

Regulations or Delegations?: How Congress Delegated Its War Powers to the President Through Discretionary AUMFs

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I, Morgan Baker, confirm that the work presented in my thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

Dedications

This thesis is dedicated to my dad, Michael J. Baker, who has witnessed and continues to witness remarkable changes within the U.S. It is also dedicated to my grandfather Rivers Peters, who served in the segregated 92nd Infantry "Buffalo Soldiers" Division during WWII, and to all those who perished in unconstitutional wars.

Abstract

My thesis examines the expansion of U.S. presidential war power, under the lens of congressionally enacted authorizations for use of military force (AUMFs), since the founding. Whereas most academic scholarship has been dedicated to unauthorized presidential war making, my research analyzes the impact of AUMFs and their potential to delegate constitutional powers to the President through vague language, highly discretionary provisions, and the non-inclusion of specific regulatory measures.

Two relevant analytical legal doctrines apply: void-for-vagueness and legislative non-delegation. No scholar has previously applied these two legal doctrines to scrutinize AUMFs and their potential to unconstitutionally empower the President. I draw from historical precedents, specifically U.S. Supreme Court cases concerning executive power, separation-of-powers, and war powers. These cases are critical in understanding the difference between *general* versus *limited* wars. By applying legal doctrines and judicial precedents, I argue that AUMFs were originally intended to regulate the President as commander-in-chief. Yet, historically enacted AUMFs have violated these two legal doctrines, unconstitutionally delegating broad war powers to the President. Consequently, presidents execute AUMFs in a highly arbitrary fashion, as the vague language provides discretion to wage virtually unrestricted warfare.

My thesis is structured chronologically, with case studies that investigate specific conflict AUMFs. The historical chapters cover the period from the U.S. founding to the Korean War (1789-1950). The case studies include: the 1955 Formosa Resolution and 1957 Middle East Resolution, 1964 Tonkin Gulf Resolution, 1991 Persian Gulf

War AUMF, and the 2001 AUMF. My research draws from archival documents and personal interviews conducted with U.S. judges, law professors, historians, and other scholars of U.S. politics.

Impact Statement

This thesis carries substantial impact, both within academia and external to it. Within academia, it illuminates a generally neglected aspect of presidential and congressional war powers: *authorized* war making. This historical study of war authorizations provides presidential scholars with greater insight into how Congress has enabled prerogative and "imperial" presidencies. Furthermore, this thesis affords new opportunities for interdisciplinary research on presidential and congressional war powers, specifically AUMF texts, the language used, and governmental *processes* concerning use of military force. For example, research examining AUMFs utilizing historical, political, legal, and corpus linguistics methods can add further insight regarding vague and discretionary language within AUMFs and its wider impact. This thesis can also benefit scholars seeking to understand the roles of individual actors and certain identity groups involved in AUMF enactment processes. It draws attention, for example, to the overlooked role of women, such as Jeannette Rankin and Barbara Lee, both of whom opposed war resolutions and faced substantial political and social repercussions.

Outside of academia, the research findings can benefit public policy, specifically the drafting of new regulatory AUMFs and potential repeal of residual active war authorizations. Additionally, its analysis can assist Congress in drafting and enacting a new War Powers Resolution, one that reinforces congressional primacy in lawmaking and ensures the President conducts military actions in accordance with statutory regulations and restrictions. Lawmakers can apply the case-study research to include multilateralism requirements, such as UNSC authorization, in future AUMFs. They can also include international law requirements, such as Geneva Convention

provisions and other human rights protections. This thesis can be a practical tool for litigants seeking to challenge unconstitutional wars and human rights abuses. Those challenging unconstitutional presidential war making will find the advice on procedural due process most relevant, as this applies to the President as commander-in-chief, an administrator of decision rules. Legal representatives for Guantanamo detainees may find the information on substantive due process relevant in challenging vague AUMFs used to justify indefinite detentions.

As U.S. partisan polarization increases, an independent and informed Congress will be more critical. A Congress aware of the "rally-round-the-flag" effect and presidential preemption of the legislative AUMF process can lead to profound change in how the U.S. goes to war and conducts hostilities. This thesis and its perspectives can provide legislators with historical, political, and legal information to ensure proper oversight of the executive branch and adherence to constitutional separation-of-powers.

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Acknowledgments

I would like to express my profound gratitude to Professor Iwan Morgan for his doctoral supervision and tireless enthusiasm for my academic endeavors. I would also like to thank Dr. Tony McCulloch, my secondary supervisor, and Professor Melvyn Stokes for their valuable upgrade feedback.

Additionally, I want to thank the individuals who participated in personal interviews, including: Louis Fisher, Judge Duane Benton, and KU Law Professor Lumen Mulligan. Special thanks to Harvard Law Professor Mark Tushnet for two personal interviews, the first during my 2014 MA dissertation, and the second, by complete coincidence, approximately 5 years later to the day for my PhD thesis.

Lastly, I would like to thank Nik Kyriacou for his positive critical feedback and thought-provoking conversations about my peculiar yet fascinating homeland.

Introduction

Foundations of the War Power and Scholarly Perspectives

The power of the Legislature to declare war and judge of the causes for declaring it, is one of the most express and explicit parts of the Constitution. To endeavor to abridge or effect it by strained inferences, and by hypothetical or singular occurrences, naturally warns the reader of some lurking fallacy.

—James Madison

*The Pacificus-Helvidius Debates 1793-1794*¹

James Madison never could have foreseen the U.S. government's remarkable evolution more than two centuries after his riposte to Alexander Hamilton during a debate on executive power. Madison would have been troubled about the expansion of executive power, especially the President's capacity to conduct warfare without congressional authorization. Yet, the U.S. finds itself in a new era of warfare, fought against both state and non-state actors. The American-led War on Terror, beginning in 2001, is now in its twentieth year. There are concerns that the conflict represents perpetual presidential warfare. Just as it was the case with the Korean War—when President Harry Truman initiated major military actions without congressional approval—the U.S. has now passed another critical threshold. The President and executive branch have redefined the boundaries of presidential power through congressional statutes authorizing the use of military force.

For us to fully comprehend how the U.S. reached this moment we must first analyze the conflicting interpretations, ideas, and legal principles during the nation's founding. We also need to examine how executive-legislative relations have

¹ James Madison, "Helvidius Number III," in *The Pacificus-Helvidius Debates of 1793-1794: Toward the Completion of the American Founding*, ed. Morton J. Frisch (Indianapolis: Liberty Fund, Inc., 2007), 75.

developed concerning war powers apportionment. The dispute regarding separation-of-powers and checks and balances illustrates the imperfect nature of the written constitution as well as the ideological and theoretical differences between the American Founding Fathers. The system of separated powers was designed to prevent any one branch from dominating or arrogating the powers of the others. Accordingly, the executive, legislative, and judicial branches have distinct functions, albeit with some overlapping zones. However, the Constitution never clearly defined whether the President, as chief executive, has primacy over Congress in conducting foreign policy and using the war power to initiate military hostilities overseas. Therefore, scholars must examine founding arguments and the legal traditions for constitutional interpretation to gain greater *insight* as to the meaning of the original charter.²

This introduction will examine foundational and contemporary interpretations for executive and legislative branch exercises in foreign relations authority, specifically the war power. I will challenge some assumptions that have shaped current orthodoxy. Historians and presidential scholars typically see periods of war as significant concerning the expansion of *unauthorized* executive power. However, they neglect the impact of discretionary authorizations for use of military force (AUMFs) and the role of government branches in drafting and enacting this type of legislation, which can significantly impact presidential unilateralism. Congress has, at times, ceded substantial constitutional power to the President through law. This war authorization issue dealing with the cession of constitutional power versus the regulation of the commander-in-chief merits further examination and debate.

² While I do not claim that modern scholars can ever fully determine the founders' so-called "original intent," examining the founding history can provide a practical framework for constitutional interpretation.

This raises the fundamental issue of whether congressional war authorizations either regulate or delegate constitutional power to the President as commander-in-chief. How have discretionary war authorizations impacted presidential war powers since 1798? What has been the historical role of the executive branch in the *legislative* process of drafting declarations of war and AUMFs? Likewise, how has executive strategizing, its role in the drafting process, and its groundwork with Congress influenced the formulation and enactment of discretionary AUMFs that grant broad and unconstitutional powers to the President?

To facilitate the answering of these questions, this thesis will frequently use specific terminology related to war making, including such terms as *general* (perfect) and *limited* (imperfect) war. I broadly define a *general* war as sustained large-scale military operations with the use of ground forces. This type of warfare typically involves a national mobilization to achieve political and military objectives. A *limited* war, in contrast, must be restricted in some capacity so as to distinguish it from *general* warfare. In short, *general* wars must be declared, while *limited* wars must be authorized to regulate the commander-in-chief and restrict the use of force in certain manners.³

I argue that there has been a fundamental misunderstanding regarding: the hidden administrative maneuvering before and during the drafting of AUMFs; the vague and discretionary language included within them; the congressional AUMF enactment *process*; how Presidents have broadly waged *authorized* wars using AUMFs; and the

³ Concepts of *general* and *limited* war are reviewed in greater depth in Chapter One.

consequences when AUMFs lack constitutionally required restrictions, guidelines, and explicit standards for the commander-in-chief.

