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Ending Perpetual War? Constitutional War Termination Powers and the Conflict Against Al Qaeda

David A. Simon

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Ending Perpetual War? Constitutional War Termination Powers and the Conflict Against Al Qaeda

David A. Simon*

This Article presents a framework for interpreting the constitutional war termination powers of Congress and the President and applies this framework to questions involving how and when the war against Al Qaeda and associated forces could end. Although constitutional theory and practice suggest the validity of congressional actions to initiate war, the issue of Congress's constitutional role in ending war has received little attention in scholarly debates. Theoretically, this Article contends that terminating war without meaningful cooperation between the President and Congress generates tension with the principle of the separation of powers underpinning the U.S. constitutional system, with the Framers' division of the treaty-making authority, and with the values they enshrine. Practically, this Article suggests that although the participation of both Congress and the President in the war termination process may make it more difficult to end a war, such cooperative political branch action ensures greater transparency and accountability in this constitutional process. This Article also examines normative questions about the role of the President and Congress in exercising their respective war termination powers, and argues that the treaty-making process represents an approach to war termination that best reflects the constitutional values of the interdependence of the political branches, while checking interbranch rivalry and preserving the constitutional and foreign relations prerogatives of Congress and the

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I. INTRODUCTION

The United States has ended its combat mission in Iraq, is winding down the war in Afghanistan,¹ and has begun looking toward a “tipping point” in the conflict against Al Qaeda and associated forces.² How does war end as a matter of U.S. constitutional law? Which branch of government has the power to end war in the American constitutional

1. See Remarks by President Barack Obama, State of the Union Address, January 29, 2014 (Referring to U.S. plans to end major combat operations in Afghanistan by the end of 2014, President Obama stated: “Together with our allies, we will complete our mission there by the end of this year, and America’s longest war will finally be over.”); Barack Obama, President of the U.S., Weekly Address: Ending the War in Afghanistan and Rebuilding America, Remarks at the White House (Jan. 12, 2013) (transcript available at <http://www.whitehouse.gov/the-press-office/2013/01/12/weekly-address-ending-war-afghanistan-and-rebuilding-america>) (“[B]y the end of next year, America’s war in Afghanistan will be over.”).

2. See Barack Obama, President of the U.S., Remarks of President Barack Obama (May 23, 2013) (transcript available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-barack-obama>) (“Our systematic effort to dismantle terrorist organizations must continue. But this war, like all wars, must end. That’s what history advises. That’s what our democracy demands.”); see also Jeh Charles Johnson, Gen. Counsel, U.S. Dep’t of Def., The Conflict Against Al Qaeda and Its Affiliates: How Will It End? (Nov. 30, 2012) (transcript available at <http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/>).

system? Unlike the Declare War Clause³—which vests the power to create a de jure state of war in the legislative branch—there is no clear vesting of the peace power in the Constitution. To what extent should Congress and the President collaborate to bring a war to an end? Is the power to end war shared between the Senate and the President as part of the treaty power? This Article presents a framework for interpreting the constitutional war termination powers of Congress and the President.

During the Constitutional Convention, Oliver Ellsworth remarked that “[i]t should be more easy to get out of war than into it.”⁴ His desire has come to fruition: decisions to initiate war are wrought with scholarly, political, and legal debate from the living room to the halls of Congress. Decisions regarding whether to terminate war are no less politically fraught, but the attendant domestic legal issues are not as frequently discussed and have not been entirely resolved.

Consider two hypothetical scenarios in which Congress and the President have divergent views concerning the necessity of initiating a war or continuing to wage an existing war. If Israel were, for example, to strike Iranian nuclear facilities, and Iran retaliated against Israel, it is conceivable that the President might direct U.S. forces to take military action against Iran in collective self-defense of Israel. But if Congress wished to end the war before it started—and a veto-proof majority of legislators passed a joint resolution declaring an end to the nascent war—there would be a constitutional question of which branch’s will ought to prevail in what might otherwise be an interbranch foreign policy dispute. Alternatively, for example, if the President proclaimed an end to the “armed conflict” against Al Qaeda and associated forces, but Congress did not repeal the 2001

3. U.S. CONST. art. I, § 8, cl. 11.

4. See JAMES MADISON, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL . . .* 439 (Jonathan Elliot ed., 1876) (“There is a material difference between the cases of making *war* and making *peace*. It should be more easy to get out of war than into it. War, also, is a simple and overt declaration; peace, attended with intricate and secret negotiations.”). Ellsworth spoke during the deliberations over whether the congressional war power should be characterized as the power to “make war” or to “declare war.” See *id.* The general mood of the founders was that the deliberative process would ensure wars were not entered into hastily, but that the word “declare” would allow the President to retain the power to repel attacks against the nation. *Id.* Ellsworth seems to be in favor of a congressional power to declare war, but it is less clear whether he opposed a congressional peace power; however, the reference to intricate negotiations and the following unsuccessful vote to vest a congressional peace power in Article I, § 8 of the Constitution suggests that he did not favor such a power. See *id.* See generally U.S. CONST. art. I, § 8.

Authorization to Use Military Force (AUMF) against these organizations,⁵ some might contend that the cessation of hostilities in this armed conflict—or at least the presidential or legislative recognition thereof—would require the relatively immediate release of Guantanamo detainees. Could Congress, in such a scenario, prevent the release of detainees after the war had effectively been terminated? In such situations, the locus of the constitutional authority to terminate the war is not crystal clear.

This Article concludes that terminating war without meaningful cooperation between the President and Congress generates tension with the Framers' division of the treaty-making authority, with the principle of the separation of powers that underpins the American constitutional system, and with the values they enshrine. In addition, this Article advances the normative argument that wars between States should be terminated by treaty.⁶

First, the Framers did not design a constitutional system of checks and balances that encourages one political branch seeking to end a war to do so without involving the other political branch.⁷ Under certain circumstances, the exercise of unilateral congressional war termination power may generate friction with the Commander in Chief power, as well as with the President's foreign relations power. Similarly, under certain circumstances, executive action to end war may generate tension with Congress's power to declare war and control its funding.⁸

Presidents, however, have used sole executive agreements to conclude international agreements unilaterally since the early days of the American republic.⁹ In the absence of a clear constitutional provision for declaring

5. See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter "2001 AUMF"].

6. This position is reflected in Justice Samuel Chase's observation, in *Ware v. Hylton*, concerning the 1783 Treaty of Paris between the U.S. and Great Britain:

A right to make peace, necessarily includes the power of determining on what terms peace shall be made. A power to make treaties must of necessity imply a power, to decide the terms on which they shall be made. A war between two nations can only be concluded by treaty.

3 U.S. 199, 236 (1796).

7. See, e.g., U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."); see also Adam Heder, *The Power to End War: The Extent and Limits of Congressional Power*, 41 ST. MARY'S L.J. 445, 459 (2010).

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

9. See *infra* Section II.B.

peace, the wars waged by the founding generation against States were all ended by peace treaties¹⁰ (since peace treaties were the customary method of ending interstate war for much of the first part of U.S. history).¹¹ Before World War II, congressional approval of formal peace treaties was the standard practice for major wars.¹² Since 1945, however, as the United States has engaged in more frequent military operations of limited duration and amounting to hostilities below the threshold of war, presidents have ended wars unilaterally—often without any formal legal termination agreement.¹³ At the same time, and particularly in the last few decades, it is commonplace for the executive branch to conclude international agreements without congressional approval.¹⁴ From 1980 to 2000, for example, presidents unilaterally entered into more than 500 security-related agreements—including numerous status of forces agreements with foreign countries.¹⁵ There is, thus, a strong trend of post-World War II congressional acquiescence in the face of unilateral presidential action to conclude international agreements—including as part of efforts to terminate wars.¹⁶ Such historical pattern of congressional acquiescence and executive action supports the contention that the President’s authority to terminate wars unilaterally through executive agreements and presidential proclamations has increased in the period since World War II.¹⁷

Second, this interdependence functions as a constructive impediment to efforts by either political branch to become the predominant actor in war powers disputes.¹⁸ Justice Robert Jackson stated, in his famous concurring

10. See CONG. RESEARCH SERV., 93D CONG., CONGRESS AND THE TERMINATION OF THE VIETNAM WAR 3 (Comm. Print 1973) (discussing how the declared, undeclared, and *de facto* wars the United States entered into tended to be concluded by peace treaties: in particular, the quasi-war with France, the War of 1812, and the Barbary Wars were ended by peace treaties).

11. See John M. Mathews, *The Termination of War*, 19 MICH. L. REV. 819, 823 (1921) (citing examples for the proposition that peace treaties are generally recognized as the method of ending wars between nations).

12. See *infra* notes 36–102 and accompanying text; see also Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1287 (2008); 93 C.J.S. *War and National Defense* § 51 (2013).

13. See *infra* Part II.A.3; see also Hathaway, *supra* note 12, at 1287.

14. Hathaway, *supra* note 12, at 1260.

15. Hathaway, *supra* note 12, at 1260; see also U.S. DEP’T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2012 (2012).

16. See *supra* notes 12–15 and accompanying text.

17. See *infra* Part II.A.3.

18. See *infra* Part VI.D.

opinion in *Youngstown*, that the Constitution “enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”¹⁹ The interdependent relationship between Congress and the President is a crucial element of our system of constitutional war powers, and with respect to war termination, it encourages and catalyzes interbranch reciprocation and collaboration.²⁰ In order to maintain this interdependence, the constitutional design envisions that the two branches should cooperate and work together even while exercising their independent powers.²¹ Indeed, through various forms of consultation, cooperation, and bargaining, the political branches maintain a healthy degree of interdependence in fulfilling their constitutional roles in the war initiation and termination processes.²²

Finally, the participation of both Congress and the President in the war termination process may make it more difficult to terminate a war, but this constitutional process has the political benefit of ensuring more transparent and accountable decision-making.²³ For example, whether unilateral branch action is any swifter in practice remains an open question; the Vietnam War took years to end despite congressional assertions of power.²⁴

Part II examines the history of U.S. war termination, and discusses constitutional patterns and themes that bear on the exercise of presidential and congressional war termination powers. Part II begins with the Founding Era, demonstrating that during the first 100 years of U.S. history Congress and the President played formal roles in the termination of war—primarily through the peace treaty-making process. Concerted efforts to conclude World War I seemingly put an end to the routine practice of terminating wars with peace treaties—a practice that survived through World War II but has not been common since. The creation of the United Nations and the adoption of the U.N. Charter after World War II ushered in an era in which congressional declarations of war appear to be relics of a prior age, and in which Congress’s war termination role is less prominent, though no less

19. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

20. See *infra* notes 366–70 and accompanying text.

21. See *infra* Part IV.D.2.

22. See Jules Lobel, *Conflicts Between the Commander in Chief and Congress: Concurrent Power over the Conduct of War*, 69 OHIO ST. L.J. 391, 393 (2008) (stating that “Congress and the President have concurrent power to conduct warfare that has been authorized by Congress,” but ultimately concluding that Congress can control many elements of warfare).

23. See *infra* Part IV.D.1.

24. See *infra* notes 152–57 and accompanying text.

significant.

Part III addresses two misconceptions pertinent to interpreting constitutional war termination powers. First, Part III shows that Congress does not have the power under the Declare War Clause to terminate war unilaterally. Although the Constitution assigns Congress the power “to Declare War,”²⁵ that does not necessarily mean that the Constitution gives Congress the power to declare peace. To the extent that the Congress has an implied war termination power under the Declare War Clause, it should be exercised in tandem with its concurrent treaty power. Second, Part III shows that the President does not have the constitutional authority to terminate war unilaterally by treaty. Notwithstanding the President’s broad unilateral authority to execute sole executive agreements concerning foreign affairs matters, founding history and case law reflect the substantial extent to which the power to make peace treaties is not meant to be held exclusively by the President.

Part IV provides an analytical framework for understanding the constitutional roles of the President and Congress in terminating wars. First, Part IV examines the necessity of presidential involvement in war termination and argues that the President is an indispensable actor. Second, Part IV shows that Congress’s purse power should not be a war termination power of first resort—contending that Congress ought to first exhaust alternate cooperative remedies. Third, Part IV identifies and analyzes patterns of rivalry and aggrandizement that disrupt the constitutional war termination process. Finally, Part IV shows that the unilateral exercise of war termination power by one political branch provokes aggrandizement by the other political branch. Accordingly, Part IV argues that the treaty-making process represents an approach to war termination that best reflects the constitutional values of the interdependence of the political branches, while checking interbranch rivalry and preserving the constitutional and foreign relations prerogatives of Congress and the President.

Part V applies the analytical framework from Part IV to one important set of questions that would arise as the armed conflict with Al Qaeda and associated forces comes to an end, including the question of which branch of the federal government should have the final say in determining whether an armed conflict has ended. The Constitution does not explicitly address war termination powers, and there are few, if any, definitive guiding precedents

25. See U.S. CONST. art. I, § 8, cl. 11.

on this question. First, Part V focuses on the significant roles that both political branches should play in resolving legal questions associated with the termination of the “armed conflict” with Al Qaeda. Next, Part V explains that there exists sparse judicial guidance from the Supreme Court regarding whether a war has been terminated. Part V explains that, historically, wars ended through peace treaties; however, in the post-World War II era, Congress has played a passive role or been largely absent from the process of determining whether an armed conflict has ended. Part V goes on to summarize prudential arguments in favor of broader congressional engagement—such as promoting the constitutional system of checks and balances, which would be gained from some level of interbranch cooperation. The degree of congressional engagement, however, which may take place through a range of formal and informal mechanisms, may vary greatly.

Three caveats are appropriate before proceeding: First, this Article does not address the termination of hostilities short of war, including the hundreds of instances in which the U.S. has used its armed forces abroad.²⁶ Notwithstanding the absence of a definition of “war” in the Constitution’s text,²⁷ this Article assumes a definition of “war” in the domestic constitutional sense.²⁸ For the purposes of the Declare War Clause, “war” includes military operations undertaken that are extensive in nature, duration, and scope.²⁹ At the margins, this Article’s definition of “war”

26. Examples of hostilities short of war include the bombardment of Greyton, Nicaragua in 1854; the noncombatant evacuation operations in Liberia in the 1990s; air strikes in Libya in 1986; as well as cruise missile strikes in Sudan and Afghanistan in 1998. See Peter J. Spiro, *Old Wars/New Wars*, 37 WM. & MARY L. REV. 723, 734 (1996) (highlighting “a number of lesser nineteenth-century engagements”); see also RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RL32170, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798–2009 (2010) (cataloguing the use of U.S. forces abroad).

27. See Proposed Deployment of U.S. Armed Forces into Bosn. 19 Op. O.L.C. 327, 330–31 (1995) (“The scope and limits of that power are not well defined by constitutional text, case law, or statute. Rather, the relationship of Congress’s power to declare war and the President’s authority as Commander in Chief and Chief Executive has been clarified by two hundred years of practice.”).

28. The most recent definition of “war” in the constitutional sense articulated by the executive branch that triggers a requirement for congressional authorization exists only in the case of “prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period.” See Authority to Use Military Force in Libya, 35 Op. Att’y Gen. 1, 8 (2011). Regarding the use of force in Libya, OLC also concluded “the limited military operations the President anticipated directing were not a ‘war’ for constitutional purposes.” *Id.* at 13.

29. See *id.* at 6–9. Consent of the government of the country involved may also be a factor. See Deployment of U.S. Armed Forces into Haiti, 18 Op. O.L.C. 173, 177–78 (1994) (“[The Haiti]

includes some instances of *limited* war (such as the Quasi-War with France) in which Congress authorizes major hostilities, either pursuant to a formal declaration of war or pursuant to some other form of legislative authorization for the use of military forces.³⁰ Additionally, this conception of war in the constitutional sense includes instances in which force used against the United States, or threats thereof, triggers the defensive war powers of the President³¹ (or individual states)³² to repel attacks. In assessing the nature, duration, and scope of a given war, this Article attempts to account for the character of the U.S. forces deployed, the magnitude of the force deployed, whether the military operations involved “boots on the ground,” and the probability of U.S. or enemy forces being killed in action.

Second, this Article does not examine the constitutional implications of concluding armistice agreements or otherwise terminating fighting without ending a formal state of war.

Third, this Article does not attempt to analyze the means of war termination for purposes of international law. Such an undertaking would require distinguishing the meanings of actions by Congress and the President to initiate and terminate war under international law from their respective

deployment was characterized by circumstances that sufficed to show that the operation was not a ‘war’ within the meaning of the Declaration of War Clause. The deployment was to have taken place, and did in fact take place, with the full consent of the legitimate government of the country involved. Taking that and other circumstances into account, the President, together with his military and intelligence advisors, determined that the nature, scope and duration of the deployment were not consistent with the conclusion that the event was a ‘war.’” (footnotes omitted).

30. See *Bas v. Tingy*, 4 U.S. 37, 40–45 (1800). During the Quasi-War with France, for example, Congress authorized armed U.S. ships to attack, seize, and take as prize armed French vessels. *Id.* at 42. Justice Bushrod Washington found the hostilities to be an “imperfect war,” but a constitutional war nonetheless, where “the degree of hostility meant to be carried on [(American vessels interdicting French vessels)], was sufficiently described without declaring war.” *Id.* at 40–41. He contrasted limited war to the “perfect war” that is declared, where “one whole nation is at war with another whole nation; and *all* the members of the nation declaring war, are authorised [sic] to commit hostilities against all the members of the other, in every place, and under every circumstance.” *Id.* at 40. Some scholars, however, disagree with the contemporary analysis regarding the constitutional meaning of “war,” contending that the Founders believed that the Declare War Clause encompassed more military actions than now recognized. See, e.g., Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by “Declare War,”* 93 CORNELL L. REV. 45, 67 (2007).

31. See *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862) (“If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority.”).

32. See U.S. CONST. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”).

meanings under U.S. domestic law, including an assessment of the definition of “war” under international law. Another reason for focusing on war termination under domestic law is that, even assuming a common definition of “war” under both domestic and international law, the legal conditions of war created under domestic and international law may not end at the same time or in the same way.

Despite the methodological limits on the nature and scope of this Article, the constitutional framework for interpreting the roles of the President and Congress in terminating armed conflicts warrants a more searching analysis than it has received.

II. CONSTITUTIONAL WAR TERMINATION POWERS IN HISTORICAL PERSPECTIVE

A. *Historical Turning Points*

1. Founding to World War I: Peace Treaties As the Predominate Mode of War Termination

The first 100 years of war in the U.S. were remarkably uniform: Congress would declare war; the President would negotiate a peace treaty that was advised and consented to by the Senate. Congress and the President both played formal roles in the termination of war. The Civil War and Quasi-War with France were the exceptions that established precedent for alternative forms of war initiation and termination. In particular, the Supreme Court began to acknowledge the import of presidential proclamations for termination of war during the Civil War.

In the Supreme Court’s first case that implicated war termination after the U.S. Constitution was ratified, *Ware v. Hylton*, Justice Samuel Chase noted that wars between states could only be officially terminated through the treaty process, observing that “[a] war between two nations can only be concluded by treaty.”³³ The case concerned a private debt nullification provision in the 1783 Treaty of Paris between the U.S. and Great Britain, and Justice Chase made the statement in the context of discussing the supremacy of Congress vis-à-vis a state under the Articles of Confederation,

33. 3 U.S. 199, 236 (1796).

which specifically gave Congress the power to determine peace.³⁴ Each Justice wrote a separate opinion; so his statement was dictum, and did not necessarily reflect the view of the majority of the Court.³⁵ Still, early history supports the view that only treaties can end declared wars.

a. Indian Wars

Although the Indian Wars were undeclared wars with non-state actors, Congress played an important role in determining the duration and the end of the war. Treaties, such as the 1795 Treaty of Greenville, played a significant role in their termination.³⁶

In addition, Congress's active legislative role in providing conditional appropriations during the Indian Wars reflects the historical role Congress has played in exercising its purse power to influence the duration of a given armed conflict. In 1789, for example, Congress responded to President Washington's request to defend the Western Frontiers by authorizing General Arthur St. Clair (who had been appointed the governor of the Northwest Territory) to call up the frontier militia; however, the congressional authorization included explicit durational limits to ensure that the authorization lasted for less than a year—"until the end of the next session of Congress, and no longer."³⁷

After General Arthur St. Clair's and General Josiah Harmer's forces suffered a significant defeat on the battlefield, President Washington requested a surge of funding from Congress to bolster the war effort.³⁸ Congress responded with detailed appropriations—"one hundred thousand dollars, for defraying the expenses of an expedition lately carried on against certain Indian tribes"³⁹—to provide pay, subsistence, and rations for 1,700 militia and for 400 continental forces for three months.⁴⁰ Congress soon

34. *Id.* at 220–22.

35. *See generally* 3 U.S. 199.

36. The United States signed and ratified the Treaty of Greenville in 1795. *See, e.g.*, Treaty of Greenville, Aug. 3, 1795, 7 Stat. 49; *State v. Keezer*, 292 N.W.2d 714, 717 (Minn. 1980) ("The treaty [of Greenville] established peace, provided for the return of prisoners, and set a boundary line between the lands of the United States and the lands of the Indian Tribes.").

37. Act of Sept. 29, 1789, ch. 25, § 6, 1 Stat. 95–96.

38. *See generally* Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447, 480–81 (2011).

39. Act of Feb. 9, 1791, ch. 6, 1 Stat. 190.

40. Alexander Hamilton, *Estimates for 1791*, reprinted in 1 AMERICAN STATE PAPERS: FINANCE 82, 87 (1832).

authorized appropriations again for additional infantry to protect the frontier, but only “for one year.”⁴¹ After the Indians again defeated St. Clair, President Washington once again requested support from Congress, which appropriated \$532,449.76 and two-thirds cents in response.⁴² Significantly, however, the next year, after a series of detailed appropriations, Congress eventually granted President Washington the broader authority to call up militia whenever the United States was invaded or “in imminent danger of invasion by any foreign nation or Indian tribe.”⁴³

b. Quasi-War with France

America’s first war with a European power after the ratification of the U.S. Constitution was actually a limited, undeclared conflict entirely authorized by Congress.⁴⁴ Known as the Quasi-War with France, in 1798, Congress—at the invitation of President John Adams—terminated various treaties with France⁴⁵ and passed several acts that authorized U.S. ships to capture vessels on the high seas, but not attack French territory.⁴⁶ The Supreme Court observed that the Quasi-War was not “the perfect kind” in which “one whole nation is at war with another whole nation.”⁴⁷ Instead, “it

41. Act of Mar. 3, 1791, ch. 28, § 15, 1 Stat. 222.

42. Act of Dec. 23, 1791, ch. 3., § 4, 1 Stat. 226.

43. Act of May 2, 1792, ch. 28, § 1, 1 Stat. 264.

44. See *Quasi-War with France*, U.S. DEP’T OF STATE, http://future.state.gov/when/timeline/1784_timeline/quasiwar_withfrance.html (last visited Nov. 20, 2013).

45. See Act of July 7, 1798, ch. 67, 1 Stat. 578 (declaring that “the United States are of right freed and exonerated from the stipulations of the treaties, and of the consular convention, heretofore concluded between the United States and France; and that the same shall not henceforth be regarded as legally obligatory on the government or citizens of the United States.”). President Adams, however, did not provide France formal notice of termination of the treaties, and France continued to insist the treaties were in force as late as 1800. See *Gray v. United States*, 21 Ct. Cl. 340 (1886) (recounting the negotiations of 1800).

46. Although Congress did not authorize U.S. forces to attack French territory, it passed four separate acts allowing U.S. ships “[t]o resist the search of a *French* public vessel,” to “capture any vessel that should attempt, by force, to compel submission to a search,” to “re-capture any *American* vessel seized by a *French* vessel,” and to “capture any *French* armed vessel wherever found on the high seas.” See *Bas v. Tingy*, 4 U.S. 37, 44 (1800) (opinion of Washington, J.); Ackerman & Hathaway, *supra* note 38, at 454. David Barron and Martin Lederman discussed the Quasi-War at some length and argued that the Supreme Court has concluded repeatedly that “included within Congress’s authorizations for the use of military force in an undeclared war are implied statutory limitations on the Commander in Chief’s war powers that must be followed.” See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 968 (2008) (emphasis omitted).

47. *Bas*, 4 U.S. at 40 (opinion of Washington, J.).

was an ‘imperfect war’ in which ‘hostilities . . . subsist between two nations more confined in its nature and extent; being limited as to places, persons, and things’ and in which ‘those who are authorised [sic] to commit hostilities, act under special authority, and can go no farther than to the extent of their commission.’⁴⁸ The Quasi-War established early precedent for Congress to authorize limited war without formally declaring war on another state (although this practice did not become routine until after World War II).⁴⁹ Interestingly, the war was terminated via a ratified peace treaty—the Convention of 1800, also known as the Treaty of Mortefontaine—thereby involving both the President and the Senate.⁵⁰

Though the Quasi-War was authorized by normal acts of Congress, whether Congress could terminate the war by the same process is an open question. The Court seemed willing to enforce congressional conditions of the authorization to use force, even where the President might have been able to act in the absence of special authorization.⁵¹ This bolsters the argument that Congress has the power to repeal constitutionally enacted laws using the normal legislative process.⁵²

Not only did Congress authorize the Quasi-War with France, but it also played an active role—through the legislative authorization and appropriation process—in limiting the authority, scope, and duration of the conflict.⁵³ In May 1798, Congress authorized the President to act against armed vessels that had committed or were attempting to commit “depredations” on U.S. vessels and to recapture U.S. vessels.⁵⁴ One month later, Congress authorized private, armed U.S. vessels to use force in defending against any search, restraint, or seizure by French vessels.⁵⁵ Once again, within a month Congress authorized the President to use private U.S.

