Constitutional Convention held similar opinions on splitting the war power in the new Constitution.[117]

The Framers of the Constitution clearly and intentionally took the unitary war power of the British monarch and divided it between the two representative branches of the government. Their purpose was clear—to give "one effectual check to the Dog of war"[118] while maintaining the general effectiveness of military command.[119] They intentionally divided the British king's power to initiate and conduct small wars between the legislative and executive branches in the United States.

The war powers in the Constitution include small wars. As detailed earlier, the British king held a unitary war power which gave him authority to engage in small wars.[120] The most notable of these were waged on the Indian subcontinent.[121] The thirteen colonies mimicked the war power of the British king in the Articles of Confederation by entrusting "the exclusive right and power" of war-making with Congress.[122] When the Articles of Confederation were discarded as insufficient, the Framers consciously re-tooled the war power, ultimately deciding to split it into declaration and conduct, with the former vesting in the legislature and the latter in the executive.[123] Considering the well-known British small wars in India[124] and the overwhelmingly broad definition of war in contemporary theory,[125] the war power vested by the Founding Fathers certainly included the power to declare, wage, and end small war. America's earliest small war demonstrates this point.

C. The Tripolitan War Demonstrates that the Founders Understood Small War to be Included in the War Power

The Barbary Pirates and their North African benefactors were a constant threat to early American trade and shipping.[126] Seeking easy prey among the shipping fleets of the Atlantic, these resourceful pirates would operate "from strategically placed islands,

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115. THE FEDERALIST No. 25 (Alexander Hamilton) (Issac Kramnick ed., 1987) (hereinafter FEDERALIST No. 25).

116. *Id.*

117. Ramsey, *supra* note 14, at 1548–50 (noting the clear support of Jefferson and Madison for splitting the war power between the executive and legislative branches).

118. THE PAPERS OF THOMAS JEFFERSON, *supra* note 7, at 397.

119. FEDERALIST No. 69, *supra* note 101.

120. HALE, *supra* note 91, at 159.

121. DUPUY, *supra* note 95, at 699–702.

122. ARTICLES OF CONFEDERATION of 1781, art. 9, § 1.

123. FEDERALIST No. 69, *supra* note 101.

124. Smith, *supra* note 100.

125. *See* discussion *supra* Section III.A.

126. 1 THE ENCYCLOPEDIA OF THE WARS OF THE EARLY AMERICAN REPUBLIC, 1783–1812: A POLITICAL, SOCIAL, AND MILITARY HISTORY, *Barbary Pirates* 32 (Spencer C. Tucker ed., 2014).

deserted or populated, that could be held temporarily."[127] From these hidden bases, the pirates would capture goods and captives for their own profit and to pay off the Ottoman client-states which supported and legitimated them.[128] Their contemporaries referred to them variously as Barbary Pirates or Barbary Corsairs, but the terms in this instance are interchangeable since "corsairs differed from pirates only in that the former enjoyed the legal authorization of a recognized government" in attacking shipping vessels.[129] North African client-states of the Ottoman Empire were the patrons of these Atlantic raiders.[130] The most notable of these North African governments for the present case was Tripoli—a nation whose income was "principally based on pirate raids."[131]

Following years of intermittent raiding and multiple treaty violations, Tripoli declared formal war on the United States during the early months of Thomas Jefferson's administration.[132] President Jefferson, unaware of the initiation of hostilities, dispatched a squadron of warships to the Mediterranean with orders to protect American shipping but with no authority to engage in combat.[133] On reaching the North African coast, the squadron commander learned of Tripoli's declaration of war but refused to take military action because "he had no such authority."[134] Meanwhile, a Tripolitan warship engaged a lone American vessel and was defeated in the first combat action of the Tripolitan War.[135] After learning of this engagement and Tripoli's official declaration of war, Congress authorized the use of all available warships against the Tripolitan threat.[136] Congress concurrently authorized war with Tripoli in the event that negotiations failed, which was likely.[137] Negotiations did fail, and three years of small war ensued.[138]

The Tripolitan War was a small war because it involved clearly mismatched naval capability. The United States, though a very young nation, could field multiple squadrons of three to five frigates, each carrying between twenty-eight and fifty-two cannons.[139] Additionally, the United States could procure bomb ketches—an invaluable naval weapon for coastal sieges.[140] Tripoli, on the other hand, relied in the Atlantic on corsair ships built for intimidating unarmed merchant vessels and, in the Mediterranean, smaller polaccas which typically carried half the firepower of the American frigates.[141] Clearly, the disparate naval power of the two belligerents qualifies the Tripolitan War as a small war.