AUMFs are regulatory legislation and must comply with separation-of-powers requirements.⁴ When AUMFs include vague and discretionary provisions, they unconstitutionally delegate legislative powers to the President, specifically the power to declare war and regulate the armed forces. Depending on the provisions, the statute may cede additional constitutional powers to the executive, such as the power to legislate itself. In many cases, the legislature may not even comprehend that it has delegated its own constitutional powers to the President.

Historically, there have been numerous meaningful periods for AUMFs; this thesis will examine the most important eras. I will employ historical, political, and legal methodologies as a basis for AUMF analysis. A case study approach will be utilized; four cases will be examined, each representing a key period for war authorizations. Primary source evidence includes documents acquired from archival research and information obtained from specialist interviews. Chapter One revisits the historical foundation for declarations of war and AUMFs. It also reviews significant eras of congressionally *authorized* conflicts from the 1798 Quasi-War to the Second World War. It furthermore analyzes the onset of the Korean War in 1950, a congressionally *unauthorized* large-scale conflict, as a key departure from previous eras.

Chapter Two outlines fundamental legal doctrines that form the basis of my argumentation regarding discretionary AUMFs: legislative non-delegation and void-

⁴ See Chapter Two, 99.

for-vagueness. AUMFs must comply with separation-of-powers and the rule of law. Separation-of-powers utilizes all constitutional provisions, including due process requirements for both the President and Congress. It also requires robust statutory scrutiny under the vagueness doctrine. Chapter Three examines the Dwight Eisenhower administration's role in the enactment of the 1955 Formosa and 1957 Middle East resolutions. The 1950s Cold War years were critical for the development and employment of discretionary AUMFs, as President Eisenhower learned the lessons from President Harry Truman's highly criticized and congressionally unauthorized use of force during the Korean War. Eisenhower sought the enactment of preemptive AUMFs, as vague and discretionary as possible, to use as deterrents to prevent international crises from becoming broader conflicts.

Chapter Four details President Lyndon Johnson's actions to secure a war authorization prior to and after the 1964 Tonkin Gulf incidents and highlights the hazards of discretionary AUMF use. Johnson and Richard Nixon waged a disastrous large-scale war in Southeast Asia under the Gulf of Tonkin Resolution. Congressional reaction against their interventions brought about the repeal of the Tonkin Resolution, the enactment of an inadequate War Powers Resolution, and the beginning of a decades long aversion to major wars known as the "Vietnam Syndrome." Yet, lingering issues regarding the Tonkin Resolution's vague and discretionary provisions were not acknowledged, nor were they resolved.

Chapter Five explores the 1991 Persian Gulf War AUMF. President George H.W. Bush appeared to have overcome lingering Vietnam War effects after obtaining U.N. sanction, congressional authorization, and routing Iraqi forces during hostilities. Yet,

Representative Ronald Dellums' legal challenge to Bush's military deployment and a divisive congressional AUMF vote illustrate the significance of passive executive strategizing. The Bush administration had opportunities to obtain an AUMF in 1990 but failed to complete preemptive groundwork with Congress.

Chapter Six assesses the 2001 AUMF and the current War on Terror. By the time terrorists conducted the largest mainland attack in U.S. history on 11 September 2001, a new paradigm had been established: the Unitary Executive Theory. The George W. Bush administration, fully supportive of plenary executive power, succeeded in drafting its own discretionary AUMF and using the post-9/11 "rally-round-the-flag" effect to obtain congressional enactment. The AUMF included unitary executive trademarks that would expand presidential and executive power to levels incompatible with founding philosophies. It also enabled indefinite detention of suspected terrorists, torture, extra-judicial killings, and other egregious human rights abuses. It would furthermore authorize the longest war in U.S. history, the War on Terror, a war that continues at present.

While each AUMF period is distinct in comparison to the next, common links exist between them. There were vast differences, regardless of the foreign policy crisis, between what administrations claimed an AUMF was for versus what the textual language actually authorized. Although certain presidents maintained greater restraint in their use of force, vague and discretionary AUMF language still set arbitrary and unconstitutional standards for the commander-in-chief. At certain times the executive branch also preempted the legislative process with its own advanced planning. This

resulted in more extreme policy shifts during situations when a more independent Congress might have been more restrictive in its AUMF provisions.

American Founding Literature

This thesis recognizes the extensiveness and density of written works on U.S. war powers. Such recognition is essential for any new scholarly contribution. Studies have examined war powers issues from historical, political, and legal disciplines. This literature has explored both unauthorized and authorized conflicts.⁵ Many studies have examined the American founding, U.S. government structure, constitutional and legal processes, and significant political developments in foreign policy.⁶ For example, constitutional scholars have emphasized the Constitution's drafting and early founding era as critical to any understanding of domestic and international politics.⁷ During the 1787 Constitutional Convention, the framers were concerned to guard against the possibility of presidents having the power to individually determine

⁵ For example, Howard Nash, Jr.'s *Forgotten Wars* provides contextual information about the politics of the Quasi-War and First Barbary War. See Howard P. Nash, Jr., *The Forgotten Wars: The Role of the U.S. Navy in the Quasi War with France and the Barbary Wars 1798-1805* (South Brunswick: A.S. Barnes and Company, 1968). Gene Allen Smith's "Foreign Wars of the Early Republic" details conflicts from the 1798 Quasi-War to the War of 1812. See Gene Allen Smith, "Foreign Wars of the Early Republic, 1798-1816," in *A Companion to American Military History*, ed. James C. Bradford (Chichester: Blackwell Publishing, 2010), 39-58. Karl Jack Bauer's *Mexican War* provides a substantive history of the 1846 conflict. See Karl Jack Bauer, *The Mexican War, 1846-1848* (New York: Macmillan Publishing Co., 1974). David Trask's *War with Spain* provides a general summary of the 1898 Spanish-American War. See David Trask, *The War with Spain in 1898* (New York: Macmillan, 1980). For a reexamination of President McKinley's decision-making prior to the war, see Nick Kapur, "William McKinley's Values and the Origins of the Spanish-American War: A Reinterpretation," *Presidential Studies Quarterly*, Vol. 41, No. 1 (March 2011): 18-38.

⁶ For a general survey of American foreign policy, see Alexander DeConde's *A History of American Foreign Policy, Volume I: Growth to World Power (1700-1914)*, Third Edition (New York: Charles Scribner's Sons, 1978) and *A History of American Foreign Policy, Volume II: Global Power (1900 to the Present)*, Third Edition (New York: Charles Scribner's Sons, 1978); George Herring, *From Colony to Superpower: U.S. Foreign Relations since 1776* (Oxford: Oxford University Press, 2008).

⁷ For further reading on the U.S. Federal Convention and founding, see *The Debates in the Federal Convention of 1787: Which Framed the Constitution of the United States of America*, ed. Gaillard Hunt and James Brown Scott (New York: Oxford University Press, 1920); Lance Banning and Todd Estes (editor) *Founding Visions: The Ideas, Individuals, and Intersections that Created America* (Lexington: University Press of Kentucky, 2014). For further analysis on founding-era fiscal and foreign policy ideologies, see Richard Buel Jr., *Securing the Revolution: Ideology in American Politics, 1789-1815* (Ithaca: Cornell University Press, 1972).

war-making decisions. They decided that the legislature would have the power to declare, but not make, war. Congressionally executed warfare would be both impractical and problematic since it infrequently convened. Therefore, the President was entitled commander-in-chief of the armed forces to direct *offensive* military operations, once congressionally authorized.

The delegates were wary of emulating the British system, which endowed the monarch with plenary war making authority. Pierce Butler of South Carolina was the only delegate to diverge from this accepted orthodoxy. He proposed a prerogative war power for the President to declare and make war unilaterally.⁸ It was his conviction that the President would only invoke this discretionary power if he felt confident that the nation supported going to war. Yet, none of the other delegates supported Butler on granting the President this type of power, and Massachusetts delegate Elbridge Gerry remarked that he “never expected to hear in a republic a motion to empower the Executive alone to declare war.”⁹ Connecticut delegate Roger Sherman added that the President should be “able to repel and not to commence war.”¹⁰ Butler quickly reversed his opinion on the matter by the end of the war powers debate, and he even moved to give Congress the power of peace (this was rejected).¹¹ The resulting unanimity of the delegates on war powers illustrates the strong consensus for prohibiting the President from operating as a unitary actor in *offensive* actions.

⁸ *The Debates in the Federal Convention of 1787: Which Framed the Constitution of the United States of America*, ed. Gaillard Hunt and James Brown Scott (New York: Oxford University Press, 1920), 418.