48. Ackerman & Hathaway, *supra* note 38, at 453–54 (emphasis omitted) (quoting *Bas*, 4 U.S. at 40); see also *Bas*, 4 U.S. at 43 (opinion of Chase, J.).

49. MICHAEL LIND, VIETNAM: THE NECESSARY WAR: A REINTERPRETATION OF AMERICA’S MOST DISASTROUS MILITARY CONFLICT (1999).

50. See Treaty of Mortefontaine, U.S.-Fr., Dec. 21, 1801, 8 Stat. 178.

51. See, e.g., *Little v. Barreme*, 6 U.S. 170, 177 (1804).

52. This argument is not entirely coherent. Congress could not admit a state and then repeal the legislation that admitted it. See Mark W. Mosier, *The Power to Declare Peace Unilaterally*, 70 U. CHI. L. REV. 1609, 1626 (2003) (citations omitted).

53. See, e.g., Act of Feb. 9, 1799, ch. 2, 1 Stat. 613; Act of July 9, 1798, ch. LXVIII, § 1.2, 1 Stat. 578; Act of June 25, 1798, ch. LXV, § 1, 1 Stat. 572; Act of May 28, 1798, ch. XLVIII, 1 Stat. 561.

54. See Act of May 28, 1798, ch. XLVIII, 1 Stat. 561.

55. See Act of June 25, 1798, ch. LXV, § 1, 1 Stat. 572.

vessels and to grant special commissions to private U.S. vessels to capture armed French vessels.⁵⁶ And six months thereafter, in February 1799, Congress granted the President the additional authority to seize U.S. vessels in route to French ports.⁵⁷ Not only did Congress impose legislative limits on the particular ships that would be subject to U.S. capture, but Congress also limited the use of particular ships⁵⁸ and the personnel deployed on each frigate,⁵⁹ and regulated the treatment of civilians on shore⁶⁰ and the detention of prisoners captured on French vessels.⁶¹ This series of narrow congressional appropriations in short succession, reflects the active role Congress can play in shaping the conduct of hostilities—however limited—and arguably, buttresses the contention that Congress can and should play a meaningful role in determining when wars end.

Even where the war was undeclared, Congress and the President chose to rely on the formal treaty tool utilized in declared wars.⁶² The use of a peace treaty to end the Quasi-War is a strong indication that the political branches viewed peace treaties, at the very least, as important processes to ending war with other states. The Quasi-War experience might also suggest that undeclared wars should only be terminated through a peace treaty.

c. War of 1812

In 1812—at the request of President James Madison—Congress declared war for the first time; officially starting the War of 1812 against the United Kingdom.⁶³ After over a year of fighting, President Madison agreed to peace talks in the neutral city of Ghent in Belgium (where the U.S.

56. See Act of July 9, 1798, ch. LXVIII, § 1–2, 1 Stat. 578.

57. See Act of Feb. 9, 1799, ch. 2, 1 Stat. 613.

58. See Act Providing a Naval Armament, ch. 7, 1 Stat. 523 (1797).

59. See *id.* at 524 (“That there shall be employed on board each of the ships of forty-four guns, one captain, four lieutenants, two lieutenants of marines, one chaplain, one surgeon, and two surgeon’s mates.”).

60. See Act Vesting the Power of Retaliation, in Certain Cases, in the President of the United States, ch. 45, 1 Stat. 743 (1799).

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

62. See *supra* note 46 and accompanying text.

63. See Act of June 24, 1812, ch. 102, 2 Stat. 755. President Madison asked for a congressional declaration of war on June 1, 1812, and the U.S. House passed the declaration on June 4, 1812, followed by the Senate on June 17, 1812. See *id.* President Madison signed the declaration on June 18, 1812. See *id.*

delegation was led by John Quincy Adams).⁶⁴ Negotiations commenced in August of 1814, and the peace treaty was signed on December 24, 1814.⁶⁵ The Senate then provided advice and consent to the Treaty of Ghent on February 17, 1815, thereby terminating the war.⁶⁶ The war was a model of the formal state-based conflicts of the nineteenth century, seen both in the Mexican-American War and the Spanish-American War: it began with a congressional declaration of war and ended with a peace treaty.⁶⁷ The broad authorization to use force found in the declaration of war was used in future congressional war declarations, as well as, in congressional authorizations of undeclared wars.⁶⁸ The War of 1812 set a precedent for the formal roles of Congress and the President in both the initiation and termination of war that would be applied to subsequent U.S. wars until the twentieth century.⁶⁹

d. Mexican-American and Spanish-American Wars

The Mexican-American and Spanish-American Wars demonstrate that a cease-fire agreement, agreed to without congressional involvement, does not constitute a formal war termination agreement. The Mexican-American War was not definitively terminated by the cease-fire agreement, or by the suspension of hostilities; like the War of 1812, it was ended by the senatorial consent to a peace treaty signed by a representative of the executive branch.⁷⁰ After the U.S. annexed Texas in June 1845, President Polk ordered a military buildup near Mexico, in March 1846, to protect U.S. interests in Texas,⁷¹ and Congress declared war on Mexico on May 11, 1846.⁷² U.S. military operations against Mexico were successful, and after heavy fighting

64. See DONALD R. HICKEY, *THE WAR OF 1812: A FORGOTTEN CONFLICT* 285 (2012).

65. See Treaty of Peace and Amity, Between His Britannic Majesty and the United States of America (Treaty of Ghent), U.S.-Gr. Brit., art. IX, Dec. 24, 1814, 8 Stat. 218.

66. See *id.*

67. See *infra* Part II.A.1.d.

68. Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2073–75 (2005).

69. See *infra* Parts II.A.1.d, II.B.

70. See *infra* note 71 and accompanying text.

71. See Joseph G. Dawson III, *The U.S. War with Mexico: The Difficulties of Concluding a Victorious War*, in BETWEEN WAR AND PEACE: HOW AMERICA ENDS ITS WARS 85 (Matthew Moten, ed., 2011).

72. President Polk asked for a congressional declaration of war on May 11, 1846. Congress passed a resolution that declared war against Mexico the two days later. See Act of May 13, 1846, ch. 16, 9 Stat. 9. The President then signed the declaration of war on May 13, 1846. *Id.*

in Mexico City the two sides signed a cease-fire agreement on August 24, 1847; however, the cease-fire agreement was terminated on September 6, 1847.⁷³ In August of 1847, representatives of the Mexican government and Nicholas Trist, an unofficial U.S. representative, started to negotiate a peace treaty.⁷⁴ The U.S. eventually signed the Treaty of Guadalupe Hidalgo on February 2, 1848,⁷⁵ and the Senate provided advice and consent on March 10, 1848.⁷⁶

After the Spanish-American War, the Supreme Court, in *Ribas y Hijo v. United States*, confirmed that a presidential proclamation establishing a truce is not a termination of the legal state of war.⁷⁷ During the Spanish-American War—after decisive naval and ground victories by the United States in Cuba and the Pacific—Spain signed an armistice on August 12, 1898.⁷⁸ A peace treaty, the Treaty of Paris,⁷⁹ was signed by Spain and the U.S. on December 10, 1898,⁸⁰ with the Senate providing advice and consent in February,

73. Dawson, *supra* note 71, at 93–95; see also RICHARD GRISWOLD DEL CASTILLO, THE TREATY OF GUADALUPE HIDALGO: A LEGACY OF CONFLICT 30 (1990).

74. Initially, President Polk sent Nicholas Trist to negotiate the end of the U.S.-Mexican War, but Polk eventually recalled Trist. See GRISWOLD DEL CASTILLO, *supra* note 73, at 37–39; see also Dawson *supra* note 71, at 98–99. However, Trist disobeyed the President's recall order and completed the treaty negotiations. See GRISWOLD DEL CASTILLO, *supra* note 73, at 37–39. Polk then accepted the substance of the Treaty even though he had previously fired Trist. See *id.*

75. Dawson, *supra* note 71, at 98–99. Mexico and the U.S. were the parties to the Treaty of Guadalupe Hidalgo, July 4, 1848, U.S.-Mex., 9 Stat. 922; JOSEPH WHEELAN, INVADING MEXICO: AMERICA'S CONTINENTAL DREAM AND THE MEXICAN WAR, 1846–1848 407 (2007); see GRISWOLD DEL CASTILLO, *supra* note 73, at 45–46.

76. Dawson, *supra* note 71, at 98–99. The Treaty of Guadalupe Hidalgo was provided with the advice and consent of the Senate, thirty-four to fourteen on March 10, 1848 with amendments, and it was ratified by President Polk on March 16, 1848. WHEELAN, *supra* note 75, at 409–11. The Senate-approved version of the treaty did not include Article X, which guaranteed the protection of Mexican land grants. *Id.* After the Senate provided advice and consent to the treaty, the treaty entered into force in Querétaro, Mexico on May 30, 1848, and peace was proclaimed on, July 4, 1848. *Id.* The May 30, 1848 agreement included a new three-article protocol, the Querétaro Protocol, to explain the amendments that had been added between February and May. *Id.*

77. See *Ribas y Hijo v. United States*, 194 U.S. 315, 323 (1904).

78. The last shots of the war were fired off the coast of Cuba on August 14. COLEMAN PHILLIPSON, TERMINATION OF WAR AND TREATIES OF PEACE 70 (1916). Commercial intercourse between Spain and America resumed later in August. *Id.* at 71; see also IVAN MUSICANT, EMPIRE BY DEFAULT: THE SPANISH-AMERICAN WAR AND THE DAWN OF THE AMERICAN CENTURY 581–82 (2008). See generally DAVID F. TRASK, THE WAR WITH SPAIN IN 1898 445–72 (1996).

79. December 10, 1898, 30 Stat. 1754. On August 26, the President appointed peace commissioners and the delegates met in Paris for the first time on October 1. PHILLIPSON, *supra* note 78, at 141–43. Negotiations last until December 10. 30 Stat. 1754.

80. TRASK, *supra* note 78, at 466.

1899.⁸¹ The Court found that “state of war did not, in law, cease until the ratification” of the Treaty of Paris, notwithstanding the earlier armistice.⁸² The Court did not indicate what effect an actual presidential proclamation of peace would have on the legal state of war. Still, *Ribas y Hijo* is useful in showing that the termination of war for constitutional purposes must be done purposely; although, it does not address whether the President can terminate a war unilaterally.

Both the Mexican-American and the Spanish-American Wars are illustrative of how Congress and the President must work together to terminate wars formally, and that peace treaties can provide an appropriate balance of authority between the political branches.

e. Civil War

The Civil War was not a war between States, but an insurgent rebellion, which was not initiated by formal declaration of war, nor terminated by the signing of a peace treaty.⁸³ The Civil War helped establish the general principle that although Congress has the power to declare war, war can be made by outside actors that require the President to act “without waiting for Congress to baptize it with a name.”⁸⁴

The Court also created precedent in acknowledging presidential proclamation as sufficient to terminate the war, at least for statutory interpretation purposes.⁸⁵ In *The Protector*, the Court considered a statute of limitations question associated with the Judiciary Act of 1789 that turned on the termination date of the Civil War, and ruled that it is necessary “to refer to some public act of the political departments of the government to fix the dates [of war termination].”⁸⁶ According to *The Protector* Court, the U.S.

81. ROBERT L. BEISNER, *TWELVE AGAINST EMPIRE: THE ANTI-IMPERIALISTS, 1898–1900* 3 (1968).

82. *Ribas y Hijo v. United States*, 194 U.S. 315, 323 (1904).

83. See Mathews, *supra* note 11, at 821. Although the Civil War was not a “war” in the constitutional sense described in this Article’s Introduction, a discussion of Supreme Court decisions from the Civil War period is included, because they bear important implications for the development of judicial precedent concerning the war termination power of Congress and the President.

84. *The Prize Cases*, 67 U.S. (2 Black) 635, 668–69 (1862) (“If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force.”).

85. See *The Protector*, 79 U.S. 700 (1871).

86. *Id.* at 701–02 (1871); see also *United States v. Anderson*, 76 U.S. 56, 70 (1869) (Whereas, the ratification of a peace treaty would determine the termination of the war between States, “in a domestic war . . . some public proclamation or legislation would seem to be required to inform those

Civil War ended in different states on different dates based on different presidential proclamations.⁸⁷ Congress recognized the last presidential proclamations as marking the end of the rebellion in a statute continuing wartime pay for three years after the end of the war.⁸⁸ In absence of clearer standards, the Court relied upon two presidential proclamations to declare that the war had concluded.⁸⁹

Faced with a similar question nine years later, the Court, in *McElrath v. United States*, determined that the public proclamation of war termination would be a joint effort between Congress and the President.⁹⁰ Though the Court in *The Protector* used the presidential proclamations in lieu of more certain criteria,⁹¹ Congress subsequently recognized the presidential proclamations as marking the end of the rebellion in a statute continuing wartime pay for three years after the end of the war.⁹²

2. World Wars I and II: The Breakdown of the Model War Termination Process

With the exception of the Civil War, the lion's share of nineteenth century U.S. wars ended with peace treaties. World War I marked the end of this treaty-making practice—which disappeared altogether after the creation of the United Nations. World War II was the last declared war, and the complexity of its end in the early stages of the Cold War marked a shift in how wars are terminated. The fact that Congress has not played as

whose private rights were affected by it, of the time when it terminated . . . it is only necessary to notice the proclamation of the President, of August 20th, 1866, and the act of Congress of the 2d of March, 1867.”).

87. See *The Protector*, 79 U.S. at 701–02. It is worth noting that the Supreme Court used this metric in want of an established rule.

88. Act of Mar. 2, 1867, ch. 145, § 2, 14 Stat. 422.

89. *The Protector*, 79 U.S. at 702; see also Proclamation No. 4, 12 Stat. 1258, 1258–59 (1861) (stating “insurrection against the Government of the United States has broken out in the [southern states]” and directing a blockade of Southern ports); Proclamation No. 1, 14 Stat. 811, 812–13 (1866) (“I, Andrew Johnson, . . . declare that the insurrection . . . is at an end [in all states except Texas], and is henceforth to be so regarded.”); Proclamation No. 4, 14 Stat. 814, 814–17 (1866) (declaring the war also ended in Texas).

90. See *McElrath v. United States*, 102 U.S. 426, 438 (1880) (“Since peace, in contemplation of law, could not exist while rebellion against the national government remained unsuppressed, the close of the rebellion and the complete restoration of the national authority, as announced by the President and recognized by Congress, must be accepted as the beginning of the ‘time of peace.’”).

91. See *supra* note 89 and accompanying text.

92. Act of Mar. 2, 1867, ch. 145, § 2, 14 Stat. 422; see also Mathews, *supra* note 11, at, 821.

prominent a role in the termination of wars as it did before the world wars has coincided with a significant shift in how the political branches interact when wars end.

a. World War I

Congress played an integral role in the termination of World War I; peace treaties, however, were not ratified before the political branches declared peace. World War I involved U.S. declarations of war,⁹³ but U.S. involvement was terminated through a multi-step process. Hostilities ended after armistice agreements were signed near Compiègne, France, on November 11, 1918.⁹⁴

Although today sole executive agreements are signed frequently,⁹⁵ President Wilson denied having the power to end the war solely through presidential proclamation,⁹⁶ and consequently submitted the Treaty of Versailles to the Senate for its advice and consent.⁹⁷ Despite President Wilson's vigorous advocacy, the Senate rejected the Treaty of Versailles—largely because of its unpopular provisions related to the establishment of the League of Nations.⁹⁸ Congress attempted to pass a joint resolution ending the war, which was vetoed by Wilson, but was ultimately able to pass a joint resolution ending the war at the behest of President Harding;⁹⁹ the

93. The U.S. declared war against Germany by Joint Resolution of Congress on April 6, 1917. S.J. Res. 1, 65th Cong., 40 Stat. 1 (1917). War against Austria-Hungary was declared by Joint Resolution of Congress, December 7, 1917. S.J. Res. 169, 65th Cong., 40 Stat. 429 (1917).

94. HEW STRACHAN, *THE FIRST WORLD WAR* 325–26 (2003); see Edward A. Coffman, *The Meuse-Argonne Offensive: The Final Battle of World War I?*, in *BETWEEN WAR AND PEACE: HOW AMERICA ENDS ITS WARS* 179, 190 (Matthew Moten ed., 2011).

95. The United States concluded ten times as many executive agreements as treaties in the 1990s. Hathaway, *supra* note 12, at 1287 (“The average number of treaties concluded each year has grown from slightly over one per year during the first fifty years of the republic to about twenty-five per year during the 1990s. Executive agreements, on the other hand have gone from one on average every two years during the first fifty years of the republic to well over three hundred per year.”)

96. 58 CONG. REC. 4434–35 (Aug. 22, 1919) (statement of President Wilson) (“I feel constrained to say . . . not only that in my judgment I have not the power by proclamation to declare that peace exists, but that I could in no circumstances consent to take such a course prior to the ratification of a formal treaty of peace.”).

97. Manley O. Hudson, *The Duration of the War Between the United States and Germany*, 39 HARV. L. REV. 1020, 1031–32 (1926).

98. See generally, JOHN MILTON COOPER, JR., *BREAKING THE HEART OF THE WORLD: WOODROW WILSON AND THE FIGHT FOR THE LEAGUE OF NATIONS* (2001).

99. A Joint Resolution of Congress terminated the wars between Germany and the U.S., and Austria-Hungary and the U.S. on July 2, 1921. See Act of July 2, 1921, ch. 40, 42 Stat. 105.

resolution was followed by treaties regularizing relations and establishing peace with the Central Powers¹⁰⁰ and a presidential proclamation¹⁰¹ declaring that the war had ended on the date of the second congressional resolution.¹⁰²

After the Senate's refusal to ratify the Treaty of Versailles, a series of joint resolutions, treaties normalizing relations, and a presidential proclamation ended U.S. involvement in World War I.¹⁰³ Although congressional resolutions purported to end the war, they came at the President's behest and were accompanied by treaties. Consequently, they affirm the President's role in the termination of war even in the absence of a formal peace treaty.

The Senate's rejection of the Treaty of Versailles in the face of presidential support reflects the important role of both the executive and legislative branches in terminating World War I.¹⁰⁴ Notably, both political

100. The Treaty on Establishment of Friendly Relations with Germany ("Treaty of Berlin") was ratified by the U.S. on October 21, 1921, and by Germany on November 2, 1921. See Treaty of Peace Between the United States and Germany, U.S.-Ger., Aug. 25, 1921, 42 Stat. 1939; Treaty of Peace Between the United States and Austria, U.S.-Austria, Aug. 24, 1921, 42 Stat. 1946; see also Treaty of Peace Between United States and Hungary, U.S.-Hung., Aug. 29, 1921, 42 Stat. 1951. Ratification instruments were exchanged in Berlin on November 11, 1921. See Treaty of Peace Between the United States and Germany, U.S.-Ger., Aug. 25, 1921, 42 Stat. 1939; Treaty of Peace Between the United States and Austria, U.S.-Austria, Aug. 24, 1921, 42 Stat. 1946; see also Treaty of Peace Between United States and Hungary, U.S.-Hung., Aug. 29, 1921, 42 Stat. 1951.

101. Presidential Proclamation Declaring Peace with Germany, 42 Stat. 1944.

102. See CONG. RESEARCH SERV., 93D CONG., CONGRESS AND THE TERMINATION OF THE VIETNAM WAR 2 (Comm. Print 1973) ("[A]ction by Congress to terminate a war . . . can become the instrument by which the war is officially ended by the United States from the standpoint of its own position with respect to a state of war After the failure of the Treaty of Versailles it was Congress which brought the war officially to an end, . . . by first enacting a joint resolution terminating the war from the domestic legal standpoint, and then enacting a second joint resolution terminating it from the standpoint of U.S. belligerency. . . . To obviate all uncertainty, the President, after Congress acted, negotiated treaties [not peace treaties] which, in substance, gave effect to what Congress had done."). It is worth noting that the congressional resolutions came at the request of President Harding, as President Wilson had vetoed a previous resolution attempting to end the war, and that after the President had conducted the treaties, he issued a presidential proclamation adopting the date of the second Congressional resolution as the end of the war. See *id.* at 4.

103. See notes 99–102.

104. A number of provisions of the Treaty of Versailles, which was rejected by the Senate, were incorporated into the Treaty of Berlin. See Hudson, *supra* note 97, at 1031; Mosier, *supra* note 52, at 1618. The Treaty of Berlin was the second attempt to end World War I by treaty. See Hudson, *supra* note 97, at 1031; Mosier, *supra* note 52, at 1618. The Treaty of Versailles was defeated in the Senate on March 19, 1920. See Hudson, *supra* note 97, at 1031; Mosier, *supra* note 52, at 1618. The Senate did not approve the Treaty of Versailles largely because of the controversial Article Ten, which dealt with the newly created League of Nations. See Hudson, *supra* note 97, at 1031; Mosier, *supra* note 52, at 1618. Although the Treaty of Berlin did not include a provision regarding the League of Nations, it stated that the U.S. would enjoy all "rights, privileges, indemnities, reparations

branches adopted the date of the congressional resolution as the end of the war—rather than the ratification of the final treaty on November 11, 1921¹⁰⁵—and President Harding both requested and ratified, post hoc, the congressional peace resolutions.¹⁰⁶ World War I does not furnish an example of a unilateral peace declaration by Congress, but it marks a significant departure from prior historical practice.

The unusual circumstances surrounding the ratification debate over the Treaty of Versailles made it difficult for the Supreme Court to determine when the state of war had terminated. In *Hamilton v. Kentucky Distilleries & Warehouse Co.*, the Supreme Court considered whether the phrase “conclusion of the present war,” as used in the War-time Prohibition Act, prohibited the distribution and sale of whiskey in 1919.¹⁰⁷ When the *Hamilton* Court heard oral argument—one day after the Senate declined to ratify the Treaty of Versailles—it did not appear that a formal peace treaty was on the horizon.¹⁰⁸ Rather than examine the constitutional issues at stake in the case, the Court chose to frame the decision as one of statutory interpretation.¹⁰⁹ The Court found that the Act itself was an appropriate use

or advantages” conferred to it by the Treaty of Versailles. See Hudson, *supra* note 97, at 1035; Mosier, *supra* note 52, at 1618. See generally COOPER, *supra* note 98; Coffman, *supra* note 94.

105. One scholar noted:

It would seem not improper to set July 14, 1919, as the date of the end of the war for purposes of trading between nationals of the two countries; to set March 3, 1921, as the date of the end of the war for the purpose of applying much of America’s wartime legislation; and to set July 2, 1921, as the date of the end of the war for purposes of American municipal law and claims before the Mixed Claims Commission. But there may also be some international situations in which it would be improper to say that the war ended before November 11, 1921.

Hudson, *supra* note 97, at 1045.

106. See *id.* at 1035.

107. 251 U.S. 146, 153, 160–61 (1919).

108. See generally *Hamilton*, 251 U.S. 146.

109. See generally *id.* The Court chose to analyze similar wartime federal statutes with termination provisions contingent upon ratification of a treaty of peace or presidential proclamation either of the exchange of treaty instruments or of termination of the existing state of war. See *id.* at 165 n.12 (“Within one year from the signing of a treaty of peace with the Imperial German Government.’ ‘That this act shall remain in force during the continuance shall cease six months after . . . the termination of the war by the proclamation of the treaty of peace.’ . . . ‘All power and authority shall cease upon the proclamation of the final treaty of peace between the United States and the Imperial German Government.’ . . . ‘That the provisions of this act shall cease to be in effect when the existing state of war between the United States and Germany shall have terminated, and the fact and date of such termination shall be ascertained and proclaimed by the President.’ ‘The words “end of the war,” as used herein, shall be deemed to mean the date of proclamation of exchange of ratifications of the treaty of peace, unless the President shall, by proclamation, declare a

of congressional authority under the war powers clause¹¹⁰—that it did not depend on “the existence of a technical state of war, terminable only with the ratification of a treaty of peace or a proclamation of peace.”¹¹¹

Some commentators have suggested that *Hamilton* confirms that wars must be terminated either by the President or a combination of the President and Congress through treaty signing and ratification.¹¹² A closer reading of the case, however, suggests that *Hamilton* merely concerned the statutory construction of the phrase “conclusion of the war,” and does not bear directly on the issue of constitutional war termination powers.¹¹³ Indeed, the *Hamilton* Court devoted only one sentence to the constitutional requirement for formal termination of war that was not essential to its statutory holding.¹¹⁴ At a minimum, that opinion was the first time the Court suggested—at least for the purpose of the statute in question—that a presidential proclamation was sufficient to terminate a war. After *Hamilton*, various federal court decisions reiterated that the legal state of war could end through either a presidential proclamation of peace or ratification of a peace treaty.¹¹⁵

prior date, in which case the date so proclaimed shall be deemed to be the “end of the war” within the meaning of this act.” (citations omitted)).