The Clausewitzian trilogy is also informative. The United States was operating with

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127. *Id.*
128. *Id.*
129. *Id.* at 31.
130. 2 THE ENCYCLOPEDIA OF THE WARS OF THE EARLY AMERICAN REPUBLIC, 1783–1812: A POLITICAL, SOCIAL, AND MILITARY HISTORY, *Tripoli* 673–74 (Spencer C. Tucker ed., 2014) (hereinafter ENCYCLOPEDIA).
131. *Id.* at 674.
132. *Id.* at 675–77.
133. *Id.*
134. *Id.* at 677.
135. ENCYCLOPEDIA, *supra* note 130, at 677.
136. *Id.*
137. *Id.*
138. *Id.* at 677–81.
139. *Id.* at 677.
140. ENCYCLOPEDIA, *supra* note 130, at 677, 679.
141. *Id.* at 677.

a strong policy arm in its newly established constitutional structure, while Tripoli was little more than a pirate-state that owed its existence to the Ottomans in Istanbul.[142] Ultimately, Tripoli was unable to compensate for its relative dearth of policy, and it was defeated by small, professional United States squadrons within a few years.[143]

The behavior of President Jefferson, Congress, and American military commanders show that they understood the Tripolitan War to be within the purview of the constitutional war power. Most tellingly, neither Jefferson nor the military commanders saw themselves as authorized to initiate hostilities with Tripoli. Jefferson sent the initial squadron to the Mediterranean as a protective force, yet he explicitly instructed them not to engage in combat.[144] Jefferson understood that a "check to the Dog of war" lay in another branch of government.[145] Similarly, the squadron commander refused to go on the offensive, even after learning of Tripoli's declaration of war, because he "had no such authority."[146] That authority lay with Congress, who used it the next year to authorize the small war.[147] This incident shows the full operation of the constitutional war power—Jefferson directing military operations and Congress officially authorizing war. The United States government at the turn of the nineteenth century, when nearly every decision maker was a member of the founding generation, demonstrated in practice that the war power was intended for small wars. Unfortunately, that understanding has been lost in recent decades.

IV. THE JUDICIARY SHOULD EXERCISE ITS INTERPRETIVE POWER AFTER A CENTURY OF DISAPPOINTMENTS

Part II of this Comment argued that the United States' recent campaign in Afghanistan fits an ancient pattern of small wars. Then, Part III demonstrated that small wars are included in the War Powers Clause. Part IV begins by noting that the United States has repeatedly engaged in small wars without any congressional declaration.[148] This conduct is outside of constitutional bounds and destroys the delicate division of the war power in the Constitution.[149] This Part then argues that the judiciary has the *ability* to right the ship of state with its interpretive power and the *right* to exercise judicial review in certain cases implicating wartime authority.

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142. *Id.* at 673–74.

143. *Id.* at 677, 680–81.

144. *Id.* at 677.

145. THE PAPERS OF THOMAS JEFFERSON, *supra* note 7, at 397; Jeremy D. Bailey, *It's the War Power, Again*, 50 TULSA L. REV. 649, 649 (2015) (explaining Jefferson's use of the war power in the context of the Tripolitan War).

146. ENCYCLOPEDIA, *supra* note 130, at 677.

147. *Id.*

148. U.S. CONST. art. 1, § 8, cl. 11. *See generally About Declarations of War by Congress*, *supra* note 4 (listing the official declarations of war by Congress; note the absence of Vietnam, Afghanistan, or either of the wars in Iraq).

149. *See generally* FEDERALIST No. 25, *supra* note 115 (emphasizing that the British monarch's war power was better used by a federal government than by dispersed and confederated states); FEDERALIST No. 69, *supra* note 101 (explaining how the British war power has now been split by the Constitution into separate parts and separate branches).

A. The War Power has Become Incoherent in Practice Since World War II

Earlier generations of Americans would find our conception of a President-centered war power completely alien and incomprehensible.[150] The national consensus from the Constitutional Convention to the early-twentieth century was that only Congress had the power to declare war, while the President alone could conduct the war as Commander-in-Chief.[151] This traditional division of the war power has been vividly analogized as Congress "load[ing] the gun" and the President "pull[ing] the trigger."[152] Indeed, this belief was so deeply embedded that Jefferson and his military commanders avoided combat in our nation's first small war absent congressional declaration and authorization.[153] Compare Jefferson's deference to Congress in the Tripolitan War with modern arguments that the phrase "declare War" is purely a ceremonial anachronism,[154] or that "the President enjoys full discretion" in the use of American military force,[155] and the enormity of this paradigm shift becomes clear.