⁹ *Ibid.*, 419.

¹⁰ *Ibid.*, 418-419.

¹¹ *Ibid.*

This consensus resonated during the Pennsylvania State Convention debate on constitutional ratification, when delegate James Wilson remarked on the Constitution's structural war powers safeguards:

This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large: 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 war.¹²

His statement directly referenced European wars, conducted unilaterally through monarchical prerogative. The American founders specifically created a system to avoid *offensive* warfare without legislative consent. Wilson had a clear understanding at the time of ratification that the President would not wield prerogative war powers like the British King to commit the nation to *offensive* war. His views reflected those of *every* delegate at the Federal Convention.

Procedures were, however, built into the Constitution to account for shifts in national perspectives on presidential war powers. If Americans later decided that the President should have greater war powers or a unilateral war prerogative, the Constitution allowed amendments to adjust executive power. Article V outlines amendment procedures for Congress and state legislatures. Constitutional modifications are only permitted when either two-thirds of both congressional houses propose amendments or two-thirds of state legislatures call for an amendment convention. Additionally, three-fourths of state legislatures must ratify proposed amendments.¹³ Other than a constitutional convention, there is no other systematic alternative to this process.

¹² "The Debates in the Convention of the State of Pennsylvania on the Adoption of the Federal Constitution," in *The Debates in the several State Conventions on the adoption of the Federal Constitution*, Volume II, ed. by Jonathan Elliot (Philadelphia: J.B. Lippincott Company, 1901), 528.

¹³ U.S. Constitution, Article V.

Laws that seek to bypass this process, shift power from one branch to another, or delegate constitutional powers are prohibited. State legislatures have historically ratified 27 amendments from 33 total proposals, all of which originated from Congress.¹⁴

Like the Convention debates, *The Federalist Papers* are equally noteworthy, since they were written and published during the constitutional ratification period (1787-1788).¹⁵ Their original purpose was to persuade the state of New York to ratify the Constitution. Alexander Hamilton, James Madison, and John Jay each provided a descriptive philosophical framework for the charter. They detailed issues of potential concern, such as political factions and government tyranny, and explained the Constitution's remedies for them.¹⁶ U.S. political scholars widely view these papers as the best source of explanation for the Constitution.

In Federalist No. 51, Madison described the government's checks and balances:

It is equally evident, that the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal. But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as

¹⁴ "America Might See a New Constitutional Convention in a Few Years," *The Economist*, September 30, 2017, Accessed: 10 February 2018, <https://www.economist.com/news/briefing/21729735-if-it-did-would-be-dangerous-thing-america-might-see-new-constitutional-convention>.

¹⁵ Alexander Hamilton, James Madison, and John Jay, Edited by Benjamin Wright, *The Federalist* (Cambridge: Harvard University Press, 1966).

¹⁶ James Madison described the issue of factions in Federalist No. 10. For a detailed discussion and modern-day interpretation of each Federalist Paper, See Sanford Levinson, *An Argument Open to All: Reading The Federalist in the Twenty-First Century* (New Haven: Yale University Press, 2015).

in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition.¹⁷

Madison emphasized that each government branch cannot encroach upon the powers or appropriate the functions of the other branches. The heads of each department are furthermore given means and motives to resist this encroachment.

In detailing executive power in Federalist No. 69, Hamilton explained the President's commander-in-chief power and compared it to that of the British monarch. He contended that the President's power "would be nominally the same with that of the king of Great Britain, but in substance much inferior to it."¹⁸ He also remarked that the title of commander-in-chief is "nothing more than the supreme command and direction of the military and naval forces."¹⁹ Hamilton recognized that the British monarch had full authority over the military, such as the power to regulate the army and navy, declare war or authorize any hostilities without declaring war, and conduct warfare as he saw fit.²⁰ Yet, the American constitutional design distinguished itself from the monarchic British system. The Constitution allocated these powers to Congress, which would exercise them through explicit legislative procedures.

Hamilton additionally reviewed the need for an executive branch capable of enabling government action in Federalist No. 70. According to Hamilton, "Energy in the Executive is a leading character in the definition of good government."²¹ He believed that a strong national government would be capable of defending itself and competing

¹⁷ James Madison, "Federalist No. 51," in *The Federalist*, ed. Benjamin Wright (Cambridge: Harvard University Press, 1966), 356.

¹⁸ Alexander Hamilton, "Federalist No. 69," in *The Federalist*, ed. Benjamin Wright (Cambridge: Harvard University Press, 1966), 446.

¹⁹ *Ibid.*, 446.

²⁰ *Ibid.*

²¹ Hamilton, "Federalist No. 70," 451.

economically on the international stage with European powers.²² The new American government should exercise the authorities of European monarchs, which were able to tax, borrow money, deficit spend, and build robust armed forces.²³ Hamilton envisioned a government able to survive and prosper. He further asserted, “A feeble Executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government.”²⁴ This concept of “energy,” however, transcends simply the executive branch. It also means that government as a whole has the “ability to behave as a singular actor to effect national functions.”²⁵ This results in less gridlock, more efficiency, and more harmony between government branches.

Federalist No. 74 attempted to justify the President’s role as commander-in-chief of the armed forces. Hamilton argued that a single person, as opposed to a council of officials, would best serve the military.²⁶ He pointed out that the commander-in-chief title is so obvious that it does not need a great deal of explanation. Ironically, this title has led to fierce debate regarding its actual definition and the limits of presidential authority in war making. Hamilton also highlighted the time-consuming process of organizing a council or the legislature to deal with critical situations. He appeared to support an executive capable of responding to rebellions or attacks. However, he added regarding emergency situations:

²² Andrew Shankman, *Original Intent: Hamilton, Jefferson, Madison, and the American Founding* (New York: Oxford University Press, 2018), 26-27.

²³ Ibid.

²⁴ Ibid, 451.

²⁵ Andrew Rudalevige, “Hail Gridlock? Hamiltonian Energy, Madisonian Institutions and American Dissensus,” in *Broken Government? American Politics in the Obama Era*, ed. Iwan Morgan and Philip John Davies (London: Institute for the Study of the Americas, University of London, 2012), 17.

²⁶ Hamilton, “Federalist No. 74.”

If it should be observed, that a discretionary power, with a view to such contingencies, might be occasionally conferred upon the President, it may be answered in the first place, that it is questionable, whether, in a limited Constitution, that power could be delegated by law; and in the second place, that it would generally be impolitic beforehand to take any step which might hold out the prospect of impunity.²⁷

Undoubtedly, Hamilton was very concerned about the possibility of the legislature providing discretionary power to the president through law. He exhibited a clear apprehension about the potential for executive impunity in the exercise of this authority. These remarks should be interpreted as explicit opposition to legislative grants of discretionary war making authority to the President to be executed *in futuro*.²⁸

Additionally, Hamilton defined the fundamental essence of the legislative and executive branches in the making of treaties in Federalist No. 75. Like war powers, treaties would be a shared duty between executive and legislative. He contended that the legislative branch has a chief responsibility to create laws for society, whereas the executive branch only executes the laws and provides “for the common defence.”²⁹ However, he never mentioned anything further about what defines defensive executive actions, nor does he explain what defines offensive executive actions or conduct abroad.

Hamilton’s views on foreign relations did lead to a point of contention with Madison in 1793 when he claimed, “However proper or safe it may be in governments where the executive magistrate is an hereditary monarch, to commit to him the entire power

²⁷ Ibid, 475.

²⁸ By *in futuro*, I mean a legislative authorization granting the executive discretionary power for future military actions, which do not require any further congressional authorization.

²⁹ Hamilton, “Federalist No. 75,” 476.

of making treaties, it would be utterly unsafe and improper to intrust that power to an elective magistrate of four years duration.”³⁰ Hamilton was emphasizing that the executive is the most adept in conducting foreign relations. Yet, he was also ascribing a role for the legislative branch to manage treaties as legal statutes.

While *The Federalist Papers* were originally meant to persuade New Yorkers to ratify the Constitution, they also foreshadowed the ideological and partisan divides to follow. Hamilton and Madison shared more consonant beliefs in their defense of the Constitution; namely, that good government was derived from popular consent and that its purpose was to protect personal rights through checks, balances, and independent government branches.³¹ One dispute at the time concerned the authorship of many essays (especially between Hamilton and Madison), since the authors had little time to revise their own or their associates’ essays. Hamilton and Madison also did not discuss their philosophical differences during publication. It is possible that they were not aware of their contrasting ideological visions for the nation, which were placed in their personal writings. Also, the differences between Hamilton and Madison—specifically, their aspirations for the nation—were not entirely well defined during the 1780s, so these disparities did not inhibit their shared determination to support the Constitution’s ratification.³²

Along with the foundational philosophies during the American founding, the Constitution itself contains key articles, sections, and clauses that enumerate the powers and responsibilities of each government branch. Article I details legislative

³⁰ Ibid, 477.