110. *Hamilton*, 251 U.S. at 160–61.

111. *Id.* at 161 (citations omitted) (“Assuming that the implied power to enact such a prohibition must depend, not upon the existence of a technical state of war, terminable only with the ratification of a treaty of peace or a proclamation of peace, but upon some actual emergency or necessity arising out of the war or incident to it, still, as was said in *Stewart v. Kahn*, [78 U.S. 493 (1870)], ‘The power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress.’” (citations omitted)).

112. *See, e.g.*, *Mosier*, *supra* note 52, at 1619–20, 1622–23 (“Congress can determine when a statute expires; the usual political agencies, the President or the President and Senate, can end war through presidential proclamation or peace treaty, respectively.”); *see also Mathews*, *supra* note 11, at 822–23 (stating that the wartime statutes indicate that Congress believed WWI could be legally terminated both by presidential proclamation or by a peace treaty).

113. *See Hamilton*, 251 U.S. at 167 (“Congress . . . provided that the time when the act ceased to be operative should be fixed by the President’s ascertaining and proclaiming the date when demobilization had terminated.”).

114. *See id.*; *see also Hudson*, *supra* note 97, at 1045 (distinguishing the termination provisions of wartime legislation from the termination of the legal state of war).

115. *See, e.g.*, *Citizens Protective League v. Byrnes*, 64 F. Supp. 233, 234 (D.D.C. 1946) (“[T]he period of war has been held to extend to the ratification of the Treaty of Peace or the Proclamation of Peace.”); *The Elqui*, 62 F. Supp. 764, 767 (E.D.N.Y. 1945) (recognizing that the state of war ends upon “the formal signing of a peace treaty or a proclamation by the sovereign that the war has been officially recognized as being at an end.”); *Miller v. Rouse*, 276 F. 715, 716 (S.D.N.Y. 1921) (denying a claim because it was made “three days after the declaration of peace as now promulgated

Nonetheless, this Article contends that Congress has a significant constitutional role to play in the war termination process.¹¹⁶

In *Commercial Trust Co. of New Jersey v. Miller*, the Court considered whether the Trading with the Enemy Act of October 6, 1917, could be enforced following the cessation of hostilities, given that the Act was an emergency wartime provision.¹¹⁷ The Court responded “that the power which declared the necessity is the power to declare its cessation, and what the cessation requires. The power is legislative.”¹¹⁸ The unattributed pronoun in this statement should be read to address Congress’s power to determine how long the Act should remain in effect based on whether the “emergency of war” had passed.¹¹⁹ It does not directly address a congressional power to declare peace.¹²⁰ Instead, the statute stated that the

by the President’s recent proclamation”). *See generally*, *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 140 (1948) (“The District Court was of the view that the authority of Congress to regulate rents by virtue of the war power ended with the Presidential Proclamation terminating hostilities on December 31, 1946, since that proclamation inaugurated ‘peace-in-fact’ though it did not mark termination of the war.” (citations omitted) (footnote omitted)); *id.* at 140 n.3 (noting that the presidential proclamation did not terminate Congress’ war powers because the proclamation recognized the end of hostilities but noted that “a state of war still exists” (citations omitted)). In *United States v. Hicks*, the district court examined the same question of statutory interpretation posed in *Hamilton*, and concluded that although a ratified treaty of peace is the best evidence of the termination of a war, a presidential proclamation supported by evidence that hostilities have ceased is a sufficient alternative. 256 F. 707, 710–14 (W.D. Ky. 1919) (“The authoritative publications show that, while war is usually terminated by a treaty of peace, and that such treaty is the best evidence of such termination, history shows many instances in which wars were terminated without any treaty at all. . . . [A] completely ratified treaty of peace is the best evidence of the termination of a war; but as we have said such a treaty is not essential to the actual ending of a war, as have many times been demonstrated. Indeed, there is no formal or ceremonious way agreed upon in international law or otherwise for ending a war. . . . [T]he statement of the President, officially made and acclaimed on the 11th of that month, and which met with quite universal acceptance by the people, is as effective in showing the fact of the actual termination of real war as would be the case with a treaty.”).

116. *See infra* Part IV.

117. *See Commercial Trust Co. of N.J. v. Miller*, 262 U.S. 51, 57 (1923) (“The next contention of the Trust Company is that, the act being a provision for the emergency of war, it ceased with the cessation of war, ceased with the joint resolution of Congress declaring the state of war between Germany and the United States at an end, and its approval by the President, July 2, 1921, and the Proclamation of Peace by the President August 25, 1921.”).

118. *Id.* at 57.

119. *See generally id.*

120. *See id.* (“A court cannot estimate the effects of a great war and pronounce their termination at a particular moment of time, and that its consequences are so far swallowed up that legislation addressed to its emergency had ceased to have purpose or operation with the cessation of the conflicts in the field. Many problems would yet remain for consideration and solution, and such was the judgment of Congress, for it reserved from its legislation the Trading with the Enemy Act and

phrase “end of the war,” which was defined as the date the treaty ratification was concluded or an earlier date when the President proclaimed the war to have ended, only applied to the construction of the act.¹²¹

b. World War II

World War II marked the end of the traditional war termination paradigm and a shift to ending war by presidential proclamation of peace without a peace treaty. Although the conflict was more in line with nineteenth century wars in terms of interbranch cooperation, it had some differences. The termination of World War II is more complex than previous wars because of the number of foreign states that were at war with the United States. As a result, there were multiple war terminations.

The U.S. entered World War II after Japan attacked the U.S. Naval Base at Pearl Harbor in 1941.¹²² World War II involved separate U.S. declarations of war against Japan, Germany, Italy, Romania, and Hungary.¹²³ Germany surrendered in May of 1945, after Berlin fell,¹²⁴ and Japan surrendered in August of 1945,¹²⁵ in the wake of successful military operations on Iwo Jima

amendments thereto, and provided that all property subject to that act shall be retained by the United States ‘until such time as the Imperial German government shall have made suitable provision for the satisfaction of all claims.’” (citations omitted)).

121. Trading with the Enemy Act of October 6, 1917, ch. 106, 40 Stat. 411.

122. See generally WILLIAMSON MURRAY & ALLAN R. MILLETT, A WAR TO BE WON: FIGHTING THE SECOND WORLD WAR (2001); R. J. OVERY, THE ORIGINS OF THE SECOND WORLD WAR (3d ed. 2008); GERHARD L. WEINBERG, A WORLD AT ARMS: A GLOBAL HISTORY OF WORLD WAR II (2005). The U.S. declared war on Japan on December 8, 1941. Joint Resolution of Dec. 8, 1941, ch. 561, 55 Stat. 795. The U.S. declared war on Germany on December 11, 1941. Joint Resolution of Dec. 11, 1941, ch. 564, 55 Stat. 796. The U.S. declared war with Italy on December 11. Joint Resolution of Dec. 11, 1941, ch. 565, 55 Stat. 797. The U.S. declared war on Bulgaria, Hungary, and Rumania on June 5, 1942. Joint Resolution of June 5, 1942, ch. 323–25, 56 Stat. 307.

123. See *supra* note 122.

124. See B. H. LIDDELL HART, HISTORY OF THE SECOND WORLD WAR 680 (First Am. ed. 1971). Fighting ended on the Italian front on May 2, 1945, and a surrender document was signed three days prior. *Id.* The German signed another surrender on May 4, and signed a more conclusive surrender that applied to all German soldiers in a more elaborate ceremony on May 7. *Id.* See generally JOHN TOLAND, THE LAST 100 DAYS: THE TUMULTUOUS AND CONTROVERSIAL STORY OF THE FINAL DAYS OF WORLD WAR II IN EUROPE (Modern Libr. Paperback ed. 2003). Eisenhower announced the end of the war in Europe on May 7. Theodore A. Wilson, *Gotterdammerung: War’s End in Europe, 1945*, in BETWEEN WAR AND PEACE: HOW AMERICA ENDS ITS WARS 213 (Matthew Moten, ed., 2011).

125. See LIDDELL HART, *supra* note 124, at 698. Japan formally surrendered on September 2, 1945, on the U.S.S. *Missouri*. *Id.* The Emperor of Japan had actually announced Japan’s surrender on August 14, 1945, after the nuclear bombing of Hiroshima. *Id.* President Truman declared the

and Okinawa, and the deployment of nuclear weapons by the U.S. against Japan.¹²⁶

Even though both Germany and Japan surrendered in 1945, President Truman did not proclaim the cessation of hostilities until December 31, 1946, and even then noted that “a state of war still exists.”¹²⁷ It was not until July 1951 that “Truman called for an end to this state of war.”¹²⁸ On June 5, 1947,¹²⁹ the Senate passed a resolution to ratify the Paris Peace Conference treaties with Bulgaria, Romania, Hungary, and Italy.¹³⁰ No formal peace treaty was signed with Germany¹³¹ at the conclusion of World War II,¹³² although, in 1990 the U.S., France, the USSR, Britain, and Germany signed a final agreement on the status of Germany that resulted in German reunification.¹³³ Instead of a peace treaty, the President issued a declaration

cessation of hostilities by a presidential proclamation on December 31, 1946. BARBARA SALAZAR TORREON, CONG. RESEARCH SERV., RS21405, U.S. PERIODS OF WAR AND DATES OF CURRENT CONFLICTS 3 (2012). The war was also terminated by the Multilateral Treaty of Peace with Japan, signed in San Francisco on September 8, 1951 (“Treaty of San Francisco”). See Treaty of Peace with Japan, U.S.-Japan, Sept. 8, 1951, 3 U.S.T. 3169. The peace treaty with Japan was ratified on March 20, 1952, and became effective on April 28, 1952. TORREON, at 3.

126. LIDDELL HART, *supra* note 124, at 698; Gerhard L. Weinberg, *The End of the Pacific War in World War II*, in BETWEEN WAR AND PEACE: HOW AMERICA ENDS ITS WARS 220, 223–31 (Matthew Moten, ed., 2011).

127. See Proclamation 2714: Cessation of Hostilities of World War II, 1946 PUB. PAPERS 514 (Dec. 31, 1946); President Harry S Truman, *President’s Proclamation*, N.Y. TIMES, January 1, 1947, at 1; Letter to the President of the Senate Recommending Legislation to Terminate the State of War with Germany, 1951 PUB. PAPERS 378 (July 9, 1951).

128. Mary L. Dudziak, *Law, War, and the History of Time*, 98 CALIF. L. REV. 1669, 1685 (2010).

129. The President proclaimed the cessation of hostilities between the U.S. and Italy, Hungary, and Bulgaria on December 31, 1946. TORREON, *supra* note 125, at 4. The parties agreed to the terms of war termination at the Paris Peace Conference, on February 10, 1947, and it became effective September 15, 1947. *Id.*

130. Treaty of Peace with Italy, U.S.-It., Feb. 10, 1947, 61 Stat. 1245; Treaty of Peace with Roumania, U.S.-Rom., Feb. 10, 1947, 61 Stat. 1757; Treaty of Peace with Bulgaria, U.S.-Bulg., Feb. 10, 1947, 61 Stat. 1915; Treaty of Peace with Hungary, U.S.-Hung., Feb. 10, 1947, 61 Stat. 2065. See generally TONY JUDT, *POSTWAR: A HISTORY OF EUROPE SINCE 1945* (2006).

131. “German representative Colonel General Alfred Jodl signed the unconditional act of surrender to Allied representatives in . . . Reims, France . . . on May 7, 1945.” TORREON, *supra* note 125, at 3. “A second German surrender ceremony was held on May 8 in Berlin at the insistence of the U.S.S.R.” *Id.* The “presidential proclamation of December 31, 1946” declared the end of hostilities. *Id.* Congress passed a joint resolution ending the war on October 19, 1951, and the President followed with a proclamation on October 24, 1951. *Id.* (citations omitted).

132. TORREON, *supra* note 125, at 3.

133. The Treaty was signed on September 12, 1990; the Senate gave its advice and consent on October 10, 1990; and the treaty went into force on March 15, 1991. Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990, 1696 U.N.T.S. 115.

that the war with Germany had ended in 1945,¹³⁴ following a congressional joint resolution.¹³⁵ A formal peace treaty was signed with Japan in 1951.¹³⁶ World War II eventually involved formal peace treaties as World War I did, but it also had presidential proclamations that declared a cessation of hostilities.

In 1948, the Court, in *Ludecke v. Watkins*, held that the legal state of war is terminated not merely by a cessation of hostilities, but by a political act.¹³⁷ The relevant issue addressed by the Court was whether the provisions of the Alien Enemy Act of 1789 had expired, which depended on whether the “declared war” referenced in the statute had ended.¹³⁸ Drawing on historical observations, the Court ruled that the state of war can be terminated by a peace treaty, congressional legislation that declares an end to the state of war, or a presidential proclamation that the war has ended.¹³⁹

134. Proclamation 2950: Termination of the State of War with Germany, 1951 PUB. PAPERS 598 (October 24, 1951).

135. Act of Oct. 19, 1951, Pub. L. No. 82-181, 65 Stat. 451.

136. See Weinberg, *supra* note 157, at 232.

137. See *Ludecke v. Watkins*, 335 U.S. 160, 166–67 (1948); see also Dudziak, *supra* note 128, at 1685. Compare the Supreme Court’s holding with *United States v. Hicks*, 256 F. 707, 711–12 (W.D. Ky. 1919), which treated President Wilson’s statement that the “war” had “ended” subsequent to the armistice with Germany as evidence that wartime statutory authorization had ended. Though the district court treated that statement as a presidential proclamation for the purposes of statutory construction, subsequent events—such as congressional declarations ending U.S. belligerency, treaties normalizing relations with Germany, and President Harding’s proclamation that the war had ended (not to mention the circus around the ratification of the Treaty of Versailles)—belie any notion that the ending of hostilities in World War I signified the end of the legal state of war. See *id.*

138. *Ludecke*, 335 U.S. at 166, n.11.

139. See *id.* at 168–69; see also *id.* at 169 n.13 (“Congress can, of course, provide either by a day certain or a defined event for the expiration of a statute. But when the life of a statute is defined by the existence of a war, Congress leaves the determination of when a war is concluded to the usual political agencies of the Government.”). This is not to suggest that a congressional joint resolution can, of its own force, legally terminate a state of war. See, e.g., CONG. RESEARCH SERV., 93D CONG., CONGRESS AND THE TERMINATION OF THE VIETNAM WAR 10–11 (Comm. Print 1973) (observing that there is no precedent for Congress ending an undeclared war by joint resolution, and conceding that though a presidential proclamation combined with such a resolution might suffice to end U.S. belligerency from an international perspective and it might end wartime congressional delegations of domestic authority to the President, a unilateral resolution would not prevent the President from carrying out hostilities). The analysis in this report is complex: it acknowledges a difference between the war power, domestic wartime grants of power, and the international status of war. During World War I, different treaties, congressional resolutions, and presidential proclamations addressed each of these issues separately. See also Mosier, *supra* note 52, at 1622–23 (“The [*Ludecke*] Court’s footnote to the statement “‘the state of war’ may be terminated by treaty or legislation or Presidential proclamation” also suggests that the Court was listing the methods by which the statute, not the war, could be terminated. Congress, according to the Court, could

Clarifying that by “state of war” it was referring to the end-life of the statute and that it was not reaching the question of whether Congress has the constitutional authority to declare peace, the Court ruled the statute was applicable even though hostilities had ended in World War II because the U.S. was still in a state of war.¹⁴⁰

3. Post-World War II to the Present: War in the Age of the United Nations

Post-World War II wars involving the United States are remarkably consistent in their lack of a formal declaration by Congress, the predominance of presidential control, and the haze around when they are terminated.¹⁴¹ With the increase in smaller conflicts that defy clear categorization as war (such as in Bosnia and Kosovo) Congress has occasionally relied on its power of the purse to control the direction and end of hostilities.¹⁴² Generally, however, Congress has authorized the use of force without a formal declaration of war and allowed the President to terminate the war unilaterally.¹⁴³

Because the U.N. Charter generally prohibits states from engaging in the non-consensual use of force on the territory of another state,¹⁴⁴ some scholars believe that “modern international law has largely eliminated th[e] historic function for declarations of war.”¹⁴⁵ Actual declarations of war are arguably

‘provide either by a day certain or a defined event for the expiration of a statute. But when the life of a statute is defined by the existence of a war, Congress leaves the determination of when a war is concluded to the usual political agencies of the Government.’ Congress can determine when a statute expires; the usual political agencies, the President or the President and Senate, can end war through presidential proclamation or peace treaty, respectively.” (footnotes omitted).

140. See *Ludecke*, 335 U.S. at 168–69, n.13.

141. See generally William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 702–04 (1997).

142. See Michael J. Glennon, *Publish and Perish: Congress’s Effort to Snip SNEPP (Before and AFSA)*, 10 MICH. J. INT’L L. 163, 173 (1989).

143. Saikrishna Bangalore Prakash, *Exhuming the Seemingly Moribund Declaration of War*, 77 GEO. WASH. L. REV. 89, 123 (2008).

144. See U.N. Charter art. 2, para. 4 (“All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.”).

145. CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS* 220 (3d ed. 2009); Robert F. Turner, *The War on Terrorism and the Modern Relevance of the Constitutional Power to “Declare War.”* 25 HARV. J.L. & PUB. POL’Y 519, 531 (2002) (adding that “no sovereign state has clearly issued a declaration of war in more than half a century”).

useless because “[w]ar has disappeared from international law.”¹⁴⁶ Thus, although Congress has not formally declared war since World War II, it has authorized the use of force on several occasions to provide the appropriate domestic authority to the President.¹⁴⁷

Even if the U.N. Charter could account for the change in how war is initiated, it does not completely explain why treaties are no longer the method of terminating war. One might argue that when there is no formal declaration of war there cannot be a formal declaration of peace through a treaty. However, the peace treaty after the undeclared Quasi-War with France is clear precedent for allowing termination of any war by treaty.¹⁴⁸ Perhaps the President does not negotiate peace treaties with senatorial advice and consent, because of a general preference to use executive agreements to make international law developed in recent decades.¹⁴⁹

Notwithstanding post-U.N. Charter executive and legislative branch practices, as well as the exceptional example of the Quasi-War with France, this Article contends that adhering to such unilateral war termination practices generates friction with the principle of the separation of powers; the Framers’ vision of a divided treaty-making power; and the values of democracy, transparency, and accountability that they preserve.¹⁵⁰

a. Vietnam and Related Southeast Asian Wars

Like the Quasi-War with France, the Vietnam War was authorized by a congressional resolution that stopped short of declaring war.¹⁵¹ As the war grew unpopular, Congress placed multiple restrictions on military operations

146. Paul W. Kahn, *War Powers and the Millennium*, 34 *LOY. L.A. L. REV.* 11, 17 (2000). *But see* Prakash, *supra* note 143, at 108–16 (noting the many other reasons for declaring war, including placing the foreign state on notice, as well as activating war-time domestic law). Whether congressional authorizations for the use of force establish a “state of war” under international law is beyond the scope of this Article.

147. Such authorizations also serve the other original functions of a formal declaration of war, leading Saikrishna Prakash to argue that such authorizations are actually declarations of war. *See* Prakash, *supra* note 143, at 137–38.

148. *See* Vasani Kesavan, *The Three Tiers of Federal Law*, 100 *NW. U. L. REV.* 1479, 1618 n.695 (2006).

149. *See* Oona A. Hathaway, *Presidential Power Over International Law: Restoring the Balance*, 119 *YALE L.J.* 140, 149–50 (2009).

150. *See* discussion *infra* Part IV.

151. *See* Gulf of Tonkin Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964); Treanor, *supra* note 141, at 702–03.

in Vietnam.¹⁵² In 1967, Congress passed a “Congressional Statement of Policy,” calling on the President to reach a negotiated settlement in Vietnam.¹⁵³ In 1971, Congress considered passing the Cooper Church Amendment, which would have banned the use of ground troops in Cambodia.¹⁵⁴ Additionally, the Mansfield Amendment of 1971 declared that the United States was to withdraw from Vietnam “at the earliest practicable date.”¹⁵⁵ Through a series of appropriations bills, in 1973 Congress banned all combat activities in Vietnam, Cambodia, and Laos.¹⁵⁶ Two months after the Secretary of State signed a cease-fire agreement,¹⁵⁷ the U.S. removed all combat troops from Vietnam.¹⁵⁸ The Vietnam War ended with neither a peace treaty nor a direct presidential proclamation.

Foreign relations scholars disagree on whether the congressional amendments terminated authorization for the war.¹⁵⁹ Congress also repealed the Gulf of Tonkin resolution that authorized the War in Vietnam in 1970,

152. The Nixon Administration never challenged the constitutional power of Congress to cut off funds for the war in court. Glennon, *supra* note 142, at 173. It is notable, however, that Congress repealed the Gulf of Tonkin Resolution. See Foreign Military Sales Act, Amendments, Pub. L. No. 91-672, § 12, 84 Stat. 2053, 2055 (1971) (“The joint resolution entitled ‘Joint resolution to promote the maintenance of international peace and security in Southeast Asia’, approved August 10, 1964 (78 Stat. 384; Public Law 88-408), is terminated effective upon the day that the second session of the Ninety-first Congress is last adjourned.”).

153. 22 U.S.C. § 2301 (2012).

154. Special Foreign Assistance Act of 1971, Pub. L. No. 91-652, § 401, 85 Stat. 348, 360; HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 52 (1990).

155. Mansfield Amendment, Pub. L. No. 92-156, § 601, 85 Stat. 423 (1971). It is notable that Congress continued to appropriate money for operations in Vietnam even though these amendments were passed. BRADLEY & GOLDSMITH, *supra* note 145, at 256.

156. Department of State Appropriations Authorization Act, Pub. L. No. 93-126, § 13, 87 Stat. 451 (1973); Continuing Appropriations, 1974, Pub. L. No. 93-124 § 1, 87 Stat. 449 (1973); Continuing Appropriations Resolution of 1974, Pub. L. No. 93-52, § 108, 87 Stat. 130 (1973); Fulbright Amendment to Second Supplemental Appropriations Act of 1973, Pub. L. No. 93-50, § 307, 87 Stat. 99.

157. See Agreement on Ending the War and Restoring Peace in Vietnam, U.S.-Viet., Jan. 27, 1973, 24 U.S.T. 1.

158. Interestingly, Vietnam era veteran benefits continued until May 1975. See Gerald R. Ford, *Statement on Terminating the Eligibility Period for Vietnam Era Veterans Benefits*, AMERICAN PRESIDENCY PROJECT (May 7, 1975), <http://www.presidency.ucsb.edu/ws/?pid=4901>.

159. Compare FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW 231 (1989) (stating that these appropriations conditions repealed authorization), with JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 32–34 (1993) (stating appropriations conditions did not deauthorize the Vietnam War).

but even this did not bar the President from continuing operations in Vietnam.¹⁶⁰ Part of the reason why the repeal of the Gulf of Tonkin resolution did not end the war was that Congress continued to authorize the draft and finance parts of the war.¹⁶¹ Even prior to repeal, congressional studies admitted that simply repealing the resolution would not prevent the President from resuming hostilities provided that appropriations for the war continued.¹⁶² Some scholars have taken the view that continued appropriations made with full knowledge of the ongoing operations in Vietnam constituted ratification of the war, even though the original authorization provided by the Gulf of Tonkin resolution was repealed.¹⁶³ However, they emphasize that such ratification depends on knowledge; thus, the secret bombing campaigns against Cambodia in 1970 were not authorized simply by virtue of continued appropriations.¹⁶⁴

Following the Vietnam War, Congress attempted to limit presidential authority to act militarily overseas through the use of appropriations restrictions.¹⁶⁵ The Boland amendments limited the availability of appropriations money to aid the anti-communist Contras in Nicaragua.¹⁶⁶ The first amendment Congress passed in 1982 attempted to bar the use of all appropriations funds to help any group overthrow the Nicaraguan government, but this amendment's ban was not complete.¹⁶⁷ In November 1983, Congress passed a second Boland amendment that limited funding of the Contras to \$24 million for 1984.¹⁶⁸ In October 1984, Congress passed a

160. See *supra* note 152 (discussing the Gulf of Tonkin Resolution). Certain scholars believe the President did not have the authority to continue the war in Vietnam after this repeal. See generally William Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1 (1972). Ely argues the repeal of the Gulf of Tonkin resolution did not repeal authorization for the war, in part because Congress took other actions including extending the draft and providing funds for some activities in Vietnam. ELY, *supra* note 159, at 33–34.

161. See *supra* note 160.

162. See, e.g., CONG. RESEARCH SERV., 93D CONG., CONGRESS AND THE TERMINATION OF THE VIETNAM WAR 11 (Comm. Print 1973).

163. See, e.g., WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE 121 (1994).

164. See *id.* at 121–22.

165. See Louis Fisher, *Presidential Independence and the Power of the Purse*, 3 U.C. DAVIS J. INT'L L. & POL'Y 107, 111 (1997).