The shift from enormous deference to Congress' war powers to its current relegation to anachronism and mere ceremony is a result of a quiet encroachment on an explicit constitutional power during recent decades.[156] This shift was noticed as early as 1991, prior to the War on Terror, when Robert J. Spitzer argued that it was the natural result of the strong, modern presidency, "congressional acquiescence," inactive courts, and the emergence of a "national security state."[157] Modern ideas that the "declare War" clause is merely ceremonial are the natural result of these phenomena.[158] However, the Constitution was not drafted in modern times, and the war power has been altered through the passivity of one branch and the domineering of another, rather than the traditional interpretive venue of the courts.[159]

Altering the balance of the war power has been highly consequential. The Gulf of Tonkin Resolution, passed in 1964, was groundbreaking in that it gave the President "a virtual blank check to conduct the war [in Vietnam] as he saw fit" rather than simply declaring war against a recognized government.[160] The end result of Tonkin was hardly different from what an earlier American government might have effected—Congress repealed the Resolution as soon as the Vietnam War became politically untenable, thereby maintaining its purview over the declaration of war.[161] However, the Gulf of Tonkin

150. Bailey, *supra* note 145, at 650.
151. *Id.*
152. Paulsen, *supra* note 113, at 132.
153. See discussion *supra* Section III.C.
154. Robert F. Turner, *The War on Terrorism and the Modern Relevance of the Congressional Power to "Declare War"*, 25 HARV. J.L. & PUB. POL'Y 519, 521 (2002).
155. Robert J. Delahunty & John C. Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations That Harbor or Support Them*, 25 HARV. J.L. & PUB. POL'Y 487, 490 (2002).
156. *See generally* Robert J. Spitzer, *Separation of Powers and the War Power*, 16 OKLA. CITY U. L. REV. 279 (1991).
157. *Id.* at 283–84.
158. *Id.*
159. *Id.*
160. KARNOW, *supra* note 33, at 412.
161. Paulsen, *supra* note 113, at 129–30.

Resolution set a precedent which was used to the fullest extent in the Authorization for Use of Military Force ("AUMF") in 2001—an "enormous check" granting the President authority to wage war against any individual, group, or government connected to the September 11 attacks without an expiration date.[162] What made the AUMF so extraordinary was that Congress blatantly ceded its own traditional war powers to the President.[163] The AUMF was an unprecedented "embrace" of a "pro-presidential view of constitutional power to initiate war, including preemptive war, against terrorism."[164] The AUMF, therefore, is the culminating event of a decades-long usurpation of traditional constitutional war powers, and the courts have done almost nothing to address it.[165]

B. The Courts Possess an Interpretive Power Unlike Any Other Branch

The judiciary holds the exclusive power to interpret the laws and the Constitution.[166] The Supreme Court, in particular, has jurisdiction to declare "what the law is."[167] The Court may do this by looking at the Constitution and declaring what it means.[168] Consider the landmark *Marbury v. Madison* case, which established one of the most firmly rooted principles in American jurisprudence—that a "law repugnant to the Constitution is void, and that courts, as well as other departments, are bound by that instrument."[169] Therein lies the judiciary's greatest power: to define the instrument which binds the other branches.

Alexander Hamilton noted that the judicial branch is the weakest of the three branches in measure of force or will.[170] However, the judiciary has one ability which creates balance between it, the executive, and the legislature: judgment.[171] Recognizing the advantages in force and material power of the other branches, the Supreme Court has occasionally declined to exercise its exclusive power of judgment for political reasons.[172] Without robust exercise of its interpretive power, the judiciary will wither on the vine of separation of powers while the other branches exercise power within bounds that they themselves define.[173] Indeed, the "continual jeopardy" of the judiciary "being overpowered, awed, or influenced" by the other branches was the crucial reason for adopting lifetime appointments for federal judges.[174]

Unlike the explicit war power, the implied interpretive power of the judiciary has

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162. *Id.* at 122, 125.

163. *Id.* at 122.

164. *Id.*

165. *Id.* at 132–33.

166. THE FEDERALIST No. 78, at 439 (Alexander Hamilton) (Issac Kramnick ed., 1987) (hereinafter FEDERALIST No. 78). *See also* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (establishing authority for judicial review of both federal executive and legislative acts).

167. *Marbury*, 5 U.S. at 177. *See also Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1868).

168. *Marbury*, 5 U.S. at 177–78.

169. *Id.* at 180.

170. FEDERALIST No. 78, *supra* note 166, at 437–38.

171. *Id.*

172. *See* N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) *and* W. Coast Hotel v. Parrish, 300 U.S. 379 (1937) (two decisions which expansively defined Congress' commerce power made in light of President Roosevelt's threat of court packing); *see also* Baker v. Carr, 369 U.S. 186, 208–10 (1962) (continuing the Supreme Court's long tradition of refusing to issue judgment on Guaranty Clause cases).