³¹ Lance Banning and Todd Estes (editor), *Founding Visions: The Ideas, Individuals, and Intersections that Created America* (Lexington: University Press of Kentucky, 2014), 294.

³² Ibid, 137, 295, 265.

powers and duties. The Constitution states, “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.”³³ This “vesting clause” assigns all legislative power to create federal laws *solely* with Congress. On the conduct of foreign relations and the war power, the Constitution provides that Congress is empowered to “declare War, grant Letters of Marque and Reprisal, make Rules concerning Captures on Land and Water,” and “make Rules for the Government and Regulation of the land and naval Forces.”³⁴ Finally, the Constitution authorizes Congress to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”³⁵

Article II outlines the powers and responsibilities of the President and executive branch. The Constitution specifies, “The executive Power shall be vested in a President of the United States of America.”³⁶ This executive vesting clause indicates that the President has sole power to execute and implement the nation’s laws. The President also provides a final check to legislation with his power to either sign or veto bills. However, the executive branch is explicitly never afforded any power to legislate or enact federal laws under Article II.³⁷

³³ U.S. Constitution, Article I, §1, Clause 2.

³⁴ Ibid, Article I, §8, Clause 11; Article I, §8, Clause 14.

³⁵ Ibid, Article I, §8, Clause 18.

³⁶ Ibid, Article II, §1, Clause 1.

³⁷ The only exception is the President’s treaty-making power of Article II, §2, given the Senate provides a two-thirds majority approval. Ratified treaties have the legal force of domestic federal law, as confirmed in Article VI. See James Madison, “Helvidius Number I,” in *The Pacificus-Helvidius Debates of 1793-1794*, ed. Morton J. Frisch (Indianapolis: Liberty Fund, Inc., 2007), 59. Madison discussed the process of making treaties as inherently not of an executive nature.

The President is additionally designated “Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”³⁸ The commander-in-chief has an executive power to act as leader of the armed forces. Yet, he is given no constitutional power to create directives to initiate military actions as a singular actor. This clause intended for the legislature to “call” the armed forces into action by providing a legal authorization or specific directive to be undertaken by the President. The only exceptions, those generally accepted by consensus, include foreign invasions and imminent attacks on the nation, in which there is no time for the legislature to convene, deliberate, and authorize defensive military actions.³⁹

Constitutional and presidential scholar Louis Fisher argues that Congress should even authorize presidential actions retroactively, including those taken without congressional approval in defense of the nation or in the name of national security.⁴⁰ The debate on the limits of the commander-in-chief power has become much more significant since the end of the Second World War, especially since Congress has not enacted a war declaration since 1942. The legislature has only enacted a small number of AUMFs from 1945 to the present. Consequently, the executive branch has sought to legally justify unauthorized military actions by citing and expanding upon this

³⁸ U.S. Constitution, Article II, §2, Clause 1.

³⁹ See Alexander Hamilton, “Federalist No. 29,” in *The Federalist*, ed. Benjamin Wright (Cambridge: Harvard University Press, 1966), 226; also see *Martin v. Mott*, 25 U.S. 19 (1827).

⁴⁰ See Louis Fisher, “Bush and the War Power: A Critique from Outside,” in *Testing the Limits: George W. Bush and the Imperial Presidency*, ed. Mark Rozell and Gleaves Whitney (Lanham: Rowman and Littlefield, 2009), 157-176. This thesis narrowly defines “national security” according to Daniel Webster’s 1837 definition of repelling a physical attack or invasion in self-defense, without recourse for congressional deliberation. See Andrew Preston, “Monsters Everywhere: A Genealogy of National Security,” *Diplomatic History*, Volume 38, Number 3 (2014): 483. However, broader definitions exist, such as Melvyn Leffler’s contemporary interpretation: “National security policy encompasses the decisions and actions deemed imperative to protect domestic core values from external threats.” See Melvyn Leffler, “National Security,” in *Explaining the History of American Foreign Relations*, 2nd ed., ed. Michael Hogan and Thomas Paterson (Cambridge: Cambridge University Press, 2004), 123.

constitutional clause. For example, President Obama conducted an extensive targeted killing campaign in the Middle East. However, these assassination missions against suspected terrorists were congressionally unauthorized. Obama justified his actions based on the commander-in-chief power and the necessity to defend the nation against a “continuing and imminent threat” from terrorists.⁴¹

The *Pacificus-Helvidius Debates* (1793-1794) are also imperative as contextual literature.⁴² Alexander Hamilton and James Madison wrote these essays after President George Washington’s 1793 Neutrality Proclamation. These debates illustrate the broader context of presidential power and the difficulty of interpretation with a constitution that never explicitly mentioned *implied* executive powers.⁴³

Hamilton wrote his essays in defense of Washington’s proclamation, conflicting with Secretary of State Thomas Jefferson and his congressional allies. Madison, with Jefferson’s encouragement, responded with his own essays. He criticized Hamilton for his defense of presidential authority to issue a neutrality proclamation. He also generally admonished Hamilton for his broad interpretation of constitutional executive power. Washington’s proclamation, declared without any consultation with Congress, effectively invalidated future military assistance to France. Military aid had previously been based on the 1778 Franco-American treaty during the American War

⁴¹ Barack Obama, "Remarks at National Defense University," May 23, 2013. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 10 February 2018, <http://www.presidency.ucsb.edu/ws/?pid=103625>.

⁴² Morton J. Frisch (editor), *The Pacificus-Helvidius Debates of 1793-1794: Toward the Completion of the American Founding* (Indianapolis: Liberty Fund, Inc., 2007).

⁴³ For further reading on the foreign policy issues during the first presidential administration, see Alexander DeConde, *Entangling Alliance: Politics and Diplomacy under George Washington* (Durham: Duke University Press, 1958); Carson Holloway, *Hamilton versus Jefferson in the Washington Administration: Completing the Founding or Betraying the Founding?* (New York: Cambridge University Press, 2015).

for Independence, which stated that the U.S. would provide military support to France against Britain if war began between the two during the American Revolution.⁴⁴

When France subsequently recognized the independence of the U.S., Britain declared war against France, thus triggering the aid clause of the treaty.

However, once the American Revolutionary and Anglo-French Wars ended in 1783, there was still a remaining issue as to when the agreement would terminate or whether it embodied an indefinite alliance.⁴⁵ As time progressed, American enthusiasm for military aid to France declined. The French Revolution, and the onset of new military conflicts involving France and the rest of Europe, ultimately led to Washington's 1793 proclamation that the U.S. was no longer obligated to provide military assistance to France.⁴⁶

Hamilton's essays sought to expand executive branch power beyond that explicitly indicated in Article II of the Constitution. This novel executive authority to proclaim American neutrality, according to Hamilton, originated from the Vesting Clause of the Constitution, which simply states that the executive power is assigned to the President.⁴⁷ Specifically, he emphasized that the enumerative powers listed in Article II of the Constitution do not cover all *implied* executive powers. All other unspecified

⁴⁴ "Treaty of Alliance Between The United States and France," February 6, 1778, In *Statutes at Large*, Volume 8.

⁴⁵ Adam Quinn, *U.S. Foreign Policy in Context: National Ideology from the Founders to the Bush Doctrine* (New York: Routledge, 2010), 44.

⁴⁶ See Herring, *From Colony to Superpower*, 69-70; Michael H. Hunt, *Ideology and U.S. Foreign Policy* (New Haven: Yale University Press, 1987). On the French Revolutionary Wars, see T.C.W. Blanning, *The Origins of the French Revolutionary Wars* (New York: Longman, 1986) and *The French Revolutionary Wars, 1787-1802* (London: Arnold, 1996). For further discussion of the Pacificus-Helvidius Debates of 1793-1794, see Gary Schmitt, "Washington's Proclamation of Neutrality: Executive Energy and the Paradox of Executive Power," *The Political Science Reviewer*, Vol. 29 (January 2000): 126.

⁴⁷ Alexander Hamilton, "Pacificus Number I," in *The Pacificus-Helvidius Debates of 1793-1794: Toward the Completion of the American Founding*, ed. Morton J. Frisch (Indianapolis: Liberty Fund, Inc., 2007).

executive powers “flow from the general grant of that power,” that power being the Vesting Clause.⁴⁸ Hamilton highlighted three principal exceptions to this rule, which are explicitly listed in the Constitution. These exceptions include: the Senate’s role in the approval of treaties, the Senate’s function to approve appointments of officers, and the congressional responsibility to declare war and issue letters of marque and reprisal.⁴⁹

Hamilton’s fundamental argument held that the President’s power to dissolve treaties is an executive action by its nature; thus, it appertains to the executive as an *implied* power. This notion would seemingly create, based on no established or written principle, an executive or presidential “necessary-and-proper clause.” It would allow the President to take actions not specified in the Constitution yet ostensibly *needed* for the function of government.⁵⁰ The congressional “necessary and proper” clause is listed in Article I as a legislative power to create supplementary statutes to facilitate the execution of all *constitutional* powers.⁵¹ There is no such clause for the executive branch in Article II of the Constitution.⁵²

In regard to Hamilton’s final exception dealing with legislative war powers, he remarked that the power to declare war and “the right of judging whether the N[ation] be under obligations to make War or not” would be an inherent executive function,

⁴⁸ Ibid, 13.