166. See *id.* at 111, 117–18.

167. See Defense Appropriations Act for Fiscal Year 1983, Pub. L. No. 97-377, § 793, 96 Stat. 1830, 1865 (1982); Fisher, *supra* note 165, at 117.

168. See Intelligence Authorization Act for Fiscal Year 1984, Pub. L. No. 98-215, § 108, 97 Stat. 1473, 1475 (1983); Department of Defense Appropriations Act for Fiscal Year 1984, Pub. L. No. 98-

third Boland amendment, which was attached to a continuing resolution, and again barred the use of appropriations for aid to the Contras.¹⁶⁹ A fourth Boland amendment attached to the Fiscal Year 1985 Defense Appropriations bill subsequently banned sending funds to the Contras through February 28, 1985.¹⁷⁰ Eventually, funding for the Contras was renewed in August 1985.¹⁷¹ Although there was no formal legal challenge to the Boland amendments, the National Security Council securing funding from other countries for the Contras was later called the Iran-Contra scandal.¹⁷²

The constitutionality of the conditions in appropriations bills has very rarely been addressed by courts. For instance, a district court upheld the ban on military operations in Cambodia, but the Second Circuit overturned this holding and ruled the validity of the appropriations condition was a non-justiciable political question.¹⁷³

b. Contemporary Wars: Iraq (1991 and 2003) and Afghanistan

Recent wars involving major and sustained operations have been explicitly authorized by Congress (without formal declarations of war), but congressional involvement in war termination activities—such as the withdrawal of forces—has been quite limited. After the Iraqi invasion of Kuwait on November 29, 1990, the U.N. Security Council passed Resolution 678, which authorized Member States to use force to liberate Kuwait from

212, § 775, 97 Stat. 1421, 1452 (1983); see also Andrew W. Hayes, *The Boland Amendments and Foreign Affairs Deference*, 88 COLUM. L. REV. 1534, 1567 (1988).

169. See Temporary Continuing Appropriations Act, Pub. L. No. 98-441, § 106(c), 98 Stat. 1699, 1700-01 (1984); see also Hayes, *supra* note 168, at 1568.

170. See Department of Defense Appropriations Act for Fiscal Year 1985, Pub. L. No. 98-473, § 8066, 98 Stat. 1837, 1935-36 (1984); see also Hayes, *supra* note 168, at 1568.

171. See Hayes, *supra* note 168, at 1568, at 1568.

172. KOH, *supra* note 154, at 52.

173. See *Holtzman v. Schlesinger*, 484 F.2d 1307, 1309-12 (2d Cir. 1973) (“As the constitutional propriety of the means by which the Executive and the Legislative branches engaged in mutual participation in prosecuting the military operations in Southeast Asia, is, as we held in *Orlando*, a political question, so the constitutional propriety of the method and means by which they mutually participate in winding down the conflict and in disengaging the nation from it, is also a political question and outside of the power and competency of the judiciary.” (quoting *DaCosta v. Laird*, 448 F.2d 1368, 1370 (2d Cir. 1971)). For cases where the legality of the Vietnam War was challenged, and it was ruled the plaintiff lacked standing, see *Mottola v. Nixon*, 464 F.2d 178 (9th Cir. 1972); *Pietsch v. President of U.S.*, 434 F.2d 861 (2d Cir. 1970); *Kalish v. United States*, 411 F.2d 606 (9th Cir. 1969); *United States v. Battaglia*, 410 F.2d 279 (7th Cir. 1969); *Ashton v. United States*, 404 F.2d 95 (8th Cir. 1968); *Campen v. Nixon*, 56 F.R.D. 404 (N.D. Cal. 1972); *Meyers v. Nixon*, 339 F. Supp. 1388 (S.D.N.Y. 1972); *Velvel v. Johnson*, 287 F. Supp. 846 (D. Kan. 1968).

Iraqi control.¹⁷⁴ The President sought and received congressional approval for the 1991 Iraq War;¹⁷⁵ Congress also passed a Joint Resolution title “Authorizing the Use of Military Force in Iraq.”¹⁷⁶ The AUMF for the 1991 Iraq War limited the purpose of the war to the expulsion of Iraq from Kuwait, as opposed to a full invasion of Iraq to overthrow the Hussein regime.¹⁷⁷ President George H.W. Bush declared an end to hostilities on February 28, 1991, in the wake of the highly successful American military campaign.¹⁷⁸ U.N. Security Council Resolution 687 called for a ceasefire and the establishment of a demilitarized zone in Iraq.¹⁷⁹ One of Saddam Hussein’s generals signed a ceasefire and surrender at Safwan Airfield on March 3, 1991.¹⁸⁰ At no point was Congress involved in establishing peace.

The 2003 War in Iraq followed a similar trajectory. Operation Iraqi Freedom was expressly authorized by Congress pursuant to the AUMF against Iraq.¹⁸¹ Hostilities commenced on March 20, 2003.¹⁸² U.S. and coalition forces occupied Iraq from 2003 until the June 2004 transition of control from the Coalition Provisional Authority to the autonomous Iraqi government.¹⁸³ U.S. and coalition forces continued to engage in major

174. See S.C. Res. 678, ¶ 2, U.N. Doc. S/RES/678 (Nov. 29, 1990).

175. Authorization for Use of Military Force Against Iraq Resolution of 1991, Pub. L. No. 102-1, 105 Stat. 3 (1991).

176. Authorization for Use of Military Force Against Iraq Resolution of 1991, Pub. L. No. 102-1, 105 Stat. 3. Congress passed the Joint Resolution on January 12, 1991, and President George H.W. Bush signed the Joint Resolution on January 14, 1991. *Id.* In addition, “funding for the first Persian Gulf War was provided in the form of supplemental appropriations of \$42 billion.” See H.RES. 159 (1999), H. Rept. 106-127 (1999). See Pub. L. No. 102-1, 105 Stat. 3; see also STEPHEN DAGGETT, CONG. RESEARCH SERV., RS22455, MILITARY OPERATIONS: PRECEDENTS FOR FUNDING CONTINGENCY OPERATIONS IN REGULAR OR IN SUPPLEMENTAL APPROPRIATIONS BILLS 6 (2006).

177. Authorization for Use of Military Force Against Iraq Resolution of 1991, Pub. L. No. 102-1, 105 Stat. 3.

178. See Andrew J. Bacevich, *The United States in Iraq: Terminating an Interminable War*, in BETWEEN WAR AND PEACE: HOW AMERICA ENDS ITS WARS 302, 304–06 (Matthew Moten, ed., 2011). Iraq officially accepted the cease-fire terms on April 6, 1991 and the cease-fire took effect April 11, 1991. U.N. Doc. S/22485 (Apr. 11, 1991). In May of 1991, U.S. forces engaged in operations in northern Iraq for emergency relief purposes. Bacevich at 304–06.

179. S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 8, 1991).

180. GEORGE H.W. BUSH & BRENT SCOWCROFT, A WORLD TRANSFORMED (NEW YORK: ALFRED A. KNOPF) 486-490 (1998).

181. See Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498.

182. THOMAS E. RICKS, FIASCO: THE AMERICAN MILITARY ADVENTURE IN IRAQ 116 (2006).

183. U.S. *Hands Back Power in Iraq*, BBC NEWS (June 28, 2004), <http://news.bbc.co.uk/2/hi/europe/3845517.stm>; see JAMES DOBBINS ET AL., OCCUPYING IRAQ: A HISTORY OF THE COALITION PROVISIONAL AUTHORITY iii (2009).

hostilities in Iraq until August 31, 2010, when President Obama announced the end of the U.S. combat mission in Iraq.¹⁸⁴ U.S. and some coalition forces remained in Iraq to support counterterrorism missions and protect U.S. civilians until December 2011.¹⁸⁵

In an effort to keep Congress informed of developments during the final chapter of the Iraq War, the executive branch delivered several briefings to members and staff of relevant congressional committees.¹⁸⁶ Yet Congress did not play a significant role in the formal termination of the war.¹⁸⁷

184. See Barack Obama, President of the U.S., Remarks by the President in Address to the Nation on the End of Combat Operations in Iraq (Aug. 31, 2010) (transcript available at <http://www.whitehouse.gov/the-press-office/2010/08/31/remarks-president-address-nation-end-combat-operations-iraq>) Previously, on May 1, 2003, President Bush had declared that “[m]ajor combat operations in Iraq have ended.” George W. Bush, President of the U.S., Address to the Nation on Iraq from the U.S.S. *Abraham Lincoln* (May 1, 2003) (transcript available at 39 WEEKLY COMP. PRES. DOC 491, 516-18 (2003)).

185. Joseph Logan, *Last U.S. Troops Leave Iraq, Ending War*, REUTERS (Dec. 18, 2011, 3:25 PM), <http://www.reuters.com/article/2011/12/18/us-iraq-withdrawal-idUSTRE7BH03320111218>.

186. Select congressional briefings include: Status of Forces Agreements briefing of House Armed Services and Foreign Affairs Committees, closed sess., Aug. 1, 2008; House Armed Services Comm. & House Foreign Affairs Comm., Closed Session Briefing on Status of Forces Agreements (2008); Letter from Jeffrey Bergner, Assistant Sec’y Legislative Affairs, U.S. Dep’t of State to Gary Ackerman, Chairman, Subcomm. on the Middle East and South Asia, Comm. on Foreign Affairs, House of Representatives (Mar. 4, 2008) (direct correspondence in answer to question); *Negotiating a Long-Term Relationship with Iraq: Hearing Before the S. Comm. on Foreign Relations*, 110th Cong. (2008); *International Relations Budget for Fiscal Year 2009: Hearing Before the H. Comm. on Foreign Affairs*, 110th Cong. (2008); *The November 26 Declaration of Principles: Implications for UN Resolutions on Iraq and for Congressional Oversight: Hearing Before the H. Subcomm. on Int’l Orgs., Human Rights and Oversight of the H. Comm. on Foreign Affairs*, 110th Cong. (2008); *Fiscal Year 2009 National Defense Budget Request from the Department of Defense: Hearing Before the H. Comm. on Armed Services*, 110th Cong. (2008); *Status of Forces Agreements and UN Mandates: What Authorities and Protections Do They Provide to U.S. Personnel?: Hearing Before the H. Subcomm. on Int’l Orgs., Human Rights and Oversight, of the H. Comm. on Foreign Affairs*, 110th Cong. (2008). See generally 154 Cong. Rec. 13, 17840 (2008); *Hearing on U.S.-Iraq Long-Term Security Agreement, Before the S. Comm. on Foreign Relations*, 110th Cong. (2008); *Status of Forces Agreements and U.N. Mandates: What Authorities and Protections Do They Provide to U.S. Personnel?*, Before the Subcomm. on Int’l Orgs., Human Rights and Oversight of the H. Comm. on Foreign Affairs, 110th Cong. 110–53 (2008); *International Relations Budget for Fiscal Year 2009, Before the H. Comm. on Foreign Affairs* (2008); *The November 26 Declaration of Principles: Implications for U.N. Resolutions on Iraq and for Congressional Oversight, Before the Subcomm. on Int’l Orgs., Human Rights and Oversight of the H. Comm. on Foreign Affairs*, 110th Cong. (2008); *Fiscal Year 2009 Budget for the Department of Defense, Before the H. Comm. on Armed Services*, 110th Cong. (2008); Letter from Jeffrey T. Bergner, Assistant Secretary, Legislative Affairs, U.S. Dep’t of State, to the Honorable Gary Ackerman, Chairman, Subcomm. on the Middle East and South Asia Comm. on Foreign Affairs, H.R. (Mar. 5, 2008) (available at <http://www.state.gov/documents/organization/138828.pdf>).

187. See Logan, *supra* note 185.

The initiation and termination of the War in Afghanistan have followed similar paths as the wars against Iraq. U.S. forces remain in Afghanistan as part of a broad NATO-based coalition pursuant to the congressional AUMF passed on September 18, 2001.¹⁸⁸ The 2001 AUMF allowed the use of force against nations, organizations, and persons connected to the terrorist attacks, distinguishing the war from those in Iraq as a war against non-state actors.¹⁸⁹ The President has announced that most combat forces will leave the country by 2014 (when Afghanistan forces will take over security of the country).¹⁹⁰ In April 2012, the President signed a strategic partnership agreement with Afghan President Hamid Karzai that will regulate U.S.-Afghanistan relations after 2014.¹⁹¹ Like the Iraq wars, there has been no peace treaty.¹⁹²

What does the absence of formal peace treaties in recent major wars suggest about Congress's constitutional role in terminating war? The President continues to seek and receive authorization from Congress to initiate major wars; however, Congress has acquiesced in allowing the executive to establish the terms of peace.¹⁹³ Unlike in other wars since 1945, with respect to the war in Afghanistan, Congress has not significantly relied on the power of the purse to control the direction of the war.¹⁹⁴ Oona Hathaway's argument—that the President's increased use of executive agreements that do not require congressional approval actually undermines the President's ability to negotiate as effectively as possible—has great purchase.¹⁹⁵ Because the executive negotiators are “unable to point to the need to obtain congressional support as a reason for insisting on a better deal for the United States,” the other party can demand concessions from the

188. See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

189. See *id.*

190. See Barack Obama, President of the U.S., Remarks by the President at ISAF Meeting on Afghanistan (May 21, 2008) (transcript available at <http://www.whitehouse.gov/photos-and-video/video/2012/05/21/president-obama-speaks-isaf-meeting-afghanistan#transcript>).

191. Alissa J. Rubin, *With Pact, U.S. Agrees to Help Afghans for Years to Come*, N.Y. TIMES, Apr. 23, 2012, at A1, available at http://nytimes.com/2012/04/23/world/asia/us-and-afghanistan-reach-partnership-agreement.html?pagewanted=all&_r=0.

192. See Karen DeYoung & Ernesto Londoño, *In Afghanistan, U.S. Losing Patience As Deadline for Long-Term Deal Nears*, WASH. POST (Oct. 10, 2013), http://articles.washingtonpost.com/2013-10-10/world/42902092_1_aimal-faizi-u-s-forces-afghan-taliban.

193. See Logan, *supra* note 185.

194. As the Iraq War grew unpopular, some in Congress did consider possible ways to end the war, sparking legal scholarship on the issue. Accord Charles Tiefer, *Can Appropriation Riders Speed Our Exit from Iraq?*, 42 STAN. J. INT'L L. 291, 342 (2006) (arguing that Congress could end a fully authorized war through appropriations).

195. Hathaway, *supra* note 149, at 233–36.

President that are greater than what Congress would have consented to.¹⁹⁶ Thus, under some circumstances, concerted engagement by both the President and the Senate can bring about the end of a war on better terms than if the President were to act alone.

B. Emergent Constitutional Themes

1. Functional Symmetry in Declared and Undeclared Wars

Historical practice regarding war initiation and termination can clearly be divided between pre-World War II wars and post-World War II wars. Congress has declared war on five occasions, all before the creation of the United Nations. Each of these wars was terminated through a relatively robust process that involved the executive and legislative branches of government, peace treaty negotiations, and the ratification of peace treaties.¹⁹⁷ The Senate's rejection of the Treaty of Versailles after World War I and subsequent congressional resolutions ending the war arguably marked the height of congressional involvement in war termination before World War II.

The wars after World War II reflect a different paradigm, where Congress no longer formally declares war, nor plays a part in the creation of a peace treaty.¹⁹⁸ One could make the argument that based on the pre-World War II historical practice of treaty ratification or congressional resolutions associated with the end of wars, the President should not be able to terminate a war without congressional authorization. On the other hand, some commentators contend that post-World War II historical practice indicates that congressional approval is not necessary to terminate the War in Afghanistan, or other recent operations, formally.¹⁹⁹

This Article contends that although neither congressional authorization

196. *Id.* at 234–35. Hathaway's argument is based on decision theory concepts developed in THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 19 (1980).

197. *See supra* Part II.A.1–2 and accompanying notes.

198. *See* discussion *supra* Parts II.A.3 and accompanying notes.

199. *See generally* Hathaway, *supra* note 12, at 1287–88 (The United States concluded more than ten times as many executive agreements as treaties in the 1990s; evidence that the President now can act without congressional approval to sign international treaties.); Adam Klein, Comment, *The End of Al Qaeda? Rethinking the Legal End of the War on Terror*, 110 COLUM. L. REV. 1865 (2010) (discussing war termination jurisprudence and suggesting the 2001 AUMF should not be considered to provide the President war powers of an unlimited duration).

nor congressional engagement is a necessary condition for constitutional war termination, ending wars without congressional engagement generates tension with the principles of the separation of powers, and the Framers' expectation that the treaty-making power would be held and exercised concurrently by the President and Congress.²⁰⁰

Although Congress has not formally declared war since World War II, Congress still influences the war authorization process pursuant to its constitutional authority under the Declare War Clause.²⁰¹ In the decades since World War II, presidents have authorized military operations without congressional authorization on numerous occasions,²⁰² and Congress has largely acquiesced to these actions.²⁰³ Jack Goldsmith contends that this trend reflects an era devoid of formal declarations of war and increased autonomy for presidents in the war authorization process.²⁰⁴ However, presidents have often sought some form of congressional consultation or

200. See discussion *infra* Part IV.

201. See U.S. CONST. art. I, § 8. One could argue that the word, "declare," in the Declare War Clause encompasses either a formal declaration or an authorization of the commencement of hostilities. See Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1545 (2002). See generally Bradley & Goldsmith, *supra* note 68; BRADLEY & GOLDSMITH, *supra* note 145, at 220.

202. Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 YALE L.J. 845, 846–47 (1996) ("During the Cold War era . . . [p]residents often simply informed Congress of deployment decisions already made, or nominally consulted with some members, but rarely asked the full Congress to authorize combat operations. Congress, despite its constitutional power to 'declare War,' grew comfortable playing a reactive role during the Cold War years, 'scolding' the President after the fact if military action went wrong, but rarely insisting on advance approval even when doing so might have been possible. This war powers pattern—reinforced by judicial abstention—was heralded by many presidents as an appropriate and necessary response to the Cold War Strong arguments can be made that this pattern of presidential assertion and congressional passivity was never constitutionally sound." (footnotes omitted)).

203. In addition, the Supreme Court has considered the underlying constitutional war powers question a non-justiciable political question. See Jonathan L. Entin, *The Dog That Rarely Barks: Why the Courts Won't Resolve the War Powers Debate*, 47 CASE W. RES. L. REV. 1305, 1306–13 (1997); Louis Henkin, *The Constitution for Its Third Century: Foreign Affairs*, 83 AM. J. INT'L L. 713, 714 (1989); see also ELY, *supra* note 159, at 54 ("[A] tacit deal has existed between the executive and legislative branches . . . to the effect that the president will take the responsibility . . . so long as he can make the decisions, and Congress will forego actual policy-making authority so long as it doesn't have to be held accountable."); Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1304–05 (1988) (arguing that Congress often lacks the political will to challenge a President's unilateral military action).

204. BRADLEY & GOLDSMITH, *supra* note 145, at 268–69. Since the Vietnam War, there have been at least sixteen major U.S. military operations, eleven of which have received no congressional authorization. *Id.* at 359–60.

authorization, and most of the major U.S. military operations since World War II have been preceded by congressional authorization.²⁰⁵ Congressional authorizations for the use of military force and war appropriations have been viewed as the functional equivalent of a formal congressional declaration of war, as with the Vietnam-era Gulf of Tonkin Resolution; this has occasionally involved post hoc ratifications of the use of military force after such operations are already under-way.²⁰⁶

2. Absence of Functional Equivalent to Peace Treaty

Even though Congress played a strong role in terminating wars throughout the first hundred years of the U.S. through peace treaties, since the end of World War II, Congress has not settled on an equivalent means of fulfilling its constitutional role in war termination. The lack of a formal declaration of war may explain the lack of a formal peace treaty terminating the war. Functionally, however, there is no equivalent method to end a war that would involve Congress—except for perhaps relying on the appropriations process or repealing an authorization to use force.²⁰⁷ Congress has not consistently used either method. Given that both constitutional mechanisms would require a two-thirds majority to override a likely presidential veto, neither serves as an adequate substitute for the treaty-making process. Unlike submission of a peace treaty by the President, requiring two-thirds of the Senate to consent, an appropriations restriction or legislation repealing a force authorization would both require significantly more political will from Congress, while also potentially cutting the President out of the decision to terminate the war.²⁰⁸

205. Most recently the 2001 AUMF for Afghanistan, *see supra* note 5, and the 2002 AUMF against Iraq, Pub. L. No. 107-243, 116 Stat. 1498 (2002), preceded the last two major U.S. wars. The Vietnam War was preceded by the Gulf of Tonkin Resolution. Gulf of Tonkin Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964). Additionally, some scholars argue that under the Take Care Clause, Article II, Section 2, Presidents can initiate military actions based on U.N. Security Council resolutions without congressional authorization. *See, e.g., The Constitutional Roles of Congress and the President in Declaring and Waging War, Before the S. Comm. on the Judiciary*, 102d Cong. 426 (1991) (statement of Robert F. Turner).

206. GEORGE C. HERRING, *AMERICA'S LONGEST WAR: THE UNITED STATES AND VIETNAM, 1950–1975* (2d ed. 1986); GARY HESS, *PRESIDENTIAL DECISIONS OF WAR: KOREA, VIETNAM, AND THE PERSIAN GULF* (2001); WORMUTH & FIRMAGE, *supra* note 159; *see, e.g.,* Bradley & Goldsmith, *supra* note 68 (regarding congressional ratification of military action post September 11, 2001).

207. Scholars disagree about whether a repeal of an authorization can terminate a war. *See infra* note 312 and accompanying text.

208. *See generally infra* note 282.

III. TWO MISCONCEPTIONS ABOUT CONSTITUTIONAL WAR TERMINATION POWERS

In this part, the Article addresses two misconceptions germane to interpreting constitutional war termination powers. The first is that Congress has the power to terminate war unilaterally pursuant to its power to declare war. As the Article explains, the Declare War Clause does not give Congress the corresponding power to declare an end to war. Further, war termination powers must be grounded in the power to negotiate and conclude treaties, and treaty negotiations necessarily involve the executive branch.

The second misconception is that, as a constitutional matter, it is unproblematic for the President to make peace treaties without congressional consent. The power to end war is inextricably linked to the power to make treaties. Not only is the treaty power held concurrently by Congress and the President, but historical practice suggests that war termination agreements should involve congressional concurrence.

A. Congressional Power to Declare Peace Unilaterally

Some scholars have suggested that Congress's constitutional power "[t]o declare [w]ar"²⁰⁹ implies a corollary power to declare peace,²¹⁰ or that

209. U.S. CONST. art. I, § 8, cl. 11. As constitutional framer James Wilson of Pennsylvania noted:

It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large: this declaration must be made with the concurrence of the House of Representatives: from this circumstance we may draw a certain conclusion that nothing but our national interest can draw us into a war.

See JAMES MADISON, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL . . . 488 (Jonathan Elliot ed., 1876).

210. See WILLIAM WHITING, WAR POWERS UNDER THE CONSTITUTION OF THE UNITED STATES 312 (43d ed. 1871) (asserting that since Congress can declare war, as well as provide or withhold the means to carry it out, it may also "declare or recognize peace"); Leonard G. Ratner, *The Coordinated Warmaking Power—Legislative, Executive, and Judicial Tools*, 44 S. CAL. L. REV. 461, 470 (1971) ("Congress may terminate as well as authorize hostilities, *i.e.* declare peace as well as war."); J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 87 (1991) (discussing Blackstone's statement "that under English law," the power to declare war implies the power to declare peace); see also LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 76, 371 n.66 (2d ed. 1996) (arguing that although the congressional power to make peace was not generally accepted following World War I, "the power to end the state of war by resolution is now well established;" noting that a congressional declaration of war or authorization for the use of military

the congressional power to declare peace is derivative of its power to repeal legislation.²¹¹ Some of these scholars contend that the constitutional power of Congress to terminate war is grounded in Supreme Court precedent,²¹² while others assert that it is based in historical practice.²¹³

Whether this interpretation of congressional war termination powers reflects the understanding of the Founders is an open question.²¹⁴ Although

force may exercise war termination powers by temporal conditions: “Congress can decide when war should end by imposing a time limit on its duration when it authorizes war, or by defining the purposes of the war in terms that imply that it shall end when those purposes are achieved.”). *But cf.* John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 Calif. L. Rev. 167, 268–69 (1996) (contending that the Framers “believed that a decision as significant as peace could not be made without [the President’s] consent”).