173. FEDERALIST No. 78, *supra* note 166, at 437–39; *Marbury*, 5 U.S. at 177.

174. FEDERALIST No. 78, *supra* note 166, at 438.

not been diluted or made an anachronism in recent decades.[175] To the contrary, in *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court reaffirmed the delicate balance between the branches and further clarified the interpretive power of the Court.[176] The general rule established in *Youngstown*, and still followed today, is that the President's power to issue an order must stem from either "an act of Congress or from the Constitution itself."[177] Therefore, if the President issues an order that amounts to an act of war, that order must stem from the Constitution or from an act of Congress, such as the AUMF.[178] The Court plays a crucial role in this balance of power, for it has the authority to define the instrument granting inherent power to either the President or Congress—the Constitution.[179] The Court, in a well-known example, exercised this power in *Youngstown* when it found that the President's order directing the seizure of steel mills was not authorized under any constitutional provision.[180] Certainly, the vast majority of decisions made by the political branches of government in the area of war and foreign affairs are entirely political in nature and, accordingly, immune from judicial review.[181] However, the nonjusticiability of such matters is not absolute, and a "narrowly circumscribed role"[182] remains for the judiciary to act when the political branches act in a way that is "repugnant to the Constitution."[183]

C. The Supreme Court's Interpretive Power has been Readily Applied to Implicit Constitutional Balance-of-Power Questions in Wartime

The Supreme Court's power of judicial review can be applied to the war power as surely as it was applied to an economic "national emergency" in *Youngstown*.[184] Precedent

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175. *Marbury*, 5 U.S. at 177 (deriving the authority for judicial review from Articles III & VI of the Constitution).

176. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634–55 (1952) (Jackson, J., concurring) (note especially Justice Jackson's quest to determine the proper "latitude of interpretation" that the Court should use, depending on the nature of the power being exercised).

177. *Id.* at 585.

178. *Id.*

179. *Marbury*, 5 U.S. at 180.

180. *Youngstown*, 343 U.S. at 587–89.

181. *See, e.g.*, Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918). "The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Id.*

182. Made in the U.S.A. Found. v. United States, 242 F.3d 1300, 1313 (11th Cir. 2001). *Made in the U.S.A.* concerned a challenge to NAFTA and limits of congressional-executive agreements vis-à-vis the constitutional Treaty Power. *Id.* at 1303; U.S. CONST. art. II, § 2, cl. 2. Regardless, the issues involved in foreign relations directly parallel those involved in the war power, and the discussion of the "narrowly circumscribed role for the Judiciary" in *Made in the U.S.A.* is informative. 242 F.3d at 1313. The definition of "Treaty" in the Constitution, like the definition of "War," has never been set forth by the Supreme Court. *Id.* at 1304, 1312. The parallel issues involved in the Treaty Power and the war power are strongly linked, though they are outside the scope of this Comment. Ultimately, as this Comment argues, neither the conduct of foreign relations nor the conduct of war negate the government's obligation to "operate within the bounds laid down by the Constitution," and "the prohibitions [and explicit grants] of the Constitution . . . cannot be nullified by the Executive or by the Executive and [Congress] combined." Reid v. Covert, 354 U.S. 1, 17 (1957).

183. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

184. *Youngstown*, 343 U.S. at 589–90 (appendix, Executive Order Directing the Secretary of Commerce to Take Possession of and Operate the Plants and Facilities of Certain Steel Companies).

addressing the war power is relatively scant when compared to, for instance, the Fourteenth Amendment, and much of that precedent is concerned with rights-based issues rather than structural balance-of-power issues.[185] However, underlying the explicit rights-based arguments in these cases is an unavoidable institutional analysis of constitutional checks-and-balances.[186] *Ex parte Milligan* is a case in point.[187] In *Milligan*, the claimant was sentenced to death in Indiana by a military commission during the Civil War for, *inter alia*, conspiracy against the government, aiding the enemies of the United States, and inciting insurrection.[188] The *Milligan* opinion is most famous for addressing the writ of habeas corpus and civil rights in wartime.[189] Nevertheless, the Court in *Milligan* also passed judgment on the federal government's arguments that, in times of war, the executive's power "must be without limit."[190] The Court implicitly rejected this argument, concluding that the President did not have the power to use military commissions to try civilians "where the courts are open and their process unobstructed."[191] The President, in other words, lacked any constitutional authority to infringe on the province of the judiciary in wartime.[192] The Court in *Milligan* made determinations about constitutional division of power between the executive and the judiciary during wartime—an institutional balance-of-power determination in keeping with the *Youngstown* decision nearly a century later.[193]