⁴⁹ Ibid.

⁵⁰ See Louis Fisher, *President and Congress: Power and Policy* (New York: The Free Press, 1972), 35.

⁵¹ U.S. Constitution, Article I, §8, Clause 18.

⁵² It must also be stated that the Article I “necessary and proper” clause was never written or intended to replace the process of amending the Constitution as a way of reallocating powers or functions between government branches. For a more expansive interpretation of this clause, see John Mikhail, “The Necessary and Proper Clauses,” *Georgetown Law Journal*, Volume 102, Number 4 (2014): 1045-1132. Mikhail claims that these *clauses* provide an explicit constitutional basis for implied and inherent powers.

had it not been expressly assigned to Congress in the Constitution.⁵³ On one hand Hamilton seemingly argued that executive prerogative powers existed in all areas not mentioned by the Constitution as exceptions. Yet, on the other hand he readily accepted the view that Congress, not the President, held the discretionary power to decide matters of war. However, a critical question emerges from this reasoning. If Hamilton believed that the President has unilateral executive power to cancel or dissolve a treaty—or, as the President interprets, part of a treaty—could the President also unilaterally decide when military operations or a war should end?⁵⁴ This raises separation-of-powers concerns.

For example, Congress could decide to wage a general war, enact a war declaration, and direct the commander-in-chief to achieve specific military objectives. There could be a serious dilemma if the President is allowed to decide when a war declaration has been fulfilled, contrary to congressional mandates, and subsequently changes the state of the nation from war to peace. Hamilton added, “While therefore the Legislature can alone declare war, can alone actually transfer the nation from a state of Peace to a state of War—it belongs to the ‘Executive Power,’ to do whatever else the laws of Nations cooperating with the Treaties of the Country enjoin, in the intercourse of the UStates with foreign Powers.”⁵⁵ If, according to Hamilton, only the legislature can change the state of the nation from peace to war, then it does not logically follow that the President should unilaterally have the power to change the state of the nation from war to peace. Analogously, the same follows for the treaty power. The President does

⁵³ Hamilton, “Pacificus Number I,” 13.

⁵⁴ See James Madison, “Helvidius Number IV,” in *The Pacificus-Helvidius Debates of 1793-1794: Toward the Completion of the American Founding*, ed. Morton J. Frisch (Indianapolis: Liberty Fund, Inc., 2007), 89. Madison discusses constitutional constraints on the executive to unilaterally decide either the commencement or conclusion of war.

⁵⁵ Hamilton, “Pacificus Number I,” 16.

not have a prerogative power (or executive “necessary and proper” power) to cancel a treaty, since *both* President and Congress were required in the formation of the treaty.

Madison refuted Hamilton’s interpretation of presidential power and outlined a *strict constructionist* interpretation of constitutional executive-legislative functions. A *strict construction* means a “close or rigid reading and interpretation of a law.”⁵⁶ Advocates for *strict constructions* might also claim they are interpreting the Constitution according to the founders’ original intents. Madison reasoned:

The natural province of the executive magistrate is to execute laws, as that of the legislature is to make laws. All his acts therefore, properly executive, must presuppose the existence of the laws to be executed. A treaty is not an execution of laws: it does not pre-suppose the existence of laws. It is, on the contrary, to have itself the force of *law*, and to be carried into *execution*, like all *other laws*, by the *executive magistrate*. To say then that the power of making treaties which are confessedly laws, belongs naturally to the department which is to execute laws, is to say, that the executive department naturally includes a legislative power. In theory, this is an absurdity—in practice a tyranny. The power to declare war is subject to similar reasoning. A declaration that there shall be war, is not an execution of laws: it does not suppose preexisting laws to be executed: it is not in any respect, an act merely executive. It is, on the contrary, one of the most deliberative acts that can be performed; and when performed, has the effect of *repealing* all the *laws* operating in a state of peace, so far as they are inconsistent with a state of war: and of *enacting as a rule for the executive*, a *new code* adapted to the relation between the society and its foreign enemy.⁵⁷

Madison claimed that the process of making treaties is fundamentally a legislative action, because Congress is the branch that creates laws. Likewise, Congress enacts statutes, which the executive will then implement, including war declarations. He argued that the right to create treaties was specifically “vested jointly in the President

⁵⁶ Henri Campbell Black, Joseph R. Nolan, and Jacqueline M. Nolan, *Blacks Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern*, 6th Edition (St. Paul: West Publishing Co., 1990), 1422.

⁵⁷ Madison, “Helvidius Number I,” 59.

and in the Senate.”⁵⁸ Yet, he maintained that creating treaties is of a fundamental legislative nature, since they are essentially laws. This contrasts with treaty negotiations, which are largely executive functions. Congress cannot *actively* conduct these duties.⁵⁹ The executive can negotiate terms, but the Senate approves or rejects a finalized treaty in a formal legislative process. The Senate is not permitted to empower the executive to negotiate *and* approve treaty agreements without further legislative consultation or consent. Doing so would be a constitutional violation. This would be an example of the Senate delegating its discretionary approval authority to the President *in futuro*.

On warfare, Madison was explicit in his opposition to the President having any prerogative war power:

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.⁶⁰

He even cited the fact that, in the British system, the monarch exercised treaty and war powers authority as royal prerogatives.⁶¹ He contrasted treaties and war with the President’s power to remove executive officials from office, which he viewed as inherently executive, and therefore reasonable as an executive power.

Madison also cited Hamilton’s *Federalist* essay No. 75 to highlight the inconsistency in his new interpretation of executive power. Hamilton previously stated that treaty

⁵⁸ Ibid, 61.

⁵⁹ For Senate advisory powers for treaty negotiations, *see* Chapter Two, 114-115.

⁶⁰ Madison, “Helvidius Number I,” 62.

⁶¹ Ibid, 63.

making “will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them,” and “the power in question seems therefore to form a distinct department, and to belong properly neither to the legislative nor to the executive.”⁶² Thus, Hamilton contradicted himself by arguing that the President has a unilateral executive power to cancel a treaty and issue neutrality without the legislature. His reasoning on executive power shifted greatly over just a six-year timespan. During ratification in 1787, his *Federalist* essays illustrated greater constitutional restraints on executive power in an effort to garner ratification support. Yet, he produced a new principle in this instance—albeit, a principle never constitutionally enumerated—*implicit* executive power, to justify Washington’s treaty abrogation.

In response, Madison contested Hamilton’s new constitutional principle, highlighted the flaws in his logic, and issued a warning. He believed that introducing “new principles and new constructions” into the Constitution would “remove the landmarks of power” on the executive. These constructions, if accepted by the public, would allow the government to create and employ any power imaginable, for any purpose.⁶³ Madison’s commentary during these debates illustrates a practical constitutional analogy between treaties and war making by differentiating executive and legislative natures.

Treaties cannot change the state of the nation from peace to war. Congress would no longer individually possess the power to declare war if they could. The President, as an actor involved in the treaty making process, would thus have obtained,

⁶² Hamilton, “Federalist No. 75,” 476.

⁶³ Madison, “Helvidius Number IV,” 85.

surreptitiously, at least a partial power to change the state of the nation. Treaties cannot function as war declarations or AUMFs. Likewise, the executive cannot fashion agreements, treaties, or statutes that appropriate congressional power to change the state of the nation from peace to war.⁶⁴ Only Congress exercises this discretion.

One significant consequence of the events and debates of the 1790s was the separation between Federalists (such as Alexander Hamilton) and Republicans (such as Thomas Jefferson and James Madison) into political factions as a result of divergent ideologies regarding domestic economics and foreign policies towards Britain, France, and other European powers.⁶⁵ Jefferson ultimately resigned from his office of Secretary of State in Washington's administration in response to the 1793 Proclamation of Neutrality.⁶⁶ Since 1793, however, Hamilton's notions of executive preeminence in foreign policy triumphed over Madison's *strict constructionist* interpretations that mandated congressional co-activism in foreign relations. These perspectives have since developed into strict and expansive theories of presidential power, the latter largely prevailing since the 1793 debate.

Hamilton had well-defined objectives to fashion a robust central government. He supported policies that would put his ideas into effect during the period when

⁶⁴ Treaties cannot supersede or conflict with the Constitution. *See* *Kinsella v. Krueger*, 351 U.S. 470 (1956); *Reid v. Covert*, 354 U.S. 1 (1957).

⁶⁵ Banning and Estes, *Founding Visions*, 270. Also *see* Hunt, *Ideology and U.S. Foreign Policy*, 22; Herring, *From Colony to Superpower*, 64. Hunt illustrates the ideological differences between Madison-Jefferson (who favored a limited executive) and Hamilton (who favored a strong executive). On the growing ideological divide and development of political parties in the early years, *see* Morton Borden, *Parties and Politics in the Early Republic, 1789-1815* (London: Routledge and Kegan Paul Limited, 1967).