211. *See* JAMES R. TUCKER, 2 THE CONSTITUTION OF THE UNITED STATES 718 (1899) (“Is there no end to the war except at the will of the President and Senate? No authority can be cited on the question, but the writer thinks a repeal of a law requiring war would be effectual to bring about the status of peace in place of war.”); Simeon E. Baldwin, *The Share of the President of the United States in a Declaration of War*, 12 AM. J. INT’L L. 1, 13–14 (1918) (“Peace could, no doubt, also be restored by an Act of Congress. As a declaration of war takes the shape with us of a statute, it would seem that it can be repealed by a statute.”); Edward S. Corwin, *The Power of Congress to Declare Peace*, 18 MICH. L. REV. 669, 674–75 (1920). *But see, e.g.*, Mathews, *supra* note 11, at 831 (noting that Congress may not repeal a statute admitting a state to the Union and the same logic may apply to a repeal of a declaration of war, though noting such an analogy does not necessarily mean that no such power exists).

212. *See* HENKIN, *supra* note 210, at 370–71 n.66 (citing *Ludecke v. Watkins*, 335 U.S. 160 (1948), for the proposition that “[t]he State of War’ may be terminated by treaty or legislation or Presidential proclamation,” but not acknowledging that the Court there examined an issue of statutory interpretation—whether the “declared war,” had terminated, not whether the state of war had terminated).

213. These scholars emphasize that U.S. involvement in both World War I and World War II was terminated by a joint resolution of Congress. *See, e.g.*, HENKIN, *supra* note 210, at 76; *see also* CONG. RESEARCH SERV., 93D CONG., CONGRESS AND THE TERMINATION OF THE VIETNAM WAR 2 (Comm. Print 1973) (noting that the congressional resolutions pronouncing the end of both of the world wars are generally used by authorities to mark the definitive ends of those wars).

214. Regarding the balance of executive and congressional war powers, Madison wrote, Those who are to conduct a war cannot in the nature of things, be proper or safe judges, whether a war ought to be commenced, continued, or concluded. They are barred from the latter functions by a great principle in free government, analogous to that which separates the sword from the purse, or the power of executing from the power of enacting laws.

6 THE WRITINGS OF JAMES MADISON 148 (Gaillard Hunt ed., 1906). *See* MADISON, *supra* note 4, at 525–26 (discussing that the founders debated and rejected the idea of allowing the Senate to make peace treaties without the concurrence of the President as it would require with other treaties). Moreover, James Madison praised the allocation of war powers when he wrote: “In no part of the [C]onstitution is more wisdom to be found, than the clause which confides the question of war or peace to the legislature, and not to the executive department.” *See* ALEXANDER HAMILTON (PACIFICUS) & JAMES MADISON (HELVIDIUS), LETTERS OF PACIFICUS AND HELVIDIUS ON THE PROCLAMATION OF NEUTRALITY OF 1793 89 (J. & G. S. Gideon 1845).

there is no explicit reference to the power to declare peace in the Constitution,²¹⁵ the deliberations at the Constitutional Convention show that the Founders considered and ultimately rejected the view that Congress should possess the constitutional power to declare peace.²¹⁶ Pierce Butler, for example, proposed an amendment that would have added the words, “and peace,” after “declare war,” and would arguably have granted Congress the power to declare peace.²¹⁷ Another founding proponent of granting Congress the power to declare peace, Charles Pinckney, argued that “[i]t would be singular for one authority to make war, and another peace,”²¹⁸ and his claim was buttressed by William Blackstone’s view that “wherever the right resides of beginning a national war, there also must reside the right of ending it, or the power of making peace.”²¹⁹ The Founders believed that constitutional war termination powers must be grounded in the power to

215. The absence of an explicit reference to the peace power in the Constitution is particularly conspicuous, given that this peace power was included in the Articles of Confederation—under which the Continental Congress possessed the “sole and exclusive right and power of determining on peace and war.” ARTICLES OF CONFEDERATION OF 1777, art. IX. The Founders’ decision to vest in the Continental Congress the peace power did not reflect a judgment that the power was legislative in character; further, as the national government only included one branch—the legislative branch—the Founders did not vest the peace power in the legislative branch to maintain federal checks and balances. See JOHN YOO, FOREIGN AFFAIRS AND THE PRELUDE TO THE CONSTITUTION 73–75 (2006). Instead, federalism concerns regarding the desire to withhold the peace power from the states motivated the Founders to vest the peace power with the Continental Congress. See *id.* (noting that under the Articles of Confederation, most legislative powers were retained by the state, and arguing that Congress received the war and peace powers to replace the vacancy left in the executive power by the Crown and to unify foreign relations under the national government). Indeed, during a debate over whether or not the executive power under the new Constitution ought to reside in one person, James Rutledge opined that the sole executive ought to have the full executive power, save for the power of war and peace, suggesting that the understanding of the time was that declarations of war and peace were inherently executive powers. See MADISON, *supra* note 4, at 140.

216. Notwithstanding these attempts, opponents of granting Congress the exclusive power to terminate war prevailed. Here are two examples of the prevailing view. Oliver Ellsworth argued that “[t]here is a material difference between the cases of making *war* and making *peace*. It should be more easy to get out of war, than in to it. War also is a simple and overt declaration, peace attended with intricate and secret negotiations.” See JAMES MADISON, JOURNAL OF THE FEDERAL CONVENTION 548 (E. H. Scott ed., 1898). Further, George Mason disfavored “giving the power of war to the Executive, because not safely to be trusted with it He was for clogging rather than facilitating war; but for facilitating peace. He preferred ‘declare’ to ‘make’.” See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 290 (Max Farrand ed., Yale Univ. Press 1911) (emphases in original).

217. See MADISON, *supra* note 216, at 548–49.

218. *Id.* at 548.

219. See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *258.

negotiate and conclude treaties,²²⁰ and in the importance of the President's ability to negotiate peace treaties in secret.²²¹ For these reasons, it is doubtful that, as a constitutional matter, the Founders believed that a congressional declaration of peace could terminate a legal state of war.

Notwithstanding the U.S. Supreme Court's reluctance to decide whether a war has ended,²²² various Court cases during the Civil War, Spanish-American War, and World War I eras suggest that Congress should not terminate war without presidential consent.²²³ Further, the unique historical circumstances surrounding the Treaty of Versailles after World War I compelled consideration of alternative means of war termination.

After World War II, in *Ludecke v. Watkins*, the Supreme Court addressed whether the provisions of the Alien Enemy Act of 1798 had expired based on whether the "declared war" referenced in the statute had ended.²²⁴ The Court noted that "[t]he state of war" may be terminated by treaty or legislation or Presidential proclamation. Whatever the mode, its termination is a political act."²²⁵ The Court clarified that by "state of war" it was referring to the end-life of the statute and was not addressing the question of who has the authority to declare peace.²²⁶ Consequently, the

220. See JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1173, at 98 (Little, Brown & Co. 1858) (explaining that a congressional power to make peace was unanimously rejected at the Convention in favor of making peace through treaty).

221. Concerns over secrecy contributed both to the constitutional Founders' decision to ensure presidential involvement in the treaty-making process, as well as their rejection of Madison's proposal to "authorize a concurrence of two-thirds of the Senate to make treaties of peace, without the concurrence of the President." MADISON, *supra* note 4, at 525–26. As Roger Sherman of Connecticut argued, "the necessity of secrecy in the case of treaties forbade a reference of them to the whole legislature." *Id.* at 523. Further, Governor Morris, concerned about the provincial focus of Senators on individual states, argued "that no peace ought to be made without the concurrence of the President, who was the general guardian of the national interests." *Id.* at 524.

222. During the U.S. Civil War the Supreme Court held that whether there existed a state of war between the North and the South was "a question to be decided by [the President], and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted." *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862) (emphasis omitted). One hundred years after the *Prize Cases* decision, the Court observed, in *Baker v. Carr*, that "isolable reasons for the presence of political questions, underlying this Court's refusal to review the political departments' determination of when or whether a war has ended." 369 U.S. 186, 213 (1962).

223. See *supra* Part II.

224. 335 U.S. 160 (1948).

225. See *supra* note 139.

226. See *Ludecke*, 335 U.S. at 168–69 n.13; *id.* at 169 ("Whether and when it would be open to this Court to find that a war though merely formally kept alive had in fact ended, is a question too fraught with gravity even to be adequately formulated when not compelled.").

Court's observation regarding "termination by legislation" seems to be a method by which the statute, not the war, could be terminated.²²⁷ Because no treaty had been concluded before the Court issued its decision, the Court examined whether a presidential proclamation had been issued to determine whether peace had been restored.²²⁸

Scholars, who support Congress' power to declare peace, point to past practice in which Congress attempted to (or terminated) a war by placing restrictions on the use of funds to limit the President's use of U.S. forces.²²⁹

B. Presidential Peace Treaty-Making in a Vacuum

Some scholars argue that the history of the Treaty Clause suggests that although the Founders rejected numerous attempts to impose substantive limits on the treaty-making power,²³⁰ they did not believe that either Congress or the President should have the power to make treaties unilaterally.²³¹ Many scholars contend that sole executive agreements—

227. See *supra* note 139.

228. See *supra* note 227; see also *Ludecke*, 335 U.S. at 170 ("The political branch of the Government has not brought the war with Germany to an end. On the contrary, it has proclaimed that 'a state of war still exists.'" (citations omitted)).

229. See *Exercising Congress' Constitutional Power to End a War: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 11 (2007) (statement of David J. Barron, Professor of Law, Harvard Law School) ("given all that we know about the Framers' understandings and all the precedents that we have had over 200 years of the Nation's history of engagement in military conflicts, that it is clear that the measures being considered, as I understand them, fall well within the substantial zone of authority that Congress possesses.").

230. See David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1085 (2000) (contending that in defining the contours of the treaty power, the Founders prioritized procedural over substantive limitations); see also Hathaway, *supra* note 12, at 1276–85 (examining the founding history surrounding the treaty power).

231. At the Pennsylvania ratifying convention, James Wilson explained that the treaty-making power is not held exclusively by either political branch: "Neither the President nor the Senate, solely, can complete a treaty; they are checks upon each other, and are so balanced as to produce security to the people." See 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 507 (Jonathan Elliot ed., 2d ed. 1937). Similarly, Charles Pinckney and James Madison maintained that the treaty-making process necessarily involves both the executive and the legislative branches. See *id.* at 265, 347; see also Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1587 (2007) ("The history of the Treaty Clause reveals that the Founders did not trust any single actor to make treaties on its own. The drafters denied both the Senate and the President sole power to make treaties. Instead, they assigned the power to the President acting in conjunction with a supermajority of the Senate. This carefully considered procedure thus tends to rebut any suggestion that the President has unilateral power to make

international agreements concluded based on the President's exclusive constitutional authority—may only be concluded under a limited set of circumstances,²³² and raise questions about whether the constitutional authority of the President to conclude such non-treaty agreements to resolve international conflicts.²³³ Some of these scholars consider unilateral presidential action on international agreements unconstitutional and undemocratic.²³⁴ Finally, notwithstanding debates about the constitutionality of sole executive war termination agreements, there is still a question of whether war termination agreements require congressional approval under the Treaty Clause.²³⁵

Among the more prominent voices in this debate, Oona Hathaway argues “the President may not commit the United States to an international agreement on his own if he would be unable to carry out the obligations created by the agreement on his own in the absence of an agreement.”²³⁶

‘Treaties’ simply by calling them ‘agreements.’”).

232. Executive agreements are generally referred to as non-treaty agreements. See CONG. RESEARCH SERV., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 65, 76–78 (Comm. Print 2001). In terms of the specific debate regarding sole executive agreements—not limited to the war termination context—Oona Hathaway is one of the most prominent advocates of constraining narrowing the President's authority to conclude executive agreements without prior congressional approval. Hathaway argues that the intent of the framers of the Constitution was that international agreements would almost exclusively be enacted pursuant to the treaty power, except in very limited circumstances. Hathaway, *supra* note 149, at 266–67. Michael Ramsey argues that under the founding intent, sole executive agreements were limited to minor and temporary issues and they required legislative implementation. Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133, 218–40 (1998). Bradford Clark agrees with this analysis of the founding generation's view of executive agreements. Clark, *supra* note 231, at 1574–75. For further discussion of functional arguments against such executive agreements, see Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L. REV. 671 (1998).

233. Ingrid Brunk Wuerth, *The Dangers of Deference: International Claim Settlement by the President*, 44 HARV. INT'L L.J. 1, 12 (2003) (citing HENKIN, *supra* note 210, at 219–24).

234. Hathaway stresses that an imbalance in power between the President and Congress due to unilateral presidential action and congressional delegation of authority. Hathaway, *supra* note 149, at 266–67. Normatively, Hathaway argues the current system—in which executive agreements far outnumber Senate approved treaties—is undemocratic and may lead to less effective international agreements. *Id.* at 230–38. See generally Wuerth, *supra* note 233.

235. See Abraham C. Weinfeld, *What Did the Framers of the Federal Constitution Mean by “Agreements or Compacts”?*, 3 U. CHI. L. REV. 453, 460 (1936) (The Founders may have understood “treaties” to encompass “treaties of peace, of amity and commerce, consular conventions, [or] treaties of navigation.”).

236. Hathaway, *supra* note 149, at 212. Hathaway continues:

Hence, the President cannot enter an agreement that requires the appropriation of funds or declares war without congressional approval of the agreement, because the President

According to Hathaway's test, the President could commit the U.S. pursuant to an international war termination agreement, so long as the commitment thus undertaken could be discharged without congressional action in the absence of such an agreement.²³⁷ War termination, however, is an area where the President could carry out the terms of the agreement without congressional action. As the Commander in Chief and the Chief Executive of the U.S.,²³⁸ the President has the constitutional authority to withdraw U.S. forces from a theater of combat, to recognize countries and international boundaries,²³⁹ and to resolve international claims and other elements that typically are included in war termination agreements.²⁴⁰ If the President is constitutionally responsible for the individual elements of a standard peace treaty, in Hathaway's view, he may conclude the entire peace agreement unilaterally.²⁴¹

But the whole constitutional war termination power is greater than the sum of the obligations that may be undertaken in any such peace agreement. Notwithstanding the President's broad unilateral authority to conclude sole executive agreements concerning foreign affairs matters involving the President's independent war powers, founding history, political branch practice, and case law reflect the substantial extent to which the power to make peace treaties was not meant to be held exclusively by the President. Congress has a prominent role to play in making peace treaties, and determining how and when war should end—even in the absence of a peace treaty or other war termination agreement.

The text of Article II of the Constitution makes plain that “[the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”²⁴² Further, Article I provides that “[n]o State shall, without the

cannot take these actions in the absence of an agreement. The President may not use a sole executive agreement with another nation, in other words, to expand his powers beyond those granted to him in the Constitution.

Id. Bradford Clark concurs with this idea: “Simply put, courts should permit a sole executive agreement to override preexisting legal rights only when the President has independent authority to do so.” Clark, *supra* note 231, at 1577.

237. *See supra* note 236.

238. *See* U.S. CONST. art. II, § 2, cl. 1.

239. Clark, *supra* note 231, at 1637 (discussing the Presidential recognition of the Soviet Union via a sole executive agreement).

240. *Id.* at 1635–37 (discussing presidential authority to settle claims).

241. *See* Hathaway, *supra* note 149, at 212.

242. U.S. CONST. art. II, § 2, cl. 2. Under the Supremacy Clause, treaties are “the supreme Law

Consent of Congress . . . enter into any Agreement or Compact . . . with a foreign Power.”²⁴³ This clause implies that there are types of international agreements that fall outside of the treaty power.²⁴⁴ As a constitutional matter, for the President to terminate a war unilaterally by international agreement, he must use a non-treaty mechanism—such as an executive agreement.

Absent a congressional declaration of war, why is congressional action in peace treaty-making important? The historical record of congressional involvement at both the start and end of wars supports the argument that congressional action should be a necessary part of the war termination process.²⁴⁵ As a practical matter, if Congress does not perform its role in terminating war,²⁴⁶ arguably, future presidents would have the ability to re-initiate wars that had been terminated by prior presidents without congressional authorization.²⁴⁷ In other words, if Congress makes no statutory changes, ten years from now, the President might have the authority to disregard the sole executive agreement and proclamation ending combat operations in Iraq and deploy U.S. forces back into Iraq without congressional assent²⁴⁸—such congressional abdication of war termination power risks significantly expanding the President’s ability to re-prosecute prior wars.

The Supreme Court has upheld, as constitutionally valid, some sole

of the Land.” U.S. CONST. art. VI, cl. 2.

243. U.S. CONST. art. I, § 10, cl. 3.

244. See Wuerth, *supra* note 233, at 11; see also Clark, *supra* note 231, at 1587–88. For scholarship emphasizing both structural and implied text, see, e.g., Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 798 (1999) (“When extended beyond paragraphism to encompass the entire document, holistic textualism has an obvious virtue: it invites readers to ponder connections between noncontiguous clauses that have no textual overlap, yet nevertheless cross-illuminate.”).

245. Even if Congress may not be able to pass a peace treaty in some wars—such as those with non-state actors—it could still pass congressional-executive agreements that would achieve the same purposes. See Hathaway, *supra* note 12, at 1286–88 (arguing that congressional-executive agreements are preferred over Article II treaties).

246. See generally U.S. CONST. art. I, § 8, cl. 11.

247. See generally U.S. CONST. art. II, § 2, cl. 1.

248. See generally Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498; Strategic Framework Agreement for a Relationship of Friendship and Cooperation Between the United States of America and the Republic of Iraq, U.S.-Iraq, pmb., Nov. 17, 2008, Temp. State Dep’t No. 09-7, KAV 8552; Barack Obama, President of the U.S., Remarks by the President in Address to the Nation of the End of Combat Operations in Iraq (Aug. 31, 2010) (transcript available at <http://www.whitehouse.gov/the-press-office/2010/08/31/remarks-president-address-nation-end-combat-operations-iraq>).

executive agreements that received no congressional approval.²⁴⁹ The Court, however, has never ruled on the narrower issue of sole executive war termination agreements.²⁵⁰ Because the Court has not addressed the precise legal question that determines the constitutionality of unilateral war termination agreements, it is useful to consider the interpretive guidance reflected in founding history, prior political branch practice, and the Constitution's text.²⁵¹

In the post-World War II era, a variety of executive agreements have been concluded as part of efforts to wind down or simply terminate conflicts, and have taken the place of formal, Senate-approved peace treaties. For instance, U.S. relations with Iraq²⁵² and with Afghanistan²⁵³ are governed by long-term strategic agreements enacted as sole executive agreements. Both of these agreements (which are more similar in language and scope to previous declarations of war)²⁵⁴ were signed before the withdrawal of U.S. forces from those countries, and reflect the President's ability to determine unilaterally the terms of withdrawal and postwar bilateral interactions. Additionally, the combat operations in Iraq ended with a presidential

249. See *infra* note 250; see also Clark, *supra* note 231, at 1575–77. In addition to sole executive agreements, there are also congressional-executive agreements that are not subject to the Advice and Consent Clause. HENKIN, *supra* note 210, at 217 (“[I]t is now widely accepted that the Congressional-Executive agreement is available for wide use, even general use, and is a complete alternative to a treaty.”). See generally Paul, *supra* note 232 (arguing the President's foreign policy power should be reduced).

250. In *United States v. Belmont*, the Court stated in dicta that sole executive agreements are constitutionally valid international agreements. 301 U.S. 324, 330 (1937). *Belmont* concerned an executive agreement's preemption of state law, but, there, the Court did not address narrower legal questions regarding war termination agreements. *Id.* at 331; see also *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (broadly asserting the President's right to enter into sole executive agreements relating to settling claims). *American Insurance Ass'n v. Garamendi* also affirmed the Court's statement in *Dames & Moore* that the President can enter into sole executive agreements. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003). In 1942, in *United States v. Pink*, the Court also affirmed FDR's sole executive agreement that recognized the Soviet Union. 315 U.S. 203 (1942).

251. In *Ludecke v. Watkins*, the Court stated that war is terminated not by cessation of hostilities, but by a political act, including by a peace treaty; the Court, however, observed this point in dicta. 335 U.S. 160, 168–69 (1948).

252. Strategic Framework Agreement for a Relationship of Friendship and Cooperation Between the United States of America and the Republic of Iraq, U.S.-Iraq, pmbL., Nov. 17, 2008, Temp. State Dep't No. 09-7, KAV 8552.

253. Enduring Strategic Partnership Agreement between the United States of America and the Islamic Republic of Afghanistan, U.S.-Afg., pmbL., May 2, 2012, available at <http://www.whitehouse.gov/sites/default/files/2012.06.01u.s.-afghanistanspassignedtext.pdf>.

254. See Bradley & Goldsmith, *supra* note 68, at 2072–83.

announcement²⁵⁵ and the transfer of sovereignty to Iraq. Status of Forces Agreements have also become common between the U.S. and other countries during and after hostilities.²⁵⁶ The U.S. also signs defense agreements, memoranda of understanding, and trade agreements with countries after combat operations have ended.²⁵⁷

The Founders disagreed on which branch of government would be responsible for war termination.²⁵⁸ Actions at the Constitutional Convention and statements of one group of Founders support the view that the President has a unilateral power to terminate wars, while James Madison and James Monroe believed in a strong congressional role in war termination.²⁵⁹ At the Constitutional Convention, the Founders considered giving Congress the power to declare peace, but this proposal was rejected.²⁶⁰ Similarly, the Articles of Confederation gave Congress the “sole and exclusive right and power of determining on peace and war.”²⁶¹ The omission of an enumerated congressional power to declare or make peace supports the argument that the Framers intended for the President to take the lead²⁶² or even have unilateral war termination powers.²⁶³ Several attendees of the Convention (such as Oliver Ellsworth and George Mason) added that Congress should not have the power to declare peace for policy reasons—indicating that they favored

255. See *supra* note 184

256. Status of Forces Agreements commonly deal with criminal jurisdiction of U.S. armed forces members that remain in the target country, financial issues, and other agreements related to the continued U.S. presence in a country. R. CHUCK MASON, CONG. RESEARCH SERV., RL 34531, STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW HAS IT BEEN UTILIZED? (2012).

257. Other examples of bilateral agreements (not limited to the context of war termination agreements) include “nonbinding resolutions, exchanges of notes, joint communiques, joint declarations, *modi vivendi*, political agreements, administrative agreements, voluntary guidelines, handshakes, verbal promises, unperfected acts, arrangements, letters of intent, statements of intent, statements of principles, declarations of principles, ‘best practices,’ exchanges of letters, unspoken rules, gentlemen’s agreements, and side letters.” Jack L. Goldsmith & Eric A. Posner, *International Agreements: A Rational Choice Approach*, 44 VA. J. INT’L L. 113, 114 (2003).

258. See MADISON, *supra* note 216, at 547–49.

259. See *id.*

260. Pierce Butler proposed an amendment to give Congress the power to declare peace, but this amendment was rejected at the Constitutional Convention. See MADISON, *supra* note 216, at 547–49; JOHN R. VILE, THE CONSTITUTIONAL CONVENTION OF 1787: A COMPREHENSIVE ENCYCLOPEDIA OF AMERICA’S FOUNDING 73 (2005).

261. ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 1.

262. It could also imply that the power to declare peace was shared between the President and Congress through the treaty approval and ratification process.

263. See Yoo, *supra* note 210, at 268–69 (stating the Framers “believed that a decision as significant as peace could not be made without [the President’s] consent” (emphasis omitted)).

unilateral presidential declarations of peace.²⁶⁴ Oliver Ellsworth remarked that “[t]here is a material difference between the cases of making *war* and making *peace*. . . . War also is a simple and overt declaration, peace attended with intricate and secret negotiations.”²⁶⁵ Similarly, George Mason stated that “[h]e was for clogging, rather than facilitating war; but for facilitating peace.”²⁶⁶

There were other members of the founding generation, who advocated a strong congressional role in war termination. James Madison supported a robust congressional war termination power.²⁶⁷ He attempted, but failed, to lower the threshold for Senate approval of a peace treaty to a simple majority.²⁶⁸ In 1818, Congress authorized James Monroe to negotiate with Great Britain over militarization of the Great Lakes.²⁶⁹ Monroe reached an agreement with Britain, but the President felt the need to ask Congress if the document should be approved as a treaty or could be ratified unilaterally.²⁷⁰ Congress passed a resolution in which two-thirds of the Senate concurred with the agreement.²⁷¹ Although this agreement was not a formal treaty, Monroe’s actions are evidence the founding generation did not think the President had broad unilateral authority to enter into sole executive agreements that concerned defense issues.²⁷²

It is also noteworthy that the Constitutional Convention rejected proposals that would have given the President exclusive power over treaty-making.²⁷³ Even Alexander Hamilton, a strong proponent of executive power, apparently believed in the importance of both political branches participating in the treaty-making process.²⁷⁴ The fact that the Founders did not want the broad treaty power to be exclusively in the hands of the President, could support an argument that international war termination

264. See MADISON, *supra* note 216, at 549.

265. See *id.* at 548.

266. *Id.*

267. For broader historical arguments that Congress can enact strong regulation of the President during ongoing wars, see Barron & Lederman, *supra* note 46, at 689.

268. See MADISON, *supra* note 216, at 685–86.

269. See SAMUEL B. CRANDALL, TREATIES, THEIR MAKING AND ENFORCEMENT 85–86 (1904).

270. *Id.* at 85.