Similarly, *Ex parte Endo* involved implicit determinations of constitutional divisions of power.[194] *Endo*, like *Milligan*, concerned a writ of habeas corpus in wartime.[195] Unlike *Milligan*, the appellant in *Endo* was detained by the War Relocation Authority, a civilian agency, rather than the military.[196] *Endo* concerned a petition for the claimant's release from a Japanese internment camp during World War II.[197] Notably, the wartime program authorizing the claimant's detention was enacted under the authority of *both* the President and Congress.[198] Under the *Youngstown* reasoning, particularly Justice Jackson's concurrence, an act such as this would be given a strong presumption of constitutionality absent the "Government as an undivided whole lack[ing] power" to do so under the Constitution.[199] In spite of this strong presumption of constitutionality, the Court in *Endo*

185. Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights during Wartime*, 5 THEORETICAL INQ. L. 1, 7–9 (2004).

186. *Id.* at 9.

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

188. *Id.* at 6.

189. *Id.* at 118–24.

190. *Id.* at 18.

191. *Id.* at 120–21.

192. *Milligan*, 71 U.S. at 120–21.

193. *See* Issacharoff & Pildes, *supra* note 185, at 9–10 (noting the inherent constitutional power-based arguments in *Ex parte Milligan*); *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587–89 (1952) (issuing judgment on the constitutional authority granted to the President and Congress).

194. *Ex parte* Endo, 323 U.S. 283 (1944).

195. *Id.*; *Milligan*, 71 U.S. (4 Wall.) 2 (1866).

196. *Endo*, 323 U.S. at 298.

197. *Id.* at 284–85.

198. *Id.* at 287–88 (noting that the relocation and detention of appellant were authorized pursuant to Executive Order No. 9066, which was ratified by Congress by the Act of March 21, 1942).

199. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 636–37 (1952) (Jackson, J., concurring).

held that the War Relocation Authority did not have the power to continue detention of the appellant.[200] The Court reasoned that such power had been "exhausted" once the appellant's loyalty to the United States was conceded, despite explicit authorization by both the President and Congress.[201] Similarly to *Milligan*, the Supreme Court in *Endo* made determinations about constitutional division of power in wartime between the executive and the judiciary.

Although *Endo* and *Milligan* largely concerned civil rights in wartime, the Supreme Court's reasoning in these cases also involved issues of constitutional authority and institutional balance-of-power vis-à-vis the Constitution in matters of war. Indeed, the *Endo* Court showed that the judiciary has the power to determine when another branch's power to act is "exhausted" under the Constitution.[202] Applying this reasoning to the War Powers Clause, the judiciary has the power to declare when the executive or legislative branches have "exhausted" their constitutional authority to declare or conduct war.[203] In light of the Constitution's explicit grant of the power to "declare War" to Congress, the President's authority to declare war is exhausted before it even begins.[204]

D. Compacts Clause Jurisprudence Provides Ample Precedent for Interpreting the War Powers Clause

The Compacts Clause of Article I of the Constitution contains a rarely invoked allocation of war powers to the individual states. It provides that "No State shall, without the Consent of Congress . . . keep Troops, or Ships of War in time of Peace . . . or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."[205] This obscure provision is so minor that the Federalist Papers appraise it in one sentence, stating that "[t]he remaining particulars of this [Compacts] clause fall within reasonings which are either so obvious, or have been so fully developed, that they may be passed over without remark."[206] Such a cold shoulder is a remarkable way to treat a constitutional provision for the normally loquacious Publius.[207] Fortunately, the constitutional scholar is not left with a frustrating cipher, but an incorporation by reference to other arguments regarding states' powers and the war power.

Federalist No. 69 clarifies how the Compacts Clause fits in the larger constitutional scheme of the war power.[208] *Federalist No. 69*, discussed at length in Part III, made clear that the unitary war power held by the king of Great Britain was inherited by the American national government and then divided into two parts—declaring and waging—given to Congress and the President, respectively.[209] In the Compacts Clause, the same idea is

200. *Endo*, 323 U.S. at 302–04.
201. *Id.*
202. *Id.*
203. *Id.*
204. U.S. CONST. art. I, § 8, cl. 11.
205. *Id.* art. I, § 10, cl. 3.
206. THE FEDERALIST No. 44, at 288 (James Madison) (Issac Kramnick ed., 1987) (hereinafter FEDERALIST No. 44).
207. *Id.*
208. FEDERALIST No. 69, *supra* note 101.
209. *Id.*