⁶⁶ Herring, *From Colony to Superpower*, 64-65.

Federalists controlled both the executive and legislative branches.⁶⁷ For example, he sought to establish a national bank to assume state debts and provide economic stability for the new nation. Madison and Jefferson opposed the bank, claiming that it was unconstitutional. However, Hamilton succeeded in securing legislation to establish the First Bank of the United States.⁶⁸ Madison and Jefferson largely reacted to Hamilton and the Federalists' success, putting them at an initial disadvantage in restraining both executive power and the general expansion of the federal government. Hamilton had overwhelmed Washington's cabinet with his authority. Even after leaving government office in January 1795, he continued to exert great influence on President John Adams' cabinet prior to the Quasi-War with France.⁶⁹ He ultimately succeeded in fashioning an archetypal executive that subsequent presidents have been unwilling or unable to break.

War Powers Scholarship

Along with the founding debates, many significant contributions to the study of congressional and presidential war powers have been published within the last century. Prior to 1950, law professors provided significant contributions to the study of constitutional law, administrative law, and jurisprudence.⁷⁰ Through the Second World War, presidential scholars, namely political scientists and historians, were at

⁶⁷ Ibid.

⁶⁸ Michael Coblenz, "The Fight Goes On Forever: 'Limited Government' and the First Bank of the United States," *Southern Illinois University Law Journal*, Vol. 39 (2015): 391-451.

⁶⁹ Hunt, *Ideology and U.S. Foreign Policy*, 26.

⁷⁰ See, for example, Ernst Freund, *Standards of American Legislation: An Estimate of Restrictive and Constructive Factors* (Chicago: University of Chicago Press, 1917); Julius Goebel, Jr., "Constitutional History and Constitutional Law," *Columbia Law Review*, Volume 38, Number 4 (1938): 555-577; James Quarles, "The Federal Government: As to Foreign Affairs, Are Its Powers Inherent As Distinguished From Delegated?" *Georgetown Law Review*, Volume 32, Number 4 (1944): 375-383; Lon Fuller, *The Problems of Jurisprudence* (Brooklyn: Foundation Press, 1949).

the forefront of those engaged in constitutional examinations of presidential actions.⁷¹

After 1950, these disciplines shifted from constitutional law and the nature of the government's legal authority to how the government made policy. Scholars mainly described how effective the government was, but they placed little importance on the legality of government actions.⁷²

The Cold War significantly impacted the shift in focus, and studies on the exercise of power reflected national security and defense concerns.⁷³ The executive branch drew inspiration from claims that the President was unrestrained in foreign policy and defense. Outcomes, not methods, received greater attention. Consequently, many presidential actions went legally unchallenged. Scholarly literature examined notions favoring executive unilateralism (speed, dispatch, secrecy, and information) over values of collective decision-making, shared powers, and consensus.⁷⁴ The President represented efficiency, and Congress represented a time-consuming and restricting bureaucracy.⁷⁵ Richard Neustadt's acclaimed *Presidential Power* influenced a generation of scholars during this era.⁷⁶ He defined presidential power as the President's ability to influence other people around him in government.⁷⁷

⁷¹ Political scientist and historian Edward Corwin was a leading constitutional commentator during the 20th century. See Corwin's *The President's Control of Foreign Relations* (London: Princeton University Press, 1917) and *The Constitution and What It Means Today* (Princeton: Princeton University Press, 1958).

⁷² David Gray Adler, "The Presidency and the Constitution," in *New Directions in the American Presidency*, ed. Lori Cox Han (New York: Routledge, 2011), 14.

⁷³ For example, see Henry Kissinger, *Nuclear Weapons and Foreign Policy* (New York: Harper & Brothers, 1957).

⁷⁴ See George Kennan's, *American Diplomacy* (Chicago: University of Chicago Press, 1951) and *Realities of American Foreign Policy* (Princeton: Princeton University Press, 1954). Kennan, once a proponent of the "containment" strategy, later criticized the U.S. tendency to favor the threat or use of military force in Cold War foreign relations.

⁷⁵ Corwin, *The President's Control of Foreign Relations*.

⁷⁶ Richard Neustadt, *Presidential Power* (New York: John Wiley & Sons, 1960).

⁷⁷ *Ibid*, 2.

Yet, contemporary scholars such as David Gray Adler have noted that Neustadt's work never mentioned the Constitution itself.⁷⁸ For Neustadt, the constitutional powers of the presidency were far less important than the President's ability to influence others. Adler acknowledges Neustadt did recognize that the use of military force should originate from both the executive and legislative branches. Louis Fisher differs slightly with Adler's assertion about Neustadt. Fisher claims that, for Neustadt, the risk of nuclear war profoundly changed the Constitution. Neustadt noted that for actions "risking war, technology has modified the Constitution: the President perforce becomes the only such man in the system capable of exercising judgment under the extraordinary limits now imposed by secrecy, complexity, and time."⁷⁹ This means, I argue, that under normal circumstances presidents must work with and obtain authorization from Congress prior to military action. The one exception to this would be critical situations when the President might need to use nuclear weapons to avoid an existential nuclear threat to the nation. Neustadt wrote his seminal work during the Cold War era when presidents would not have time to seek congressional authorizations in the event nuclear weapons were deployed.

Richard Nixon's presidency and his claims of sweeping presidential powers produced another shift in scholarly studies. This period represented an awakening for scholars regarding questions about constitutional meaning and what the presidency *should* be.⁸⁰ Notable scholars such as Francis Wormuth, Charles Lofgren, and Louis Henkin searched for the origins and dimensions of constitutional war powers.⁸¹ This was in an

⁷⁸ Adler, "The Presidency and the Constitution."

⁷⁹ Neustadt, *Presidential Power*, 1990, 180-181.

⁸⁰ Adler, "The Presidency and the Constitution," 17.

⁸¹ See Francis Wormuth, *To Chain the Dog of War: The War Power of Congress in History and Law* (Dallas: Southern Methodist University Press, 1986) and "The Nixon Theory of the War Power: A Critique," *California Law Review*, Volume 60, Number 3 (1972): 623-703; Charles Lofgren, "War-

effort to refute Nixonian absolutist claims of the power to conduct warfare. In *The Imperial Presidency*, Arthur Schlesinger, Jr. provided an enlightening account about the increasing scope of presidential power and Nixon's desires to wield monarchical authority.⁸² He argued that this executive aggrandizement represented a grave threat to constitutional and democratic principles. Nixon confirmed this most infamously when he later asserted, "Well, when the president does it, that means that it is not illegal...If the president determines that a specified action is necessary to protect national security, then the action is lawful, even if it is prohibited by federal statute."⁸³ His presidency was thus the spark that reignited the academic field of constitutionalism.

Post-Watergate, scholarly interest increased regarding constitutional practices, and there was widespread academic appreciation of the importance of presidential action. Accordingly, current scholars still have much to examine regarding executive prerogative power with the presidencies of Ronald Reagan, George H.W. Bush, Bill Clinton, George W. Bush, Barack Obama, and Donald Trump. David Adler reviewed the historical roots of the prerogative power and outlined the commander-in-chief power.⁸⁴ He described the traditionally monarchical prerogative power as "the unilateral power of the king to undertake any act and pursue any program or policy to promote the interests of his kingdom."⁸⁵ He contends that the American founders rejected the Royal Prerogative system of executive power employed by the English

Making under the Constitution: The Original Understanding," *The Yale Law Journal*, Vol. 81, No. 4 (March 1972): 672-702; Louis Henkin, *Foreign Affairs and the Constitution* (Mineola: The Foundation Press, 1972).

⁸² Arthur Schlesinger, Jr., *The Imperial Presidency* (Boston: Houghton Mifflin, 1973).

⁸³ From the third Frost-Nixon Interview, aired on television on May 20, 1977. Also see Genovese, *Presidential Prerogative: Imperial Power in an Age of Terrorism*, 138.

⁸⁴ Adler, "The Presidency and the Constitution."

⁸⁵ *Ibid*, 12.

monarch, and he argues that the Constitution was created to overcome the concentration of the executive power in one person. Therefore, the Constitution restricted and limited the power of the executive.

Adler also argues that the commander-in-chief power provides no authority for the President to move the nation from a state of peace to a state of war. He remarked, “The Constitution, moreover, characterizes the power to declare, authorize, and initiate war as legislative and the power to conduct it as executive.”⁸⁶ He challenges assertions that the President has plenary power to launch preemptive war, claiming the framers vested Congress with sole and exclusive authority to commence war, including lesser military actions. Adler cites *Little v. Barreme* (1804), a Supreme Court case that dealt with congressional legislation directing specific naval hostilities. The Court held that the President as commander-in-chief is subject to legislative controls regarding warfare.⁸⁷ When Congress authorizes war, it can issue instructions and directions to the commander-in-chief through statutory commands, which the President is legally bound to execute.⁸⁸

Recent scholarship also gives greater consideration to domestic politics and specific AUMFs. Robert Johnson’s chapter in *Vietnam and the American Political Tradition* and Shoon Murray’s *The Terror Authorization* add important analysis of the politics

⁸⁶ Ibid, 20.