271. *Id.*

272. See Hathaway, *supra* note 149, at 170–71.

273. Jack N. Rakove, *Solving a Constitutional Puzzle: The Treaty-making Clause As a Case Study*, in 1 PERSPECTIVES IN AMERICAN HISTORY 233, 242–43 (1984).

274. 1 CHARLES HENRY BUTLER, THE TREATY-MAKING POWER OF THE UNITED STATES 308 (1902).

agreements have to be approved by Congress.²⁷⁵

Broadly, sole executive agreements have been used by presidents to unilaterally enact international agreements since the founding era.²⁷⁶ From 1980 to 2000, presidents unilaterally entered into 543 defense agreements.²⁷⁷ On defense issues, presidents have also unilaterally signed numerous status of forces agreements with foreign countries.²⁷⁸ In terms of war termination agreements, pre-World War II congressional approval of formal peace treaties was the standard practice for major wars.²⁷⁹ However, since World War II, as the United States has engaged in more frequent military operations—many of which have been of a short duration—presidents have unilaterally ended wars—often without any formal legal termination agreement.²⁸⁰

There is, thus, a strong post-World War II trend of unilateral presidential action to terminate wars, and an absence of congressionally approved peace treaties or other war termination agreements. Such strong historical evidence in the post-World War II era has enhanced the President's authority to terminate wars unilaterally through executive agreements and presidential proclamations.²⁸¹

IV. THE PROPER ROLES OF THE PRESIDENT AND CONGRESS IN CONSTITUTIONAL WAR TERMINATION

The Founders did not envision a constitutional order in which one political branch would circumvent the other to end a war. Instead, the Founders designed a war termination process rooted in the treaty power—divided between the President and the Senate—in order to facilitate genuine

275. See Oona A. Hathaway et al., *The Treaty Power: Its History, Scope, and Limits*, 98 CORNELL L. REV. 239 (2013) (identifying the various statements of the Founders on the importance of both political branches being involved in treaty-making).

276. Ramsey, *supra* note 232, at 173–74.

277. See Hathaway, *supra* note 149, at 150–52. This includes *ex ante* agreements in which Congress gave the President authority to unilaterally negotiate. *Id.* at 152 n.18.

278. *Id.* at 153.

279. *Id.* at 144.

280. See *id.* at 168 (“The collapse of Europe, the creation of the United Nations, and the newfound leadership of the United States in the world community generated increased demand for international lawmaking by the United States. In response, Congress began delegating more and more authority to the President to make international agreements.”).

281. See GLEN S. KRUTZ & JEFFREY S. PEAKE, TREATY POLITICS AND THE RISE OF EXECUTIVE AGREEMENTS: INTERNATIONAL COMMITMENTS IN A SYSTEM OF SHARED POWERS 41 (2009).

cooperation between Congress and the President in terminating war.²⁸² Observing the constitutional checks and balances as well as the separation of powers serves the functional purpose of ensuring that the U.S. speaks with a single voice—and acts accordingly—when it comes to post-war settlements and conflict resolutions.²⁸³ Examining the history of how the constitutional means of terminating U.S. wars have changed since the nation’s founding reveals at least four themes concerning the complex interaction of the executive and legislative branches involved in ending wars: the indispensability of presidential action, power balancing, promoting restraints on arrogation of power by any single branch, and encouraging mutuality in decision making.

A. Indispensability of Presidential Action

Notwithstanding the Supreme Court’s hesitance to determine whether a war has ended, various cases during the Civil War, Spanish-American War, and World War I eras indicate that the President must play a role in the constitutional termination of a war.²⁸⁴ Although early cases suggest that wars are terminated by peace treaties, *Hamilton v. Kentucky Distilleries & Warehouse Co.*²⁸⁵ (the latest and perhaps most relevant Supreme Court decision on point) supports the argument that wars between states could also be terminated by presidential proclamation.²⁸⁶ This is in line with post-

282. See Mosier, *supra* note 52, at 1611 (“[T]he Constitution makes no mention of the power to declare peace, and the debates of the Constitutional Convention demonstrate that the Framers expected war to end by peace treaty.”); *id.* at 1613 (“Several important inferences can be drawn from the Framers’ expectation that peace would be made by treaty. We can infer that the Framers intended to foreclose unilateral presidential action, because a treaty requires the concurrence of the President and two-thirds of the Senate. On the other hand, while the President’s veto power over legislation is subject to congressional override, his treaty power is absolute: No treaty can be made without the President’s agreement. Furthermore, the ability to make peace by congressional resolution is questionable as a matter of original intent because it creates a role for the House that does not exist in the treaty process.”); see also STORY, *supra* note 220, at 98 (explaining that a congressional power to make peace was unanimously rejected at the Convention in favor of making peace through treaty).

283. See generally Mosier, *supra* note 52 (discussing the implications if Congress can declare peace by treaty and the possibility of overriding the President).

284. See, e.g., *Hamilton v. Ky. Distilleries & Warehouse Co.*, 251 U.S. 146, 159–60 (1919); *Ribas y Hijo v. United States*, 194 U.S. 315, 316 (1904); *United States v. Anderson*, 76 U.S. 56, 69–70 (1869).

285. *Hamilton*, 251 U.S. at 160–61.

286. *Id.* at 161.

World War II practice.

In addition, courts commonly consider prior executive branch practice in resolving constitutional separation of powers questions—especially in the sphere of foreign affairs.²⁸⁷ Such judicial examination reflects concerns associated with the structure of the Constitution: many constitutional war powers—such as the power to initiate war and make treaties—are held concurrently by the President and Congress.²⁸⁸ Justiciability concerns also play an analytical role, because such foreign policy matters may be more suitable for resolution by the political branches of government.²⁸⁹ Consequently, in areas of concurrent constitutional authority, courts rely

287. See, e.g., *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 327–28 (1936). See generally Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109, 147 (1984) (suggesting “a method of inquiry for determining when the inaction of one branch, in the face of an established practice of another branch, may properly be deemed to authorize the actions of the latter”); Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961 (2001) (proposing the “constitutional increments” theory—“it defines and cabins the relevance of constitutional actors and episodes and provides the channels for constitutional discourse and development”).

288. See U.S. CONST. art. II, § 2, cl. 1; *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) (detailing “a zone of twilight in which [the President] and Congress may have concurrent authority”); HENKIN, *supra* note 210, at 92, 94 (stating “some undefined zone of concurrent authority in which [Congress and the President] might act, at least when the other has not acted” is “now accepted”); see also *Garamendi*, 539 U.S. 396, 415 (recognizing the Executive’s considerable foreign affairs powers are borne less out of explicit constitutional text and more out of executive practice providing a “gloss” on the meaning of the terse Article II text); *Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring) (noting that though Congress possesses enumerated powers, the contours of constitutional executive powers are largely unenumerated and may therefore be determined by observing how the Executive has consistently operated, especially in light of congressional acquiescence). But see Glennon, *supra* note 287, at 147–48 (suggesting that custom and past practice may resolve separation of powers dispute only when branch custom represents *opinio juris seu necessitatis* and that the other branch has indicated by more than mere silence that it agrees, but acknowledging that judicial practice has largely inferred congressional acquiescence simply out of silence). Though the Constitution grants Congress enumerated powers, unbroken congressional practice may also shed light on the construction of these. See *Curtiss-Wright*, 299 U.S. at 328.

289. The Supreme Court is reluctant to involve itself in these disputes because of the political, as opposed to judicial, ramifications of these disputes—the Court would essentially have to take a side. See *Haig v. Agee*, 453 U.S. 280, 292 (1981) (“Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.”); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952) (“[Matters regarding] the conduct of foreign relations [and] the war power . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.”).

heavily on interbranch understandings and historical practice.²⁹⁰ Congress legislates with a presumptive awareness of executive branch practice, but courts do not generally infer legislative intent to codify such practice,²⁹¹ and any such judicial inference is typically “stronger in the foreign affairs arena.”²⁹² In particular, congressional legislative silence in the face of consistent executive practice can be interpreted as an acknowledgment of presidential constitutional authority for that practice.²⁹³

In addition, there may be functionalist reasons for courts to rely on executive branch practice in foreign affairs cases: Congress faces “practical limitations on [its] capacity to forge ex ante standards for executive national security action,”²⁹⁴ and the executive possesses superior expertise in marshalling and interpreting facts concerning foreign relations matters.²⁹⁵

Despite the practical advantages the executive branch possesses in its ability to make reactive—rather than hypothetically proactive policy—the Constitution does allocate significant foreign relations powers to Congress—particularly the power of appropriation and the power to make rules governing the land and naval forces.²⁹⁶ The Court has generally not taken

290. For an example of the Court giving substantial deference to presidential practice in construing a foreign affairs statute, see *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981), which stated that “the enactment of legislation closely related to the question of the President’s authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to ‘invite’ ‘measures on independent presidential responsibility.’” (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)).

291. See, e.g., *SEC v. Sloan*, 436 U.S. 103, 121–23 (1978) (declining to infer legislative acquiescence regarding a longstanding practice of the Securities and Exchange Commission, even though the Senate committee with jurisdiction over the executive branch activities in question had long approved of the practice). See generally William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 90–108 (1988) (explaining the risks associated with inferring congressional intent from legislative silence in the face of executive branch practice).

292. See Eskridge, *supra* note 291, at 74.

293. See, e.g., *Dames & Moore*, 453 U.S. at 686 (citing Supreme Court precedents indicating that Congressional acquiescence of consistent executive practice creates a presumption of executive constitutional power).

294. Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 848 (1994).

295. See *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 321–22 (1936).

296. Cf. KOH, *supra* note 154, at 75 (The Framers gave “Congress, not the president . . . the dominant role” with foreign affairs, which includes “all manner of powers regarding raising, supporting, maintaining, and regulating the army, navy, and militia, which could be exercised both domestically and abroad.”); 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 4-6, at 662–67 (3d ed. 2000) (reasoning that “the Constitution mandates a major role for Congress in supervising executive military operations” because the Framers “tied the military power to

this position regarding Congress's independent foreign relations powers on the occasions that it has been willing to address the issue, primarily because Congress tends to imply its approval of—or acquiescence to—executive branch practice by refraining from objecting to practices; consequently, the combination of executive practice and legislative acquiescence form a gloss on presidential constitutional power.²⁹⁷

There is some historical practice suggesting that in the absence of a peace treaty, presidential proclamations can serve as definitive evidence of the end of a war (potentially suggesting a required presidential role in ending a war).²⁹⁸ Recent wars, however, have involved neither formal declarations of war nor formal peace treaties. An argument can be made that some recent U.S. wars were ended by negotiations that resemble treaties of peace and thereby, presidential participation in such negotiations preserves the spirit—if not the formal rituals—reflected in the original constitutional design.²⁹⁹

Congress' control of the public purse" and the Constitution "gives Congress a host of other military-related powers"). "Some commentators have argued that by virtue of the Vesting Clause in Article II (which states that '[t]he executive Power shall be vested in a President of the United States of America,' U.S. CONST. art. II, § 1, cl. 1), the President has been granted all foreign affairs powers not expressly granted to Congress." Bradley & Goldsmith, *supra* note 68, at 2064 (2005) (citing Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 252–54 (2001)). "Under that theory, one might argue that if the Declare War Clause is not a war initiation power, then such a power has not been expressly assigned to Congress and thus must rest with the President." Bradley & Goldsmith, at 2064. For a discussion on the Vesting Clause theory, see Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004).

297. As Professor Eskridge has observed, *Dames & Moore* stands for the proposition that in the foreign affairs context—more than in others—"the Court will routinely infer legislative approval of executive practices, where 'Congress has consistently failed to object to such . . . practices even when it has had an opportunity to do so.'" See Eskridge, *supra* note 291, at 74 (quoting *Dames & Moore*, 453 U.S. at 682 n.10); see also *supra* note 293. For criticism of this method of statutory interpretation, see KOH, *supra* note 154, at 139–42.

298. This proposition accords well with the argument at the Constitutional Convention that Congress should not have the sole power to declare peace. As the treaty power necessarily requires the participation of the President in peacemaking, requiring a presidential proclamation to end the legal state of war in the absence of a treaty preserves the Executive's participation in the peacemaking process.

299. Though treaties of peace are formal legal instruments, substance and the treaty-makers' intent are the primary guidelines in determining the existence of a peace treaty. See PHILLIPSON, *supra* note 78, at 166. Moreover, international law defines a treaty as any "international agreement concluded between States in written form and governed by international law," including executive agreements or informal methods such as an exchange of diplomatic notes, but excluding memoranda of understanding and other such documents not intended to be governed by international law. ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 16–18 (2d ed. 2007) (quoting Vienna Convention on the Law of Treaties art. 2(1)(a), May 23, 1969, 1155 U.N.T.S. 331). It is an open

Without congressional involvement, however, efforts to terminate war can cultivate tension with separation of powers principles and the constitutional values they enshrine.

The President was indispensable in war termination even before Congress stopped declaring wars or the U.S. stopped ratifying peace treaties.³⁰⁰ The President, perhaps, is continuing to play a role as Commander in Chief and “sole organ of the federal government in the field of international relations” by establishing cease-fire agreements and declaring that war is over.³⁰¹ Rather, Congress may have simply chosen to abdicate its traditional role in terminating war in the same way that some scholars argue it has done with respect to international law-making.³⁰² Looking through the *Youngstown* tripartite framework, the President’s actions to terminate wars unilaterally, arguably, reflect congressional acquiescence or the President’s own inherent authority, and thus, are not a constitutional defect.³⁰³ From a separation of powers perspective, however, Congress’s abdication of its war termination authority after World War II has contributed to an imbalance of power, and thereby privileging the President’s role in ending war.³⁰⁴

B. Congressional Appropriations Power: Means of Last Resort

Should the purse power be Congress’s war termination power of first resort? Cicero’s observation that “the sinews of war are infinite money,” acknowledges that the denial of funds is an extremely potent tool for ending war, and one that privileges Congress’s role in the constitutional war termination process.³⁰⁵ Although Congress has the constitutional authority to

question as to what extent documents, which are considered treaties for international purposes but not domestically for the purposes of senatorial advice and consent under the treaty power, may constitute peace treaties.

300. See *supra* note 282.

301. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936); see also *Pasquantino v. United States*, 544 U.S. 349, 369 (2005) (quoting *Curtiss-Wright*, 299 U.S. at 320).

302. See Hathaway, *supra* note 149, at 184 (arguing the Congress delegated international law making authority to the President due to “a combination of institutional myopia and the political incentives facing members of Congress”).

303. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585–86 (1952).

304. See Louis Fisher, *Congressional Abdication: War and Spending Powers*, 43 ST. LOUIS U. L.J. 931, 932 (1999).

305. See John Louis, *Infinite Money and Infrastructural Power: Analyzing the Fiscal Determinants of English State Building, 1689–1789*, 5 JOSEF KORBEL J. OF ADVANCED INT’L STUD.

terminate war pursuant to its purse power,³⁰⁶ some scholars argue that Congress's constitutional role in war termination is broader and more nuanced than merely determining whether funds may be drawn from the treasury to continue fighting a war.³⁰⁷ Not only—these scholars argue—can Congress check the President's war powers by attaching conditions to appropriations bills, but the Appropriations Clause explicitly grants Congress the power to control all spending from the federal Treasury.³⁰⁸

The appropriations power is a well-established congressional means of ending war and an essential check on executive power, but the exercise of the purse power as a war termination power may not foster genuine cooperation between Congress and the President in terminating war.³⁰⁹ Accordingly, under certain circumstances, it would be more conducive of interbranch collaboration—and would be more consistent with the Framers' division of the treaty-making power and the separation of powers principles underpinning the American constitutional system—for Congress to engage with the President through the exercise of the treaty-making power.

59, 59 (2013) (quoting Cicero) (internal quotation marks omitted).

306. Many scholars argue that Congress could use its appropriations power to terminate a war by defunding it. Tiefer, *supra* note 194, at 293 (2006) (arguing that Congress can significantly regulate wars through appropriations bills). See generally Fisher, *supra* note 165; J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162 (1989) (arguing that Congress cannot significantly regulate wars through appropriations bills). The theories underlying Tiefer's article have not been criticized in scholarly literature. He was cited for his discussion of both sides of the debate on whether Congress can order a withdrawal from a war in Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. L. REV. 299, 302 (2008). The citation of Sidak's aggressive theory of independent presidential power under the constitution is very mixed. For example, Sidak has been cited as an example of a proponent of unitary presidential power in multiple articles. Accord Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During The First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1453, 1455 (1997). His theory is discussed favorably in part in Jacques B. LeBoeuf, *Limitations on the Use of Appropriations Riders by Congress to Effectuate Substantive Policy Changes*, 19 HASTINGS CONST. L.Q. 457 (1992). However, Sidak's theory has been heavily criticized in Peter Raven-Hansen & William C. Banks, *From Vietnam to Desert Shield: The Commander in Chief's Spending Power*, 81 IOWA L. REV. 79, 130–32 (1995).

307. See, e.g., HENKIN, *supra* note 210, at 74 (noting that Congress determines "how much money the President shall have to spend on the armed forces under his command"); see also BANKS & RAVEN-HANSEN, *supra* note 163, at 171 ("[T]he power of the purse is different in national security than in domestic affairs, evolving as an intended counterweight to the president's national security power.").

308. See *supra* note 308.

309. See Michael J. Glennon, *Process Versus Policy in Foreign Relations: Foreign Affairs and the United States Constitution*, 95 MICH. L. REV. 1542, 1547 (1997) (summarizing and critiquing Henkin's assessment of the appropriation dilemma between Congress and the President).

Some scholars—such as William Banks and Peter Raven-Hansen—raise constitutional concerns that congressional funding cut-offs could leave the U.S. with inadequate financial resources to fight an ongoing war, and thereby, significantly impede the ability of the Commander in Chief to carry out his job.³¹⁰ They debate whether Congress can insert conditions into defense appropriations bills that would effectively terminate the President’s ability to conduct a war.³¹¹ Other scholars argue Congress has broad authority to limit wars through appropriations riders or supplemental amendments that could limit the President’s war termination options.³¹² Such appropriations measures might provide funds for an air campaign, but

310. See BANKS & RAVEN-HANSEN, *supra* note 163, at 150 (contending that interpreting the Boland Amendment to restrict U.S. funding of the Contras in Nicaragua as applying, even if the Sandinistas executed an armed attack on U.S. citizens or the U.S. embassy, would “intrude[] deeply into the oft-claimed and generally recognized constitutional power of the president to defend and protect Americans against attack.”).

311. See *id.* at 181; see also H. Jefferson Powell, *The President’s Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 552 (1999) (“The doctrine of unconstitutional conditions is clear; its application in [the area of foreign relations] (as in other areas of constitutional law), however, frequently is not. It is often unclear whether to interpret a conditional spending provision as a legislative assumption of authority the Constitution grants to the President, or as the legitimate use of a congressional power to express congressional views on foreign policy, or even to accomplish other proper legislative goals, in a manner that affects, without usurping, presidential authority.”).

312. Richard D. Rosen, *Funding “Non-Traditional” Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 MIL. L. REV. 1, 18 (1998) (“[A]n independent presidential spending authority is inconsistent with the text of the Constitution, the intent of the Constitution’s Framers, and the country’s experience under the Constitution.”); see also Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343, 1349 (1988) (“[E]ven if there were no appropriations clause in the Constitution, Congress would have the power to enact a statutory ‘appropriations clause,’ worded exactly the same as the clause in article I, section 9, making Congress’ appropriations power exclusive. If Congress could not prohibit the Executive from withdrawing funds from the Treasury, then the constitutional grants of power to the legislature to raise taxes and to borrow money would be for naught because the Executive could effectively compel such legislation by spending at will.” (footnotes omitted)). Kate Stith discusses an appropriations bill that banned military operations in Cambodia during the Vietnam War: “By such appropriations legislation, Congress decides that, under our constitutional scheme, for the duration of the appropriations denial, the specific activity is no longer within the realm of authorized government actions.” Stith, at 1361. “All appropriations thus may be conceived of as lump-sum grants with ‘strings’ attached. These strings, or conditions of expenditure, constitute legislative prescriptions that bind the operating arm of government.” *Id.* at 1353. This last quote is not specifically talking about appropriations that deal with war termination. See *id.*; cf. Tiefer, *supra* note 306, at 342. “A preclusive reading of the Commander in Chief Clause also fails to grapple with the fact that the text of Article I is rife with express references to the congressional role with respect to the army, navy, and militia, including specific war powers.” Barron & Lederman, *supra* note 46, at 771. These authors discuss spending on military operations. See *id.* at 739–40.

withhold them from a ground campaign, effectively forcing the President to reject the use of ground troops during a particular campaign. Yet other scholars argue that historical examples of appropriations conditions featured unconstitutional limits on the President's Commander in Chief power, contending that the Constitution grants the President some independent war powers.³¹³ A minority of these scholars claim that the President has the power to spend money in wartime without congressional appropriations.³¹⁴ They argue that, in exceptional cases the President's constitutional duty as Commander in Chief not to leave U.S. citizens marooned in hostile territory could trump conditions in an appropriations bill explicitly prohibiting the

313. Sidak, *supra* note 306, at 1170–71; *see e.g.*, JOHN N. MOORE, LAW AND THE INDO-CHINA WAR 566 (1970); George H. Aldrich, *Comments on the Articles on the Legality of the United States Action in Cambodia*, 65 AM. J. INT'L L. 76, 79–80 (1971); Powell, *supra* note 311, at 552–54 (citing William H. Taft, *The Boundaries Between the Executive, the Legislative and the Judicial Branches of the Government*, 25 YALE L.J. 599, 612 (1916)); William H. Rehnquist, *The Constitutional Issues—Administration Position*, 45 N.Y.U. L. REV. 628, 638 (1970) (arguing area restrictions on the Vietnam War could not stop the President from ordering operations in Cambodia).

One could also argue that appropriations conditions that severely limit the President's ability to prosecute a war are unconstitutional spending conditions. *See* David B. Rivkin, Jr., & Lee A. Casey, *What Congress Can (and Can't) Do on Iraq*, WASH. POST (Jan. 16, 2007), www.washingtonpost.com/wp-dyn/content/article/2007/01/15/AR2007011500970.html. One could also make functionalist arguments to support independent presidential authority war powers. *Id.* Scholars also argue that the President should have full control of the military during a war because the President has superior information and the ability to act secretly and quickly. Robert F. Turner, *Separation of Powers in Foreign Policy: The Theoretical Underpinnings*, 11 GEO. MASON U. L. REV. 97, 98–101 (1988) (discussing the theoretical and policy underpinnings for putting the executive power in the hands of the President). As Justice Sutherland stated, the President, “has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information.” *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936). Defenders of unilateral presidential power stress the expansive reasoning in the controversial *Curtiss-Wright* case—in which the court stated “[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.” *Id.* at 319 (citations omitted). This is a highly controversial case from 1936 and involved the court's analysis of a statute that barred arms sales to South American countries. *Id.* at 311. The reasoning and dicta of the case stress that the unitary nature of the President seemed to go much further than necessary to justify the Court's opinion. *See also* EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787–1984 201 (5th rev. ed. 1984).

314. *See* Sidak, *supra* note 306 at 1163 (“[T]he President, without violating the Constitution or statutory law, may obligate the Treasury provided that Congress has failed to appropriate the minimum amount necessary for him to perform the duties and exercise the prerogatives given him by article II of the Constitution.”); *see also* Powell, *supra* note 311, at 573 (“The exclusive character of the President's operational control over the military rests on the assumption, embedded in the Constitution as it has been interpreted, that military success can depend on a clear, unified chain of command. . . . Congress therefore has no power to direct the President in the planning or execution of lawful missions, and it may not lawfully interfere with the President's decisions about which military units to employ.”).

President from using force to conduct rescue operations.³¹⁵

During the Vietnam War, Congress influenced the President's foreign policy with respect to Vietnam by attaching certain conditions and restrictions to essential bills that provided funding for armed operations abroad.³¹⁶ In the 1970s, Congress debated two bills that would have barred the use of appropriated funds to support the armed forces in Vietnam and Cambodia, and eventually passed seven bills prohibiting the use of appropriated funds to support U.S. forces in Vietnam, Cambodia, or Laos (subsequent presidential uses of force in those areas were restricted to controversial rescue operations).³¹⁷ Some scholars argue that Congress merely appeared to authorize implicitly the use of force in Cambodia when (after President Nixon vetoed an initial appropriations bill) Congress compromised by delaying the cut-off of funding for military operations in the bill³¹⁸ by forty-five days.³¹⁹ The Second Circuit found that the law constituted authorization for the continued bombing of Cambodia until the cut-off date.³²⁰ Skeptical of this conclusion, other scholars identify functional concerns—such as domestic political factors or Congress's limited ability to respond swiftly—that prevent Congress from using its purse power to terminate war once U.S. forces have been introduced into hostilities.³²¹

315. KOH, *supra* note 154, at 52–53.

316. See BANKS & RAVEN-HANSEN, *supra* note 163, at 173.

317. See KOH, *supra* note 154, at 52–53. Although Congress did not declare war in connection with the use of force in Vietnam and Cambodia, the Second Circuit held that the Gulf of Tonkin Resolution (which was subsequently appealed) and ongoing congressional appropriations for military assets in Southeast Asia were sufficient to authorize the President's use of military force. See *Orlando v. Laird*, 443 F.2d 1039, 1042–43 (2d Cir. 1971) (noting that “[b]oth branches collaborated in the endeavor, and neither could long maintain such a war without the concurrence and cooperation of the other”); Gulf of Tonkin Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964) (repealed 1971) (authorizing the President “to take all necessary measures” towards these objectives “as the President determines”).