carried to its logical extent for the states. The power to engage in war or to maintain the instrumentalities of war in times of peace is especially reserved for the national government, and states are allocated only the residual authority to engage in self-defense.[210] In short, the British king's unitary war power was not granted to the states outside of bare self-defense, and all military operations conducted by states must be subordinated to the President's authority as Commander-in-Chief.[211] Wholesale subordination of state military authority to the federal government was more than a constitutional innovation, it was a highly practical means of avoiding the internecine warfare and suffering inherent in divided military authority.[212] The Founders recognized that when "England, Wales, and Scotland were separate kingdoms, military competition between them invited invasion and . . . threatened liberty."[213] With this history in mind, Publius and his contemporaries sought to protect their new nation from internal wars—state against state—using tools like the Compacts Clause.[214] Thus, the king's unitary war power was not simply assumed by the Founders, but carefully divided up within the Constitution and between the branches of government. The Compacts Clause and its case law illustrate this principle and give a roadmap for how the Supreme Court can pass judgment in cases concerning the constitutional allocation of war powers.[215]

The majority opinion and Justice Woodbury's dissent in *Luther v. Borden* illustrate how the unitary war power was carefully distributed by the Founders.[216] *Luther* arose out of the Dorr Rebellion of 1841–1842, where an armed insurrection attempted to overturn elections in Rhode Island due to the state's requirement of land ownership to vote.[217] The defendants in *Luther* were members of the state militia who, under authority of the state's declaration of martial law, entered the plaintiff's private property and searched his house.[218] The *Luther* plaintiff brought suit for trespass, and on appeal the Supreme Court famously considered whether the assurance of a "Republican Form of Government" under the Guarantee Clause was justiciable.[219] The majority's opinion almost entirely concerned analyzing the Guarantee Clause.[220] The focus of the opinion was whether the Court had the power to decide which government in Rhode Island was valid.[221] Questions of war powers and the state's ability to declare martial law in the face of insurrection were relegated to a secondary role, couched within the Guarantee Clause analysis of whether

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210. FEDERALIST No. 44, *supra* note 206; FEDERALIST No. 25, *supra* note 115.

211. FEDERALIST No. 69, *supra* note 101; FEDERALIST No. 44, *supra* note 206; James F. Blumstein & Thomas J. Cheeseman, *State Empowerment and the Compact Clause*, 27 WM. & MARY BILL RTS. J. 775, 826 n.501 (2019) (finding that the state executives must "take care to faithfully execute federal laws" in military matters).

212. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 44–46 (2005).

213. *Id.* at 44–45.

214. FEDERALIST No. 69, *supra* note 101; FEDERALIST No. 44, *supra* note 206; Blumstein & Cheeseman, *supra* note 211, at 785.

215. *See generally* Luther v. Borden, 48 U.S. (7 How.) 1 (1849); Presser v. Illinois, 116 U.S. 252 (1886).

216. *Luther*, 48 U.S. at 1.

217. *Id.* at 2.

218. *Id.* at 1.

219. *Id.* at 46–47 (this case is most famous for establishing the time-honored rule that Guarantee Clause cases are non-justiciable political questions); U.S. CONST. art. IV, § 4 (guaranteeing to "every State . . . a Republican Form of Government . . . .").

220. *Luther*, 48 U.S. at 39–45.

221. *Id.* at 39.

the acting government of Rhode Island was valid.[222] Despite a paucity of analysis on the war powers question, the majority still held that "a State may use its military power to put down an armed insurrection, too strong to be controlled by the civil authority."[223] Additionally, the *Luther* majority reiterated the Court's "high power . . . of passing judgment upon the acts of the State sovereignties, and of the legislative and executive branches of the federal government, and of determining whether they are beyond the limits of power marked out for them respectively by the Constitution . . . ."[224] Thus, while the majority declined to pass judgments on the myriad of political questions contained in Luther's complaint, it still found reason to declare the limits of the states' military authority under the Constitution and reiterate the power of the Court to declare the law in language redolent of *Marbury* and *Youngstown*.[225]

Justice Woodbury's dissent in *Luther* further illustrates the intricate division of the war power.[226] While the majority declined to address Rhode Island's war powers in detail, Justice Woodbury undertook the task of showing where those powers were found in the structure of the Constitution.[227] In considering whether Rhode Island's militia action was a constitutional exercise of wartime authority by a state, Justice Woodbury turned to the War Powers Clause, Compacts Clause, Commander in Chief Clause, and Militia Clauses.[228] Justice Woodbury reasoned that the division of war powers between different branches in these provisions, the preeminence of Congress in war powers, and the limited allocation of power to states in the Compacts Clause meant that a state's power to declare martial law was limited to situations of armed insurrection where all other recourse to suppress it had been exhausted.[229] This conclusion concurs with the majority's holding on the martial law question, but Justice Woodbury's analysis raises important points about the constitutional allocation of war powers.[230] His dissent describes how the various clauses addressing authorities in war are each relevant parts of a unitary scheme dividing the unitary war power between the branches of government.[231] The War Powers Clause, Compacts Clause, Commander in Chief Clause, and Militia Clauses are each relevant parts of a unitary scheme, and, as the majority noted, the Court has authority to determine when "acts" of the legislature, executive, or the states are "beyond the limits of power marked

222. *Id.* at 45–46.