⁸⁷ *Little v. Barreme*, 6 U.S. 170 (1804).

⁸⁸ This thesis argues that there are further congressional limitations, even to the rule listed above. In directing the commander-in-chief through statutes, Congress cannot delegate, trade, or relinquish its constitutional powers. For example, Congress cannot forfeit its responsibility to deliberate and authorize wars (both prior and retroactively). It is prohibited from issuing statutory commands that delegate constitutional power from one branch of government to another. Congress must issue specific, not vague, regulations of the President as commander-in-chief in its war authorizations.

concerning the 1964 and 2001 war authorizations, respectively.⁸⁹ Murray provides a broad overview of the 2001 AUMF, arguing that its broad grants of power could potentially last indefinitely, should Congress fail to enact an updated version (including a sunset provision) or repeal it entirely.⁹⁰ She examines the manner in which the legislature enacted the AUMF in historical context. The Bush administration initially wanted to add deterrence and preemption clauses to the AUMF, but legislators quickly rejected these provisions.⁹¹

Murray also examines the Bush administration's overreach, its lasting impact, and Obama's AUMF implementation, but she does not examine Obama's use of the 2001 AUMF to conduct military operations against the Islamic State. Murray discusses Obama's expansion of the AUMF to conduct strikes against so-called "cobelligerents" or "associated forces" of al-Qaeda, such as al-Qaeda in the Arabian Peninsula (AQAP) or al-Shabaab.⁹² Yet, she does not mention any congressional responsibility to regulate, with further statutes, the executive branch's targeted strike program. According to Murray, there have been previous authorizations, but she does not analyze how these authorizations have specifically impacted presidential power historically. Her historical overview is brief. She cites the 1798 Quasi-War with France, but she does not detail how the congressional authorizations enacted during

⁸⁹ Robert Johnson, "The Progressive Dissent: Ernest Gruening and Vietnam," in *Vietnam and the American Political Tradition: The Politics of Dissent*, ed. Randall Woods (Cambridge: Cambridge University Press, 2003), 58-81; Shoon Murray, *The Terror Authorization: The History and Politics of the 2001 AUMF* (New York: Palgrave MacMillan, 2014); also See Jennifer K. Elsea and Richard F. Grimmett, "Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications," in Elsea and Grimmett (eds.) *Declarations of War and Authorizations for Military Forces* (New York: Nova Science Publishers, Inc., 2009), 1-138.

⁹⁰ Murray, *The Terror Authorization*.

⁹¹ Ibid, 19.

⁹² Ibid, 68-69.

the conflict functioned as specific regulations on the President as commander-in-chief as opposed to delegations of power like the 2001 AUMF.

Similarly, David Barron's *Waging War: The Clash Between Presidents and Congress, 1776 to ISIS*, examines the history of the executive-legislative relationship in *conducting* wars.⁹³ Indeed, Barron covers conflicts from 1798 to the current military operations in Iraq and Syria dealing with ISIS. With regard to the 2001 AUMF, Barron explains that Congress bypassed traditional legislative committee procedures. Congressional leaders from both the Democratic and Republican parties met with the Bush administration, which presented its own draft AUMF.⁹⁴ Just prior to the congressional vote, the administration attempted to make one final amendment to the AUMF to allow the President to use military force within the United States; however, legislators rejected this domestic authorization amendment.

Barron makes a critical distinction between how legislators viewed the AUMF versus how the Bush administration viewed it. Members of Congress asserted that Bush was required to obtain an AUMF prior to engaging in warfare overseas. However, the Bush administration claimed that no congressional authorization was necessary. The administration was more worried about existing laws that might potentially limit the executive branch from preventing another terror attack.⁹⁵ While Barron includes worthwhile descriptive analysis, he fails to examine the 2001 AUMF and other war authorizations as statutory delegations of discretionary power to the executive branch.

⁹³ David Barron, *Waging War: The Clash Between Presidents and Congress, 1776 to ISIS* (New York: Simon & Schuster, 2016).

⁹⁴ *Ibid*, 387.

⁹⁵ *Ibid*, 392.

Furthermore, Barron neglects the development of a presidential prerogative war power over history. He omits the *process* of going to war. This thesis seeks to provide substantive analysis of the historical AUMF enactment process, the impact of discretionary war authorizations on presidential power, and the consequences of such delegations. By analyzing AUMF enactment historically, I aim to demonstrate how AUMFs have contributed to the development of the prerogative power, imperial presidency, and unitary executive. Doing so will expand upon contemporary understandings of separation-of-powers and checks and balances. Congress may now play a diminished role, not only in authorizing and regulating war and military operations, but also in the AUMF drafting process itself. These concepts must receive proper scholarly consideration.

Like historical works on the imperial presidency and notions of a presidential prerogative, this thesis will examine an analogous concept of presidential discretionary war power. Discretionary power is related to political science conceptualizations of unilateralism. Political scientists William Howell, Saul Jackman, and Jon Rogowski have identified a general lack of theory in studies on the imperial presidency. They argue that these studies have failed to fully explain the reasons why certain aspects of presidential power expand or what specific conditions are needed for those powers to increase.⁹⁶

For example, Terry Moe and William Howell examined presidential powers concerning unilateralism in policymaking in *Unilateral Action and Presidential*

⁹⁶ William Howell, Saul Jackman, and Jon Rogowski, *The Wartime President: Executive Influence and the Nationalizing Politics of Threat* (Chicago: University of Chicago Press, 2013), 19.

Power: A Theory.⁹⁷ They consider the foundations for presidential power and argue that unilateral presidential powers are significant in politics because they are never explicitly enumerated in the official government structure. Presidents have strong motivations to expand their own power, which the legislative and judicial branches are unlikely to restrain.⁹⁸ In particular, they look at the President's official capacity for taking unilateral action, which enables presidents to make their own law. Presidents use executive orders, proclamations, executive agreements, or national security directives to achieve their objectives. The result is essentially new presidential law and a shift of the status quo *without* explicit congressional approval.⁹⁹ While these orders and proclamations do not originate from Congress, they still have the force of law as long as the legislature and courts accept them. This thesis, however, will examine cases when presidents essentially created new law by interpreting and executing vague and discretionary war authorizations.

Ryan Barilleaux and Christopher Kelley contribute another relevant theory in *Unitary Executive and the Modern Presidency*.¹⁰⁰ Their concept is called Venture Constitutionalism, which they explain as “assertions of constitutional legitimacy for presidential actions that do not conform to settled understandings of the president's constitutional authority.”¹⁰¹ This is a method where presidents take actions they believe the other government branches will submit to or ultimately accept. Venture Constitutionalism comes in three types. Type 1 actions try to safeguard the

⁹⁷ Terry Moe and William Howell, “Unilateral Action and Presidential Power: A Theory” *Presidential Studies Quarterly*, Vol. 29, No. 4 (December 1999): 850-872.

⁹⁸ *Ibid*, 852.

⁹⁹ *Ibid*, 851.

¹⁰⁰ Ryan Barilleaux, and Christopher Kelley, “Going Forward: The Unitary Executive, Presidential Power, and the Twenty-first Century Presidency,” in Barilleaux and Kelly (eds.) *The Unitary Executive and the Modern Presidency* (College Station: Texas A&M University Press, 2010), 219-230.

¹⁰¹ *Ibid*, 222.

President's interests, such as a claim of executive privilege or the removal power.

Type 2 actions attempt to promote national security and wider political interests.

These actions include claims for a presidential plenary power to use military force and detain enemy combatants. Type 3 actions seek to increase presidential influence in policymaking. Examples include increasing presidential control of executive agency rulemaking, regulating budgets, and using signing statements as a policymaking tool.¹⁰² This thesis focuses primarily on Types 2 and 3, since they deal with prerogative (discretionary) war powers and the executive branch's ability to influence legislative processes.

Additionally, Edward Keynes provides two competing theories regarding the scope of congressional versus presidential power to initiate war in *Undeclared War: The Twilight Zone of Constitutional Power*.¹⁰³ The first model is called the defensive/offensive-war theory. It assumes that presidents have constitutional authority to defend the nation against sudden or imminent attacks. These types of military actions do not require congressional authorization to proceed. But, when these actions become offensive, presidents lack constitutional authority without congressional approval. According to this theory, the extent of "presidential and congressional authority is a function of the duration of hostilities."¹⁰⁴ The shorter the duration of hostilities, the more defensive in character they are. Similarly, the longer the duration, the more offensive in character the hostilities are.

¹⁰² Ibid, 223.