318. Joint Resolution Continuing Appropriations for Fiscal 1974, Pub. L. No. 93-52, 87 Stat. 130 (1973).

319. See Fisher, *supra* note 165, at 116 (“A revised bill delayed the cutoff of funds from June 30 to August 15, 1973, in effect giving the President freedom to bomb Cambodia for another forty-five days—which is what he did.”); see also Barron & Lederman, *supra* note 46, at 1065–67 (describing the congressional reaction to learning of the Cambodian military operations); Edwin B. Firmage, *The War Powers and the Political Question Doctrine*, 49 U. COLO. L. REV. 65, 89–91 (1977) (same).

320. *Holtzman v. Schlesinger*, 484 F.2d 1307, 1313 (2d Cir. 1973) (“[W]e cannot see how this provision does not support the proposition that the Congress has approved the Cambodian bombing.”).

321. ELY, *supra* note 159, at 29; Neal Katyal, *Executive Decision*, WASH. POST (Jan. 8, 2006),

Within the constitutional system of checks and balances, the power of the purse is an important check on the President's Commander in Chief power,³²² and Congress could use the purse power to effectuate the end of a war.³²³ Even scholars, who argue the Declare War Clause grants Congress no role in war authorization, still believe that Congress's power of the purse is a check on the President in war making, and a vehicle through which Congress can end a war.³²⁴

After some debate at the Constitutional Convention, the Founders decided against granting Congress the power to declare peace—suggesting that the Framers did not want Congress to be able to terminate a war without the President's consent, or even that they wanted the President to have the exclusive power to terminate wars.³²⁵ Hamilton argued in Federalist No. 74

<http://www.washingtonpost.com/wp-dyn/content/article/2006/01/05/AR2006010501653.html> (reviewing JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2005)). In addition, it is impossible for Congress to defund the many quick strike actions that Presidents have taken in recent decades (e.g., Grenada in 1983 and Panama in 1989) that are over before Congress has time to pass legislation. See Tung Yin, *Structural Objections to the Inherent Commander-in-Chief Power Thesis*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 965, 976–77 (2007).

322. Barron & Lederman, *supra* note 46, at 802–03. See generally ELY, *supra* note 159; Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672 (1972). Chief Justice John Marshall stated “The whole powers of war being, by the [C]onstitution of the United States, vested in [C]ongress, the acts of that body can alone be resorted to as our guides.” *Talbot v. Seeman*, 5 U.S. 1, 28 (1801).

323. Barron & Lederman, *supra* note 46, at 740.

324. “Congress certainly has the constitutional power to end U.S. military operations by refusing to appropriate the necessary funding. This was designed to be an important check given to the Congress by the Constitution.” Robert F. Turner, *War and the Forgotten Executive Power Clause of the Constitution: A Review Essay of John Hart Ely's War and Responsibility*, 34 VA. J. INT'L L. 903, 974 (1994). “If Congress feels it has been misled in authorizing war or disagrees with the president's decisions, all it need do is cut off funds, either all at once or gradually.” John Yoo, *The Presidential Power Argument*, in BATTLEGROUND: WAR POWERS AND THE CONSTITUTION 3, 6 (2011); see also John Yoo, *War Powers Belong to the President*, ABA J. (Feb. 1, 2012), http://www.abajournal.com/magazine/article/war_powers_belong_to_the_president (“Congress' check on the presidency lies not just in the long-term raising of the military. It can also block any immediate armed conflict through the power of the purse. If Congress feels it has been misled in authorizing war, or it disagrees with the president's decisions, all it need do is cut off funds, either all at once or gradually.”).

325. See, e.g., MADISON, *supra* note 216, at 684 (Gouverneur Morris argued “that no peace ought to be made without the concurrence of the President, who was the general guardian of the national interests” and therefore there ought to be no separate congressional peace power outside of the treaty process.); see also Heder, *supra* note 7, at 454–55 (arguing that “[t]hrough ultimately inconclusive, the historical evidence suggests the Framers did not prefer Congress to have powers to terminate or limit a war above and beyond what the Constitution explicitly gives it.”). See generally VILE, *supra* note 260. Heder argues:

that, “[o]f all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand.”³²⁶ Hamilton also posited in Federalist No. 71 that if the presidential war powers were, “constituted as to be at the absolute devotion of the legislative,” the separation of powers which granted declarations of war to Congress and control of the military to the President would be “merely nominal, and incapable of producing the ends for which it was established.”³²⁷

Additionally, key differences between the Articles of Confederation and the Constitution support the contention that congressional interference with the conduct of war by setting conditions on defense appropriations bills is unconstitutional.³²⁸ Article IX of the Articles of Confederation assigned to Congress the responsibility for “making rules for the government and regulation of the . . . land and naval forces, and directing their operations.”³²⁹ Article I, section 8, of the Constitution is nearly identical, except it omits the phrase “directing their operations.”³³⁰ Consequently, Congress should not subvert the Framers’ design by regulating ongoing military operations through appropriations or other means.³³¹ This argument relates to one of the major reasons the Articles of Confederation were discarded by the founding generation—the founders thought the Articles made a critical error in giving the legislature too much control over military operations.³³²

While the Framers gave Congress the appropriation power to effectively terminate a war, they did not take the additional step and give Congress the explicit authority to statutorily (or otherwise) terminate a war. The logical inference is that if the Framers purposely provided no specific guidance in the Constitution on a point, then subsequent disagreements about that point ought to be resolved by appeal to channels other than the Constitution. Thus, in choosing not to explicitly grant this power in the Constitution, the Framers preferred complex questions surrounding the termination of a war to be resolved politically rather than through appeal to the Constitution.

Heder, *supra* note 7, at 455.

326. THE FEDERALIST NO. 74 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

327. THE FEDERALIST NO. 71 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

328. Fisher, *supra* note 165, at 109.

329. ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 4.

330. Compare ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 4, with U.S. CONST. art. I, § 8, cl. 14.

331. Barron & Lederman, *supra* note 46, at 788.

332. See THE FEDERALIST No. 74 (Alexander Hamilton) (“Even those [states] which have, in other respects, coupled the chief magistrate with a council, have for the most part concentrated the military authority in him alone. Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and

Although there is general agreement that Congress has broad powers under the Appropriations Clause, courts have not played a significant role in determining the degree to which Congress can use its power of the purse to terminate war.³³³ Over the second half of the twentieth century, there were a variety of conditions inserted into appropriations bills that attempted to restrain the President, and either end wars completely or confine the geographic area of a war.³³⁴ Notably, the Court has never directly addressed the legal questions of when an appropriations restraint on the President's war making ability is unconstitutional or whether Congress can preemptively defund a war.³³⁵

In the absence of definitive Supreme Court precedent on this issue, it is important to consider the text and structure of the Constitution, as well as historical practice. Several legal theories have been proposed to deal with

employing the common strength, forms a usual and essential part in the definition of the executive authority.”).

333. *Accord* Campbell v. Clinton, 203 F.3d 19, 19 (D.C.C. 2000) (refusing to decide on the merits of whether Congress can use its power of the purse to terminate war).

334. Examples include restrictions put on military operations during the Vietnam War. *See, e.g.*, Department of State Appropriations Authorization Act, Pub. L. No. 93-126, § 13, 87 Stat. 451 (1973); Continuing Appropriations, Pub. L. No. 93-124, § 1, 87 Stat. 449 (1973); Continuing Appropriations Resolution of 1974, Pub. L. No. 93-52 § 108, 87 Stat. 130 (1973); Fulbright Amendment to Second Supplemental Appropriations Act of 1973, Pub. L. No. 93-50 § 307, 87 Stat. 99; Special Foreign Assistance Act of 1971, Pub. L. No. 91-652, § 7, 84 Stat. 1942. The 1991 AUMF for the Persian Gulf War limited the purpose of the war to expulsion of Iraq from Kuwait, as opposed to a full invasion of Iraq to overthrow the Hussein regime. Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3 (1991). Also, in 1993, Congress placed a time limit on the use of military force in Somalia—unless the President requested an extension. *See Presidential Powers—Hostilities and War Powers: Letter from Caroline D. Krass to Eric H. Holder, Jr.*, 1 PUB. L. MISC. 260, 273 (2011).

335. For one of the most recent examples of courts refusing to decide the merits of this legal issue, see Campbell v. Clinton, 203 F.3d 19, 19 (D.C.C. 2000), which dismissed a suit by Congressmen to enjoin the war against Yugoslavia due to lack of standing. *See also* Raven-Hansen & Banks, *supra* note 294, at 838 (discussing United States v. Lovett, 328 U.S. 303 (1946)). Courts often rule that Congressmen, service members, and other actors who attempt to bring civil actions to stop wars lack standing to bring a civil action because they do not have a concrete injury. *See, e.g.*, Raines v. Byrd, 521 U.S. 811 (1997) (holding that Congressmen only have standing when they have a personal injury—for example being stopped from entering the legislature, or when their votes have been nullified). Standing requires a concrete injury that is traceable to the conduct of the defendant and redressable by the courts. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (leading case on requirements of standing). Courts also often refuse to hear constitutional war powers questions because they believe the legal question is a non-justiciable political question. *See supra* note 203. In regards to political questions, courts have a desire to avoid international embarrassment of elected officials and often believe that there is a lack of judicially discoverable standards to answer the legal question. *See generally* Baker v. Carr, 369 U.S. 186 (1961) (leading case on political question doctrine).

the complex constitutional problem of appropriations conditions that limit the presidential war power.³³⁶ Two leading scholars have proposed theoretical legal frameworks to analyze defense appropriations restraints.³³⁷ Other scholars base their analysis on cases that focus on congressional-presidential conflicts more broadly,³³⁸ and attempt to analogize these cases to appropriations bills that restrict presidential war making.³³⁹ The explanatory

336. See, e.g., RAVEN-HANSEN & BANKS, *supra* note 163, at 146.

337. See *id.* Two leading appropriations scholars have argued that one must balance “the extent to which the restriction prevents [the President] from accomplishing . . . constitutionally assigned functions against the need for the same restriction to promote objectives within the authority of Congress.” *Id.* at 160. Raven-Hansen and Banks argue that Congress, in addition to having the power to completely defund a war, can also enact substantial restrictions on military operations through appropriations. See *id.* at 147–48 (citing Connie Ferguson Bryan, *Limiting the Use of Funds Appropriated for Executive Functions: Is the 1984 Boland Amendment Constitutional?*, 13 OKLA. CITY U. L. REV. 569, 595–96 (1988)). They consider the restrictions from the Vietnam War and the Boland Amendments constitutional restrictions on war making. See RAVEN-HANSEN & BANKS, *supra* note 163, at 147–48; see also LeBoeuf, *supra* note 306, at 481 (1992)). Raven-Hansen agrees with the traditional argument that Congress could completely defund a war and this would effectively end the President’s ability to fund a war. See RAVEN-HANSEN & BANKS, *supra* note 163, at 172. However, Raven-Hansen specifically noted that there may be emergency situations where the President might have to spend money without previous appropriations. See *id.* Raven-Hansen is really only referring to extreme emergencies that require immediate defensive action, when he discusses presidential spending without congressional appropriations. See *id.* at 166–68, 172. Raven-Hansen is extremely critical of theories that Presidents can spend money on wars in the face of a Congressional ban on this spending. See *id.* Additionally, in the context of appropriations conditions (not complete defunding), Raven-Hansen noted that some argue there is an inherent presidential spending authority. See *id.* at 166–68. This inherent spending authority would allow the President to “encumber the treasury for the minimum amount reasonably necessary for him to perform his constitutional duties.” *Id.* at 166 (quoting Sidak, *supra* note 306, at 1242–43).

338. The *Lovett* case stands for the proposition that “the power of the purse may not be constitutionally exercised to produce an unconstitutional result such as . . . a trespass upon the constitutional functions of another branch of the Government.” RAVEN-HANSEN & BANKS, *supra* note 163, at 144–45 (emphasis omitted) (citations omitted) (internal quotation marks omitted). *Lovett* involved a bill of attainder attached to an appropriations bill, and not restrictions on the President’s war powers. *Id.* at 145. It also did not explicitly focus on the limits of the appropriations power. *Id.* *Lovett* precedential value is thus limited. But one can use the Court’s statement on congressional power as a basis for arguments by analogy in the war powers context. See *id.* at 146–48; Raven-Hansen & Banks, *supra* note 294, at 885 (discussing *United States v. Lovett*, 328 U.S. 303 (1946)). Any attempt to extend the *Lovett* standard—which did not deal specifically with limits of the Appropriations Clause power—to the war powers context necessarily involves a debate about the President’s powers under the Commander in Chief Clause and which of these powers cannot be regulated by Congress. One must determine what powers are the core Commander in Chief powers that can never be regulated by Congress in order to analyze a specific congressional action that is short of a full defunding of a war.

339. Because there is no Court precedent on wartime appropriations bills, leading scholars also refer by analogy to other important separation of powers cases. The broad standard to judge congressional regulation of the executive branch was elaborated on in *Morrison v. Olson* when the

value of these cases is limited in that they do not specifically address either the appropriations power or ongoing military operations.³⁴⁰ Congress has inserted numerous conditions into appropriations bills in the past forty years in attempts to limit or terminate U.S. military action in specific military operations.³⁴¹

C. *Endangering Equilibrium*

1. Rivalry and Escalation

Competitive aggrandizement by the political branches encourages the use of unilateral and potentially disruptive methods of war termination. Disagreements between the political branches are a common feature of the American political process, and often spark a robust dialogue that raises the specter of war termination in the national consciousness. But the use of constitutionally disproportionate and unilateral means should not serve as a substitute for the persuasion that ought to prevail in the resolution of interbranch disputes—especially in the sphere of foreign relations, in which such domestic constitutional disputes can lead to confusion among allies and partners concerning sensitive matters of national security. Congressional aggrandizement may be the path of least political friction, and terminating a particular war might in fact be in the nation’s best interest. But political expediency is not the linchpin of constitutional separation of powers, and can be counterproductive in the war termination process.³⁴²

Congress lacks the explicit constitutional power to declare peace, and

court stated congressional action does not violate the separation of powers if it does not “impermissibly undermine the powers of the Executive Branch, or . . . prevent[] the Executive Branch from accomplishing its constitutionally assigned functions.” *Morrison v. Olson*, 487 U.S. 654, 658 (1988). A concurrence in the *Public Citizen* case also stated that “we would invalidate the statute only if the potential for disruption of the President’s constitutional functions were present and if ‘that impact were not justified by an overriding need to promote objectives within the constitutional authority of Congress.’” *Public Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 485 (1989) (quoting *Nixon v. Admin’r of Gen. Servs.*, 433 U.S. 425, 443 (1977)).

340. See cases cited *supra* note 339.

341. See *Fisher*, *supra* note 165, at 111–12 (The historical examples include congressional actions which banned military operations in Vietnam and sending assistance to anti-Communist forces in Nicaragua in the 1980s.); see also *supra* Part 2.A.3.a; *supra* note 334.

342. See *INS v. Chadha*, 462 U.S. 919, 944 (1983) (“[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.”).

this power was intentionally left out of the Constitution's text by the Framers, at least in part, to ensure that the President—as the representative of the nation in foreign affairs—maintains the central role in the war termination process.³⁴³ This is not to say that Congress may not use its appropriations power to limit or control the scope of a war, because it has the power to define the scope of a conflict through the declare war clause; instead, it is to say that Congress should not use the appropriations power as a substitute for a power to declare peace.³⁴⁴ Though some scholars have treated the past use of appropriations riders to terminate wars as a gloss on constitutional authority,³⁴⁵ mere repeated practice does not mean that such legislative war termination measures are constitutionally sacrosanct.³⁴⁶

The circumstances surrounding the Vietnam War, for example, meant that the President and Congress were at odds over the continued operation of U.S. forces in Southeast Asia, and at various points relied primarily on the use of independent constitutional war powers. Even though the use of military force against North Vietnam was initially authorized by Congress, the Gulf of Tonkin Resolution was eventually withdrawn.³⁴⁷ Moreover, the President initially directed the use of military force in Cambodia without congressional knowledge or consent.³⁴⁸ Because Congress was unable to effectuate an end to this conflict by repealing its prior authorization or by restricting the scope of authorized hostilities, it resorted to the use of an indirect, but highly potent, constitutional means of terminating those wars: the appropriations power.³⁴⁹ Notwithstanding the important U.S. national

343. Heder, *supra* note 7, at 454–55.

344. For instance, Congress may not use the appropriations power to effectively pass an unconstitutional bill of attainder, nor may it use it to trespass on the constitutional functions of a coordinate branch of government. *Lovett v. United States*, 66 F. Supp. 142, 152 (1945) (Madden, J., concurring). The Supreme Court criticized this decision for reaching a constitutional issue when unnecessary. *See United States v. Lovett*, 328 U.S. 303 (1946). After the factual situation changed, however, a lower federal court held that Congress may not use its appropriations power in order to restrain the President's Commander in Chief authority to control the classification of documents because it impermissibly intrudes on his constitutional prerogatives. *See Nat'l Fed'n of Fed. Emps. v. United States*, 688 F. Supp. 671, 685 (1988).

345. *See generally* BANKS & RAVEN-HANSEN, *supra* note 163, at 121–22.

346. *See Chadha*, 462 U.S. at 944 (noting that repeated longstanding practice of an unconstitutional nature sharpens, rather than blunts, constitutional concerns).

347. 119 CONG. REC. 15,307 (1973).

348. BANKS & RAVEN-HANSEN, *supra* note 163, at 121–22.

349. *Id.* at 154–55; CONG. RESEARCH SERV., 93D CONG., CONGRESS AND THE TERMINATION OF THE VIETNAM WAR (Comm. Print 1973) (discussing ways in which Congress might effectuate its will to end wars even when the President ignores a withdrawal of authorization).

interests that may motivate congressional attempts to check presidential power, efforts to check such executive authority should be undertaken judiciously.³⁵⁰

It is also worth noting that although the War Powers Resolution (enacted in the aftermath of Vietnam) requires congressional authorization for a war that exceeds the sixty-day—or in some cases, ninety-day—time period during which the President may direct the use of military force, Congress has not used the War Powers Resolution as a mechanism for terminating war.³⁵¹

When Congress attempts to assume full control of war authorization and termination, it jeopardizes the structural balance between the branches, especially with respect to the exercise of constitutional war powers. Some scholars argue, for example, that if Congress were to deny funds for a military action preemptively or cut funding during an ongoing operation, it would unconstitutionally undermine this interdependent relationship between the political branches.³⁵²

350. See *Chadha*, 462 U.S. at 951 (“The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.”); see also *Bowsher v. Synar*, 478 U.S. 714, 727 (1986) (“The dangers of congressional usurpation of Executive Branch functions have long been recognized.”).

351. War Powers Resolution, Pub. L. No. 93-148, § 2, 87 Stat. 555, 555 (1973) (codified as amended at 50 U.S.C. §§ 1541–48 (2012)); see also RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RS20775, CONGRESSIONAL USE OF FUNDING CUTOFFS SINCE 1970 INVOLVING U.S. MILITARY FORCES AND OVERSEAS DEPLOYMENTS 3 (2007) (“Since its enactment in 1973, there is no specific instance when the Congress has successfully utilized the War Powers Resolution to compel the withdrawal of U.S. military forces from foreign deployments against the President’s will.”).

352. There are also functionalist policy arguments one can make to support the independent powers of the President. The President has control over tactical strategy as the Commander in Chief, and Congress forcing the President to withdraw troops by a deadline arguably infringes upon the President’s power to control tactics and engage in an orderly withdrawal. If Congress has authorized a war, the President needs a practical amount of time to finish the war and withdraw troops. The concurrent authority in the zone of twilight allows the President this discretion. Heder, *supra* note 7, at 465 (noting that “times of retrograde require the specific expertise of the Commander in Chief. When Congress attempts to limit or rearrange troop numbers or redefine troops’ mission mid-war, it interferes with the Commander in Chief’s discretion.”). These functionalist arguments would receive a strong rebuke from Congress. See, e.g., Robert C. Byrd, *The Constitution, the Congress, and the Use of Military Force*, 2 BROWN J. WORLD AFF. 37 (1995); Abner J. Mikva, *Congress: The Purse, the Purpose, and the Power*, 21 GA. L. REV. 1, 4–5 (1986) (“In 1974 and again in 1975, Congress refused to appropriate the more than one-half billion dollars requested by the President to continue the war effort. The denial effectively forced the cessation of hostilities; Congress had seized the initiative in exactly the manner contemplated by the founders. Had Congress not possessed this plenary power—had the President retained any authority to raise, appropriate, or divert funds—this catastrophic war would certainly have continued.”).

Notwithstanding the challenge of identifying a limiting principle or doctrine to mediate such interbranch conflict, equilibrium does not have to mean that the assumption of unilateral presidential authority may only be checked by an assumption of unilateral congressional authority. Unquestionably, wars can and have been ended by the denial of funds, but the utility of a congressional action is not a gloss on its constitutionality.³⁵³ If left unchecked, the use of the appropriations power to induce presidential action to end war can amount to an assumption of power beyond what the Constitution grants to Congress.³⁵⁴

2. Provocative Unilateralism

Unilateral executive action can provoke an unnecessary interbranch rivalry in the war termination process. Presidential aggrandizement can lead to the congressional misuse of the appropriations power in order to induce executive action to end military operations. In other words, provocation creates an escalatory dynamic between the two political branches, and this dynamic can lead to an unconstitutional imbalance of power. This congressional inducement can also serve as a tool of political persuasion in the broader campaign to end the war in a concerted fashion.³⁵⁵ Relying on such aggrandizing means to bridge the divide between the branches at a political impasse tends to encourage more of the same; it is possible to imagine a political situation that is the reverse from that in Vietnam, where the President sought, instead, to influence Congress to end a war by simply refusing to commit any forces to the conflict. In such a situation, the President may have been abusing his constitutional war powers in order to circumvent the congressional power to declare war.

Regardless of whether protracted interbranch conflict may render attractive constitutionally questionable uses of power, unilateral assumptions of authority that accomplish short-term political goals risk escalating interbranch rivalry and causing aggrandizement, inter-branch animus, and the unsustainable arrogation of authority in the long-term. In an extreme case—though Congress successfully used appropriations riders to end U.S.

353. See generally BANKS & RAVEN-HANSEN, *supra* note 163, at 121–22.

354. See generally Rosen, *supra* note 312 (examining the independent presidential spending power, whether it is sustainable in light of the Constitution's text, the intent of the Constitution's Founders, the body of custom developed under the Constitution, and the decisions of the courts).

355. Heder, *supra* note 7, at 453–54.

operations in Cambodia—the President undertook certain legislative actions as a ratification of executive authority to engage in operations without explicit congressional authorization under the theory that Congress has the constitutional power simply to defund any operations of which it disapproves.³⁵⁶ As a result, Congress was able to implement its immediate policy goal, but escalated the constitutional confrontation with the Executive over future war termination issues.

3. Undue Interference

Interbranch rivalry and aggrandizement can interfere unduly with the war termination process. Justice Jackson cautioned that the Constitution “enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”³⁵⁷ Moreover, the Founders intended that the treaty-making power involve both the President and the Senate because of the important interests at stake.³⁵⁸ If one branch of government rushes to enact a peace without the concurrence of the other political branch, it puts its political goals ahead of the constitutional mechanism for ensuring that decisions of peace and war are treated with the proper gravity. The legal encumbrances on the termination of war serve the policy goals of ensuring that peace is entered into without due consideration.

There are practical implications associated with unilateral moves by one political branch to terminate a war. In particular, the aggrandizement of war termination powers by one political branch can lead to recklessness in the war termination process. If successful, a conflict may end up being terminated at an undesirable juncture: the judgment of the branch that is more successful in mobilizing political power is not necessarily the best judgment. If unsuccessful, branches will have antagonized each other without having accomplished the goal of terminating the particular war.

356. See BANKS & RAVEN-HANSEN, *supra* note 163, at 147 (discussing the arguments of the Reagan and Bush administrations that the actual congressional check on presidential war-making was not the Declare War Clause, but the appropriations power).

357. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

358. MADISON, *supra* note 4, at 524.

D. Concurrence and Interdependence

1. Structural Restraint

Promoting concurrent action by the political branches ensures a more transparent and accountable war termination decision-making process. Two constitutional methods of legally ending a state of war—the ratification of a peace treaty and a congressional joint resolution accompanied by a Presidential proclamation—both require the participation of more than one branch of government. One of the reasons that the Founders required the participation of both the Senate and the President in ratifying treaties was to ensure that treaty commitments would not be undertaken without due consideration, particularly if these treaties were peace treaties.³⁵⁹ Similarly, the process of bicameral presentment (a prerequisite of a congressional joint resolution) combined with a separate Presidential proclamation ensures that the expertise of both political branches may be brought to bear.³⁶⁰ Indeed, a joint resolution establishing peace would actually require the participation of the House of Representatives, as well as, the Senate and the President—eliminating the need for a senatorial supermajority, but requiring the participation of both houses of Congress.³⁶¹

Though George Mason preferred to clog war rather than peace, the Founders acknowledged that peace terms had to be carefully considered.³⁶² The participation of both political branches may make war termination more of a slog, but this constitutional process has the benefit of encouraging both political branches to make decisions openly and with greater regard for the implications of such determinations. Moreover, it is not clear that unilateral branch action is any swifter in reality—the Vietnam War took years to end despite congressional assertions of power.

359. See MADISON, *supra* note 4, at 524–26. The Founders rejected a proposal by Madison to allow two-thirds of the Senate to ratify a peace treaty without the President, as Governor Morris argued that “no peace ought to be made without the concurrence of the President, who was the general guardian of the national interests.” *Id.*

360. An appropriations bill is also presented to the President bicamerally, but the requirement of a presidential proclamation preserves executive participation in terminating war because an appropriations bill may still reflect unilateral congressional action if such legislation survives a presidential veto. See *supra* note 269 and accompanying text.

361. Joint Resolution, U.S. SENATE, http://www.senate.gov/reference/glossary_term/joint_resolution.htm (last visited Nov. 24, 2013).

362. See Mosier, *supra* note 52, at 1614, 1635.

2. Clear Statement Requirements

Reading appropriations riders defunding a war together with biennial and other ongoing war appropriations, which the Office of Legal Counsel has construed as tacit congressional authorization for the use of force,³⁶³ can lead to confusion regarding congressional intent to end a war. In contrast to situations where concurrent presidential authority allows for congressional silence to indicate acquiescence, a clear statement of congressional intent to accord powers to the executive is preferable when the President seeks to go beyond what his constitutional powers have traditionally allowed.³⁶⁴ When constitutional prohibitions are not at issue, independent or concurrent presidential authority can be manifested without the need for any clear statement by Congress.³⁶⁵ Courts have generally insisted on such clear statements, however, when presidential constitutional authority implicates express constitutional protections in order to avoid knotty constitutional issues.³⁶⁶

3. Mutuality and Concord

a. Preserving Branch Prerogatives

The two-branch methods of war termination not only preserve the constitutional vision of the Founders, where no one branch could terminate a war, but also preserve the prerogatives of each political branch.³⁶⁷ Unilateral

363. See sources cited *supra* note 27.

364. See Bradley & Goldsmith, *supra* note 68, at 2103–05.

365. See, e.g., *Cross v. Harrison*, 57 U.S. 164, 189–90 (1853) (recognizing that the President may occupy territory, and regulate import duties and tariffs in such territory during wartime under the commander in chief power, absent a congressional act authorizing such an extension because no constitutional liberty interests were at stake). Compare *Ex parte Quirin*, 317 U.S. 1, 27–29, 44 (1942) (holding that because the right to a jury trial does not apply to captured combatants, congressional authorization for military commissions for American servicemen, who violate the laws of war, can be read alongside the general wartime authority of the Commander in Chief to capture enemy combatants in a way to imply the power to try enemy combatants under military commissions) with *Ex parte Mitsuye Endo*, 323 U.S. 283, 299–300 (1944) (holding that Fifth and Sixth amendment protections for civilian U.S. citizens counsel against an inference of executive authority to detain during wartime outside a clear congressional statement).

366. See, e.g., *Kent v. Dulles*, 357 U.S. 116, 129 (1958) (declining to construe the Executive's constitutionally implied power of diplomatic protection far enough to limit the Fifth Amendment liberty right of a passport bearer to enter and exit at will, absent a clear congressional grant).

367. See generally Mosier, *supra* note 52, at 1613–14.

congressional war termination measures infringe on the President's powers as Commander in Chief and Chief Executive, as well as the foreign relations power. Similarly, unilateral presidential war termination may undercut Congress's power to declare and fund war. Unilateral termination by either branch burdens the other branch's role in the treaty-making process called for in Articles I and II of the Constitution. The Constitution did not grant either branch complete power over war and peace, and the unilateral arrogation of such a power by either branch for political expediency necessarily diminishes the constitutional role of the other branch as a partner in government.

Mutual action by the branches to end a war, whether by treaty or by joint resolution accompanied by a proclamation, ensures that each branch consents to the termination of hostilities. Not only do these processes allow for deliberation and careful assessment of weighty issues of war and peace, but they preserve the allocation of powers between the branches. A peace treaty concluded to end a war does not burden the President's foreign relations power because he negotiated it, and it does not burden Congress's declare war power because the Senate consented to it.

b. Deference to the Political Branches and Political Cover

Supreme Court case law suggests that the Court will not be the final arbiter of the constitutional allocation of the power to terminate wars.³⁶⁸ The Court is often reluctant to answer the question of whether a war has ended in light of the political question doctrine,³⁶⁹ and lower courts generally rely on

368. See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962).

369. See *supra* note 222. The political question doctrine has most recently been summarized by the Court as a bar to judicial review of "a controversy . . . where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (citations omitted) (internal quotation marks omitted). A long line of cases shows the Court's hesitance in foreign affairs. *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("Such decisions [of foreign policy] are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil . . . and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."); see cases cited *supra* note 289; see also *Goldwater v. Carter*, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring) ("I am of the view that the basic question presented by the petitioners in this case is 'political' and therefore nonjusticiable because it involves the authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is

the actions of the political branches when the question of the state of war is germane to the settlement of a private legal dispute.³⁷⁰ Typically, the cases, where the termination of war is discussed, do not involve direct disputes between the President and Congress, and are usually matters of statutory construction. Because a constitutional clash between the President and Congress over the termination of a war is not likely to be an issue necessary for resolution in a private suit,³⁷¹ the question of whether one political branch may unilaterally end a war will almost certainly not be decided by the judiciary.³⁷² It is up to each political branch, then, to protect its prerogatives in war termination.

V. IMPLICATIONS FOR TERMINATION OF THE WAR AGAINST AL QAEDA AND ASSOCIATED FORCES

This Part applies the framework discussed in Part IV to one question that would arise if the armed conflict with Al Qaeda and associated forces were to come to an end: As a constitutional matter, which branch of the federal government has the final say over whether a war has ended?

Considering that a war's legal contours under domestic and international law may not be coterminous, how one determines when the legal condition

authorized to negate the action of the President.”). Notably, Rehnquist said that the Court ought to be especially wary of rendering a constitutional holding on a matter about which the Constitution is silent. *Id.* at 1003 (“I believe it follows *a fortiori* from *Coleman* that the controversy in the instant case is a nonjusticiable political dispute that should be left for resolution by the Executive and Legislative Branches of the Government. Here, while the Constitution is express as to the manner in which the Senate shall participate in the ratification of a treaty, it is silent as to that body's participation in the abrogation of a treaty.”).

370. *Creedon v. Seele*, 75 F. Supp. 767, 769 (S.D. Ill. 1947) (“I don't believe it's up to [the court] to say Congress is wrong or the president is wrong in a holding that the war has not been concluded.”).

371. War for purposes of statutes and contracts has been read “to mean periods of significant armed conflict rather than times governed by formal declarations of war.” *Koohi v. United States*, 976 F.2d 1328, 1334 (9th Cir. 1992); *see also Darnall v. Day*, 37 N.W.2d 277, 280 (Iowa 1949) (Insurance contract use of “after the war has ended” means “after hostilities have ceased,” because the common use of war “refers to the period of hostilities and not to a technical state of war which may exist after the fighting has ended.”).

372. The Court has found that in the rare circumstance where an interbranch dispute affects private interests, the political question doctrine will not bar resolution even in foreign affairs. *See Zivotofsky*, 132 S. Ct. at 1427 (“The federal courts are not being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination of what United States policy toward Jerusalem should be. Instead, Zivotofsky requests that the courts enforce a specific statutory right” that is alleged to be unconstitutionally infringing on an exclusive presidential power.).

of war terminates, and the legal rules applicable in such a circumstance, could vary depending upon whether the analysis is conducted through the prism of U.S. domestic law or international law. Although this Article generally does not seek to examine the means or implications of war termination for the purposes of international law, it does analyze the U.S. domestic legal effect of either the President, Congress, or both recognizing, formally, the termination of the legal condition of war in this non-international armed conflict.³⁷³

More than twelve years after the attacks on September 11, 2001, the Obama administration has discussed publicly how and when the armed conflict against Al Qaeda and associated forces will end—while emphasizing that the conflict is not necessarily nearing the “beginning of the end.”³⁷⁴ First, U.S. Defense Department General Counsel Jeh Johnson, delivered a speech at the Oxford Union on November 30, 2012, concerning the legal architecture underpinning this war, and stated that as a result of continued determination and action by U.S. forces, however, there will eventually come a “tipping point” where “so many leaders and operatives of al Qaeda and its affiliates have been killed or captured” that the organization will effectively be destroyed, lacking its capacity “to attempt or launch a strategic attack against the United States.”³⁷⁵ Significantly, General Counsel Johnson explained that:

At that [tipping] point, we must be able to say to ourselves that our efforts should no longer be considered an “armed conflict” against al Qaeda and its associated forces; rather, a counterterrorism effort against *individuals* who are the scattered remnants of al

373. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 630-31 (2006) (stating that the U.S. is in a non-international armed conflict with Al Qaeda). Non-international armed conflict is “armed conflict not of an international character occurring in the territory of” a state party to the Geneva Convention. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

374. See Johnson, *supra* note 2 (citations omitted) (internal quotation marks omitted); see also Charlie Savage, *Pentagon Counsel Speaks of Post-Qaeda Challenges*, N.Y. TIMES, Dec. 1, 2012, at A17; Julian E. Barnes, *Pentagon Lawyer Looks Post-Terror*, WALL ST. J. (Nov. 30, 2012, 4:49 PM), <http://online.wsj.com/article/SB10001424127887324205404578151181874456280.html>; Daniel Klaidman, *Will Obama End the War on Terror?*, NEWSWEEK (Dec. 17, 2012), <http://www.newsweek.com/will-obama-end-war-terror-63627>; Eric Posner, *The War on Terror Will Be Ever with Us*, SLATE (Dec. 11, 2012, 11:56 AM), http://www.slate.com/articles/news_and_politics/view_from_chicago/2012/12/jeh_johnson_is_wrong_the_fight_with_al_qaida_continues.html.

375. Johnson, *supra* note 2.

Qaeda, or are parts of groups unaffiliated with al Qaeda, for which the law enforcement and intelligence resources of our government are principally responsible, in cooperation with the international community—with our military assets available in reserve to address continuing and imminent terrorist threats.

At that point we will also need to face the question of what to do with any members of al Qaeda who still remain in U.S. military detention without a criminal conviction and sentence. In general, the military's authority to detain ends with the "cessation of active hostilities." For this particular conflict, all I can say today is that we should look to conventional legal principles to supply the answer, and that both our Nations faced similar challenging questions after the cessation of hostilities in World War II, and our governments delayed the release of some Nazi German prisoners of war.³⁷⁶

As a matter of U.S. domestic law, the President's authority—as Commander in Chief and Chief Executive—to detain combatants, who would re-enter the fight, is a clear corollary of the authority to use force.³⁷⁷

At that "tipping point" the U.S. government will face a range of legal questions that arise as the state of armed conflict draws to a close. Given that, under international law, detention authority ends with the "cessation of active hostilities,"³⁷⁸ as a domestic constitutional matter, would such a cessation in this conflict require the immediate release of members of Al Qaeda who remain dangerous and who would be able to reconstitute a force that could attack the U.S.? If not militarily necessary, some may ask, why should the U.S. be able to have these war powers? What should be done to ensure the stability of the counterterrorism legal architecture at such a "tipping point?" Once this "tipping point" approaches and is recognized by the President, Congress, or both, some commentators may ask how would

376. *Id.* (footnotes omitted).

377. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004) ("[I]t is of no moment that the AUMF does not use specific language of detention. Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of 'necessary and appropriate force,' Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.").

378. *See* Geneva Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("Prisoners of War shall be released and repatriated without delay after the cessation of active hostilities.").

the U.S. government “apply the laws of war where no war . . . exists?”³⁷⁹

A. *Locus of Authority to Determine That a War Has Ended*

1. Congress and the President

The Constitution does not address war termination powers explicitly, but vests at least some war powers in both Congress and the Executive. The Declare War Clause explicitly vests at least some war initiation power in the legislative branch.³⁸⁰ No parallel war termination power exists in the Constitution. The Constitution’s text, court precedents, and executive and legislative branch practice may help determine whether Congress, the President, or both must be involved in the official proclamation that a war has ended. On the one hand, Congress faces “practical limitations on [its] capacity to forge ex ante standards for executive national security action,”³⁸¹ as compared to the Executive’s relative ability to respond swiftly.³⁸² On the other hand, the Constitution has allocated specific foreign relations powers to Congress.³⁸³

2. Sparse Judicial Guidance

The Supreme Court has offered little guidance concerning determinations of whether a war has technically concluded, preferring to show significant judicial deference to the political branches’ assessment.³⁸⁴ In 1948, the Supreme Court held in, *Ludecke v. Watkins*, that the legal state of war is terminated not merely by a cessation of hostilities, but by the President, Congress, or both.³⁸⁵ Specifically, the Court ruled that the legal condition of war—at least in the constitutional sense—can be terminated by a peace treaty, congressional legislation that recognizes an end to the war, or a presidential proclamation that the war has ended.³⁸⁶ Thus, the *Ludecke*

379. See *Ex Parte Milligan*, 71 U.S. 2, 140 (1866) (Chase, C.J., dissenting).

380. See U.S. CONST. art. I, § 8, cl. 11.

381. See *Raven-Hansen & Banks*, *supra* note 294, at 848.

382. See *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 321–22 (1936).

383. See *supra* note 296.

384. See, e.g., *supra* note 222.

385. See *Ludecke v. Watkins*, 335 U.S. 160, 166–68 (1948); *supra* note 137.

386. See *Ludecke*, 335 U.S. at 168–69; *supra* note 139.

court accepted that President Truman's authority to detain German nationals extended beyond Germany's unconditional surrender.³⁸⁷ The Court viewed the technical termination of the use of war powers to detain as the date of the enactment of pertinent legislation in 1951.³⁸⁸ Commentators have looked to Supreme Court precedent as authority that conflicts must be terminated by either the President or a combination of the President and Congress.³⁸⁹

Courts have provided only limited guidance regarding the authority to end war and tend to defer to the political branches on issues relating to separation of powers and foreign relations. The Constitution vests war powers in the Executive and Congress, rather than in the courts.³⁹⁰ Courts have often looked to the practice of the political branches as a persuasive factor in contentious separation of powers questions.³⁹¹ This judicial practice is even more commonplace in issues related to foreign affairs.³⁹²

Determining the extent to which one can draw legal conclusions from congressional intent is particularly significant today. The AUMF does not include a sunset clause, which some scholars argue serves to show that Congress did not intend to set a time limit on the President's actions.³⁹³

3. History of Collaboration Through Peace Treaty-Making

Historically, wars ended with peace treaties that required the Senate to give advice and consent to the President—a process that provided the

387. See generally *United States v. Hicks*, 256 F. 707, 710–11 (W.D. Ky. 1919).

388. See *Ludecke*, 335 U.S. at 168–69 (“The state of war’ may be terminated by treaty or legislation or Presidential proclamation. Whatever the mode, its termination is a political act. Whether and when it would be open to this Court to find that a war though merely formally kept alive had in fact ended, is a question too fraught with gravity even to be adequately formulated when not compelled.” (citations omitted)).

389. See, e.g., *supra* notes 111–12.

390. See *supra* note 296.

391. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring); see also *supra* note 293. See generally *supra* note 287.

392. See *supra* note 297.

393. See Bradley & Goldsmith, *supra* note 68, at 2123 (drawing the conclusion that the fact that the AUMF “does not purport to limit the time period in which the President can act,” based partly on the fact that the AUMF does not include a sunset clause as Congress has provided for in the past). They argue that the authorization’s open-endedness was intentional, and that Congress declined to include a sunset clause as included in the USA Patriot Act of 2001 and the Terrorism Risk Insurance Act of 2002. *Id.*; see, e.g., Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447, 449 (2011) (discussing sunset provisions in congressional authorizations for the use of military force).

framework for such collaboration in ending wars. In early U.S. history, the central mechanism for ending a war was a peace treaty.³⁹⁴ Congress remained involved in the process during World War I, engaging actively in the debates surrounding the Treaty of Versailles; since World War II, however, Congress has played a more limited role in recognizing that a war has ended.³⁹⁵

Today, however, there is no formal method for involving congressional collaboration that is equivalent to ratifying a peace treaty to terminate a war.³⁹⁶ It may be that Congress may rely on the power of the purse or on repealing the authorization for use of force as ways to try to pull back on executive powers.³⁹⁷ However, neither is an adequate substitute for the treaty process, not least because—absent a two-thirds majority of voting members—such congressional initiatives could face potential defeat by a presidential veto.³⁹⁸

4. Benefits of Congressional Engagement

There are benefits to having congressional engagement in terminating a conflict, and there are mechanisms short of a peace treaty for such interbranch cooperation. The treaty-making power has historically been the primary mechanism for the U.S. government to proclaim the end to a conflict in a way that allowed for debate in Congress, and between Congress and the Executive to shape the policy surrounding the termination of a war.³⁹⁹ There are, however, alternate ways in which the U.S. may benefit from the strengths of an interdependent system between separate branches of government. Consultation, negotiations, and cooperation can be promoted through formal or informal processes aimed at terminating a conflict.⁴⁰⁰ Potential methods of increasing such interdependence range from

394. See *supra* note 10.

395. See Mathews, *supra* note 11, at 822–23.

396. Cf. Mosier, *supra* note 52, at 1620.

397. See *id.* at 1625–26.

398. See *id.* at 1624–27.

399. See *id.* at 1613.

400. See Laura S. Fitzgerald, *Cadenced Power: The Kinetic Constitution*, 46 DUKE L.J. 679, 776 (1997) (arguing that “[n]othing in the Constitution suggests that the Congress may engage in political debate with the President only through formal legislation.”). *But cf.* INS v. Chadha, 462 U.S. 919, 951 (1983) (holding that the legislative veto was unlawful as laws must comport with Article I’s established procedures).

introducing legislation requiring disclosure and creating reporting requirements⁴⁰¹ to holding hearings and informal efforts to engage in dialogue.⁴⁰² For example, the President may disclose pertinent facts or potential actions regarding ending a war, and Congress may legislate to encourage such disclosures.⁴⁰³ Congress exercises supervisory powers over wars through mechanisms—such as, reporting requirements, congressional hearings, and closed and open session briefings.⁴⁰⁴ One aim of disclosure is to provide the congressional branch—and the public—the opportunity to contribute to the dialogue before a final decision has been made.⁴⁰⁵

401. See, e.g., U.S. DEP'T OF DEF., ANNUAL REPORT TO CONGRESS: MILITARY POWER OF THE PEOPLE'S REPUBLIC OF CHINA (2007) ("Section 1202, 'Annual Report on Military Power of the People's Republic of China,' of the National Defense Authorization Act for Fiscal Year 2000, Public Law 106-65, provides that the Secretary of Defense shall submit a report 'on the current and future military strategy of the People's Republic of China. The report shall address the current and probable future course of military-technological development on the People's Liberation Army and the tenets and probable development of Chinese grand strategy, security strategy, and military strategy, and of the military organizations and operational concepts, through the next 20 years.'" (emphasis omitted)).

402. Cf. ELY, *supra* note 159, at 109; DOUGLAS L. KRINER, AFTER THE RUBICON: CONGRESS, PRESIDENTS, AND THE POLITICS OF WAGING WAR 285 (2010) (arguing that "members of Congress have historically engaged in a variety of actions from formal initiatives, such as introducing legislation or holding hearings that challenge the president's conduct of military action, to informal efforts to shape the nature of the policy debate [on wars]."); William G. Howell & Jon C. Pevehouse, *Presidents, Congress, and the Use of Force*, 59 INT'L ORG. 209, 228–29 (2005); Aziz Z. Huq, *Binding the Executive (by Law or by Politics)*, 79 U. CHI. L. REV. 777, 781 (2012) (arguing that "[e]ven in military matters, a growing body of empirical research suggests Congress often successfully influences the course of overseas engagements to a greater degree than legal scholars have discerned or acknowledged."); Cass R. Sunstein, *Empirically Informed Regulation*, 78 U. CHI. L. REV. 1349, 1417 (2011).

403. See, e.g., War Powers Resolution, 50 U.S.C. § 1543(a) (The War Powers Resolution requires periodic reporting as well as a written report from the President within forty-eight hours "[i]n the absence of a declaration of war, in any case in which United States Armed Forces are introduced— (1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances; (2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or (3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation." The report must include: "(A) the circumstances necessitating the introduction of United States Armed Forces; (B) the constitutional and legislative authority under which such introduction took place; and (C) the estimated scope and duration of the hostilities or involvement.").

404. For example, during the final chapters of the second Iraq war, the executive branch briefed relevant congressional committees regarding a range of matters on numerous occasions. See *supra* note 186 and accompanying text.

405. See Sunstein, *supra* note 402, at 1417 (describing disclosure as a "regulatory tool," and stating that "[w]ell-designed disclosure policies attempt to convey information clearly and at the time when it is needed. . . . Well-designed disclosure policies are preceded by a careful analysis of

Justice Robert Jackson, in his famous *Youngstown* concurrence, stated that the Constitution “enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”⁴⁰⁶ When separate branches of government share authority over a decision there is arguably a greater potential for collaboration, as well as an increased likelihood that each branch will exercise greater care to avoid usurping decision-making power.⁴⁰⁷ The Constitution grants both the Executive and Congress powers in the sphere of warfare, and does not explicitly refer to separate war termination powers. Should the executive branch arrogate all war termination power, this would diminish not only the influence of the deliberative branch, but also the potential benefits of a system of checks and balances.⁴⁰⁸

The President may have the authority to proclaim an end to a conflict without congressional action based on article II executive powers and supported by a history of congressional acquiescence—however, from a separation of powers perspective, *some* congressional engagement in the process is preferable.

VI. CONCLUSION

In assessing how and when the President and Congress can end war, it is necessary to determine the constitutional role of each political branch in exercising war termination powers. This Article has attempted to outline a

their likely effects.”).

406. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

407. See Lobel, *supra* note 22, at 393 (elaborating on the ways in which Congress and the President can be influential within their “concurrent power to conduct warfare”); see also Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 950 (2005) (contending that “[t]he trick is to link the self-aggrandizing motives of government officials to the power of their branches. Given ‘the necessary constitutional means and personal motives to resist encroachments,’ Madison argues, the ambitions of the officials who comprise each of the branches will ‘counteract’ one another. The result will be a balanced equilibrium, in which no branch can accumulate a potentially monarchical or tyrannical quantum of power, try as each of them will.” (footnote omitted)).

408. Jonathan L. Entin, *Separation of Powers, the Political Branches, and the Limits of Judicial Review*, 51 OHIO ST. L.J. 175, 222 (1990) (arguing that “Congress and the President would do better to seek to resolve their separation of powers disputes by negotiating them in good faith Negotiated resolutions of specific disagreements can decide smaller questions in ways that create a foundation for similarly informal arrangements of future interbranch differences while recognizing the contrasting interests of the governmental institutions involved.”).

framework for interpreting the constitutional war termination powers of Congress and the President, and then to apply this framework to the war against Al Qaeda and its associated forces. This Article's framework suggests that, in theory, ending war without meaningful cooperation between the President and Congress generates tension with the principle of the separation of powers underpinning the American constitutional system, with the Framers' division of the treaty-making authority, and with the values they enshrine.

Although the Constitution does not explain, nor are there any clear legal precedents addressing, the issue of which branch of the federal government should have the final say in determining whether an armed conflict has ended, the President and Congress can and should play significant roles in resolving legal questions associated with the termination of the "armed conflict" with Al Qaeda. In practice, this Article's framework reflects that requiring the participation of both Congress and the President in the war termination process has the political benefit of ensuring more transparent and accountable decision making, even though such collaborative engagement may make it more difficult to terminate a war. As this Article has explained, the treaty-making process represents an approach to war termination that best reflects the constitutional values of the interdependence of the political branches, while checking interbranch rivalry and preserving the constitutional and foreign relations prerogatives of Congress and the President.

Cooperative action by the two political branches also ensures that the decision to end a war is not regarded as political opportunism or a coercive exercise of power over another branch of government. Joint action provides more than mere political cover—it puts the full imprimatur of the political branches of government on a decision to terminate a war and establishes that it is the U.S. that has ordained peace, rather than one squabbling branch of government. It increases the likelihood that peace will be lasting—if a war is ended in fact, but not in law, there is no guarantee that fighting will not simply commence once political fortunes change. Consequently, a dual branch war termination also establishes certainty by definitively ending a state of war.