223. *Id.* at 45.

224. *Id.* at 47.

225. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803) (the principle that all departments of the government are bound by the strictures of the Constitution is put most eloquently in the final sentence of *Marbury*: "the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument."); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587–88 (1952) (the *Youngstown* Court analyzed the "framework of the Constitution" to determine the limits of Executive and Legislative power and make a declaration "about who shall make laws.").

226. Luther v. Borden, 48 U.S. (7 How.) 1, 48–88 (1849) (Woodbury, J., dissenting) (the bulk of Justice Woodbury's war powers analysis can be found at pages 71–75 of the United States Reports).

227. *Id.* at 71–75.

228. *Id. See* U.S. CONST. art. I, § 8, cl. 11 (the War Powers Clause); *id.* art. II, § 2, cl. 1 (the Commander in Chief Clause); *id.* art. I, § 10, cl. 3 (the Compacts Clause); *and id.* art. I, § 8, cl. 15 & 16 (the Militia Clauses).

229. *Luther*, 48 U.S. at 71–73.

230. *Id.* at 45.

231. *Id.* at 71–72 (note especially how, in order to reach the simple conclusions about Congress' war powers, the Court looks to all the provisions in the Constitution relating to the war power as parts of a single entity).

out for them respectively by the Constitution."[232]

Examining the *Luther* opinion and dissent together illuminates how the Supreme Court can pass judgment concerning war powers. The majority opinion shows that questions involving the war power are not always political, but occasionally require the judiciary's power of judgment.[233] The major holding of *Luther* concerned non-justiciable political questions, but this holding was not extended to the question of Rhode Island's authority to declare martial law.[234] Indeed, the *Luther* majority gave a clear holding on this war powers question without extensive analysis, showing that it did not consider it a political question of the type implicated in the Guarantee Clause.[235] Detailed analysis of the war powers question was reserved for Justice Woodbury's dissenting opinion, where he clearly enunciated the various constitutional authorities held by the various branches of the federal government and the states.[236] Taken together, the majority's holding and Justice Woodbury's dissent give a roadmap for how the Supreme Court can exercise judgment on the constitutional allocation of war powers.

The case of *Presser v. Illinois* is another example of the Supreme Court's power of judgment in situations implicating the war power in the Compacts Clause.[237] *Presser* concerned an Illinois statute that established a state militia and forbade unauthorized bodies of men from associating themselves as a military company or parading under arms in any city or town.[238] The plaintiff in *Presser* participated in an unauthorized military-style parade in Chicago under the auspices of the "Lehr und Wehr Verein"—a socialist military organization organized to counter private corporate armies in urban Chicago.[239] After his conviction was upheld by the Supreme Court of Illinois, Presser appealed to the United States Supreme Court, arguing that the entire state statute under which he was convicted was unconstitutional.[240] Specifically, Presser contended that the statute's establishment of a state militia violated the specific grant of power to Congress "[t]o raise and support Armies" and to "call[] forth the Militia," the prohibition of states keeping troops in time of peace, and the Second Amendment right to "keep and bear Arms."[241]

The Supreme Court rejected Presser's arguments after considering the application of the Compacts Clause to this regulation, the structural implications of the constitutional provisions, and congressional enactments related to it.[242] The Court reasoned that Illinois' organization of a militia was a valid exercise of the police power and did not intrude on

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232. *Id.* at 47, 71–72.

233. *Id.* at 45.

234. *Luther*, 48 U.S. at 45. The majority opinion in *Luther* was conscious to avoid non-justiciable political questions. *Id.* at 1, 46–47. It is telling, then, that the Court issued a clear judgment on states' war powers during insurrections. *Id.* at 45–46. This shows that war powers questions are not always non-justiciable political questions.

235. *Id.* at 45.

236. *Id.* at 71–72 (Woodbury, J., dissenting).

237. 116 U.S. 252 (1886).

238. *Id.* at 253–54.

239. *Id.* at 254; *The Lehr Und Wehr Verein*, N.Y. TIMES (July 20, 1886), https://www.proquest.com/historical-newspapers/lehr-und-wehr-verein/docview/94405716/se-2?accountid=14676.

240. *Presser*, 116 U.S. at 253–61.

241. U.S. CONST. art. I, § 8, cl. 12 & 15; *id.* art. I, § 10, cl. 3; *id.* amend. 2.

242. *Presser*, 116 U.S. at 253–64.

the power vested in Congress to raise and support armies and organize militias.[243] The Supreme Court also found that the organization of Illinois' militia did not violate the prohibition on states' keeping "troops in time of peace."[244] Accordingly, the Court in *Presser* exercised its power of judgment over a situation implicating the division of war powers between branches of government, thus providing a roadmap and ample precedent for future Court decisions.[245]

Luther and *Presser* illustrate the careful allocation of the unitary war power in the Constitution and provide a roadmap for judicial decisions concerning this important piece of the constitutional framework.[246] The Compacts Clause may be off the beaten path of war powers analysis, but it contains important allocations of the war power on which the Supreme Court has exercised its power of judgment.[247] Extrapolating this idea to other constitutional provisions implicating the war power, as Justice Woodbury did in *Luther*, it becomes clear that certain war-related actions may be "repugnant to the Constitution" and require the Supreme Court to declare them "void."[248] Certainly, the vast majority of war-related acts will involve political questions "which properly belong to other forums," on which the Supreme Court must "take care not to involve itself."[249] There are, however, several clear exceptions to this rule that cannot be forgotten: in cases where constitutional war powers are infringed, or one branch's power is "exhausted" under the Constitution, the Court has both precedent and authority to pass judgment.[250]

V. CONCLUSION

The War Powers Clause is one of the more straightforward constitutional provisions when taken at face value. Congress is granted the simple power to "declare War."[251] But what constitutes "War" in this context?[252] This is the basic question, made more urgent in the aftermath of the War on Terror, that this Comment seeks to answer. The short answer is that "War" in the Constitution has a very broad meaning that spans nearly the entire breadth of human conflict. This is shown in the definitions of the Founders' influencers, contemporaries, and the British precedent on which the Founders heavily relied.[253] Certainly, a small war—a violent conflict where there is a disparity in traditional military capability—would fall within this definition.

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243. *Id.* at 264–65.

244. *Id.*

245. *Id.* at 253–65.

246. Luther v. Borden, 48 U.S. (7 How.) 1 (1849); Presser v. Illinois, 116 U.S. 252 (1886).

247. *Luther*, 48 U.S. at 71–72; *Presser*, 116 U.S. at 253–65.

248. *Luther*, 48 U.S. at 71–72; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

249. *Luther*, 48 U.S. at 47.

250. *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 120–21 (1866) (finding that the President lacked authority to infringe on the judiciary in wartime); *Ex parte* Endo, 323 U.S. 283, 302 (1944) (determining that the President's power to act under wartime constitutional authority had been "exhausted"); *Luther*, 48 U.S. at 45 (making a determination of where a state's power to declare martial law begins); *and Presser*, 116 U.S. at 264–65 (holding that one branch of government, the State of Illinois, had not infringed on the war powers of Congress).

251. U.S. CONST. art. I, § 8, cl. 11.

252. *Id.*

253. GROTIUS, *supra* note 85, at 540; BURLAMAQUI, *supra* note 80, at 223; HALE, *supra* note 91, at 162. *See also* BAILYN, *supra* note 91, at 30 n.11 (noting that "Hale was a particularly well-known and attractive figure" to the American founders).

The United States has engaged in numerous small wars since World War II without any explicit declaration of war by Congress.[254] The question, then, is whether engaging in small wars without a declaration of war by Congress is "repugnant" to the Constitution.[255] This is the kind of question which the judiciary is uniquely equipped to answer, and doing so would not be without precedent.[256] The Supreme Court readily passed judgment on the President's exercise of war powers when it concerned individual rights in *Milligan* and *Endo*.[257] Similarly, the Court was ready and willing to use its power of judgment concerning states' war powers in *Luther* and *Presser*.[258] After decades of the War Powers Clause being good for "absolutely nothing," it is time for the Court to finally exercise its power of judgment and determine whether entanglement in small wars is constitutional absent congressional approval.[259] The Court should do so with urgency, for this issue is far more than an arcane legal question. As the United States turns from heartbreaking defeat in Afghanistan to face the terrifying possibility of a land war in Europe, the question of who has the power to "declare War" is of grave consequence.[260]

*-Daniel W. Bryce**

254. *About Declarations of War by Congress*, *supra* note 4.
255. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803).
256. FEDERALIST No. 78, *supra* note 166, at 437 (noting that the judiciary holds the power of "judgment").
257. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 120–21 (1866); *Ex parte* Endo, 323 U.S. 283, 302 (1944).
258. Luther v. Borden, 48 U.S. (7 How.) 1, 45 (1849); Presser v. Illinois, 116 U.S. 252, 264–66 (1886).
259. STARR, *supra* note 1.
260. U.S. CONST. art. I, § 8, cl. 11.

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