¹⁰³ Edward Keynes, *Undeclared War: The Twilight Zone of Constitutional Power* (University Park: The Pennsylvania State University Press, 1982).

¹⁰⁴ Ibid, 89-90.

The second model is called the threshold theory, which “defines the zones of exclusive and concurrent power in terms of the magnitude of military and diplomatic action.”¹⁰⁵ This theory outlines military actions according to the degree of escalation and the duration of hostilities. Low levels of escalation range from intelligence gathering and covert paramilitary operations to military mobilization. High levels of escalation are congressionally declared wars. All other levels of escalation in between—ranging from sending the military into combat zones to undeclared wars like the Korean War—constitute an ambiguous gray area of constitutional authority.¹⁰⁶ The defensive/offensive-war theory has now become marginalized. Consequently, the threshold theory now presents serious issues, one being the notion that Congress only exists in these cases to delegate its war power so presidents can act unilaterally. This theory attempts to justify the delegation of congressional power to the executive branch.¹⁰⁷ Both of these theories are relevant for this thesis. They help present and frame variables such as: defensive/offensive character, duration, and escalation of military hostilities. These variables will be applied to analyze the war authorization case studies.

William Howell outlines the Unilateral Politics Model in his separate study, *Power Without Persuasion*.¹⁰⁸ This model predicts that presidents can preempt the legislative process with more moderate policy shifts when Congress is about to enact extensive legislation. Presidents can also use unilateral power to “shift status-quo policies over which Congress remains gridlocked.”¹⁰⁹ This means presidents will take it upon

¹⁰⁵ Ibid, 90.

¹⁰⁶ Ibid, 91.

¹⁰⁷ Ibid, 167.

¹⁰⁸ William Howell, *Power Without Persuasion: The Politics of Direct Presidential Action* (Princeton: Princeton University Press, 2003).

¹⁰⁹ Ibid, 53.

themselves to shift policy when Congress cannot, and the legislature may be willing to accept presidential unilateralism as a pragmatic tool in these situations. Howell stresses that presidential influence is not determined by whether policy ends up being weaker or stronger than congressional preferences. Instead, it is the fact that policy would not be created at all, if not for presidential unilateralism.¹¹⁰

This thesis will also examine the Unitary Executive Theory (UET). In contrast to the monarchical prerogative power, the UET is a contemporary model. It originated within the Reagan administration in response to the aftermath of Vietnam and Watergate, a period of widespread hostility for a strong presidency.¹¹¹ The Reagan administration sought to reinvigorate the presidency. Justice Department officials thus created a constitutional theory, defended it at conferences and in law review articles, and promoted its rhetorical use by Reagan, George H.W. Bush, and George W. Bush in public statements.¹¹²

Michael Genovese offers a detailed explanation of the UET, which asserts that presidents possess all executive power and that executive authority is disconnected from separation-of-powers and checks and balances.¹¹³ However, Genovese argues that any proper execution of the laws must be within a system of shared power with

¹¹⁰ Ibid, 54. This thesis contends that there is also the potential for the executive branch to preempt the legislative process with more extreme policy shifts in situations where a more independent Congress may have been more restrictive in the grants of power included within its war authorizations. The subsequent case study chapters will illustrate this. I argue that delegations of discretionary war power to the President within war authorizations enables unconstitutional presidential unilateralism in the use of military force.

¹¹¹ Ryan Barrilleaux and Christopher Kelley, "Introduction: What is the Unitary Executive?" in Barrilleaux and Kelley (eds.) *The Unitary Executive and the Modern Presidency* (College Station: Texas A&M University Press, 2010), 1-14.

¹¹² Ibid, 4-5. The theory was first revealed publicly in Steven Calabresi, "The Structural Constitution: Unitary Executive, Plural Judiciary," *Harvard Law Review*, Vol. 105, No. 6 (April 1992): 1153-1216.

¹¹³ Michael Genovese, *Presidential Prerogative: Imperial Power in an Age of Terrorism* (Stanford: Stanford University Press, 2011).

the other government branches. The UET can be summarized as comprising four claims. First, the Vesting Clause in Article II of the Constitution gives the President comprehensive and total executive power. This means that the executive power is not shared between any other government branches, nor is it shared with other executive branch officials and workers. Second, the legislature cannot attempt to inhibit any executive action because the President is constitutionally responsible for law enforcement and must “take care that the laws be faithfully executed.”¹¹⁴ Third, the Constitution separates powers absolutely, meaning Congress cannot restrict any executive branch powers. Fourth, both the Vesting Clause and the Take Care Clause allow the President the sole power to fire executive branch officials.¹¹⁵

David Adler highlights the UET’s faults, citing *Marbury v. Madison* (1803) and subsequent Supreme Court judgments to refute the theory’s claim that Congress cannot regulate executive officials.¹¹⁶ The President and other officials are required to follow and execute congressional statutes. Additionally, the notion that all executive power is vested in the President to carry out execution of the laws is incorrect. Adler points out that there are numerous other executive branch officials who perform tasks and execute the laws independent of the President’s control.¹¹⁷ For example, the Chair of the Federal Reserve and the FBI Director both have greater independence from presidential influence in their roles, while still acting as part of the executive branch.

John Yoo is a UET and presidential prerogative proponent. He worked in the George W. Bush Office of Legal Counsel (OLC) and was directly involved in the drafting of

¹¹⁴ See the “Take Care Clause,” U.S. Constitution, Article II, §3.

¹¹⁵ Adler, “The Presidency and the Constitution,” 26.

¹¹⁶ Ibid, 27; *Marbury v. Madison*, 5 U.S. 137 (1803). In *Marbury*, Chief Justice John Marshall ruled that executive branch officials were required to act according to the law and not by presidential orders.

¹¹⁷ Adler, “The Presidency and the Constitution,” 26.

the 2001 AUMF along with David Addington and Timothy Flanigan. He has issued numerous provocative assertions regarding the intent of the founders. For example, he claimed that Alexander Hamilton desired an executive branch capable of immediately acting or reacting to any scenario. Yoo interpreted Hamilton's concept of "energy" to constitute a plenary executive and applied it to justify the Bush administration's post-9/11 actions. He claims that the executive branch is fully empowered to take any military action it deems necessary to meet this so-called "energy" requirement set forth by Hamilton.¹¹⁸ However, this interpretation of "energy" has no concern for constitutional checks on the executive. It exceeds Hamilton's vision of a nation capable of enduring and competing globally, distorting his defensive-natured sense of survival into a theory supporting an offensive-natured executive, a President without limits or restraints.

Yoo also argues that the President has broad constitutional power to use military force, and dismissed claims that the Bush administration advanced executive authority further than any previous administration. He has often cited Presidents Lincoln, Franklin Roosevelt, Truman, and Reagan as examples of assertive executives. Bush's actions, according to Yoo, simply followed those of previous presidents. He argues that the President has full constitutional authority to use the military abroad for national security. Thus, presidential discretion should be permitted because the 2001 terror attacks dramatically changed national circumstances. Congress also provided Bush with its consent when it enacted the 2001 and 2002 AUMFs.¹¹⁹

¹¹⁸ John Yoo, "War Powers in the Bush Administration," in *Testing the Limits: George W. Bush and the Imperial Presidency*, ed. Mark Rozell and Gleaves Whitney (Lanham: Rowman and Littlefield, 2009), 131-156. For more on the concept of "energy," see Adler, "The Presidency and the Constitution," 26.

¹¹⁹ Yoo, "War Powers in the Bush Administration."

In addition to defending Bush's unilateral actions, Yoo contests the arguments of John Hart Ely and Louis Fisher. The framers, according to Ely, saw the President as the actor most susceptible to military conflict. Utilizing multiple bodies in war making decisions would decrease the number of wars.¹²⁰ In this type of system, conflicts would only occur after congressional deliberation. However, Yoo claims that involving more institutions in the process will not guarantee better outcomes and that adding congressional approval will not necessarily reduce the number of overseas quagmires. Democratic systems do not always lead to better results and are prone to mistakes just like executive-empowered systems.¹²¹

Yoo additionally claims that the Constitution did not create permanent war making procedures. Instead, it allows the government branches flexibility to formulate new methods in war making decisions. I contest this view and assert that there is no constitutional indication or founding philosophy that justifies this perspective. The only exception includes Congress' role to propose new constitutional amendments to alter formal processes for going to war. Yoo's evidence for this claim is the fact that the Constitution did not explicitly define what the procedures are for war making. He argues that the founders certainly could have clarified this process in the Constitution, and he provides an example of a clause that could have been included in the Constitution to clarify the process. For instance, the founders could have written that the President "may not, without the Consent of Congress, engage in war, unless the United States is actually invaded, or in such imminent Danger as will not admit of

¹²⁰ John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* (Princeton: Princeton University Press, 1993).

¹²¹ Yoo, "War Powers in the Bush Administration."

delay.”¹²² The problem with Yoo’s theoretical constitutional clarification is that most of the Constitution was written in a vague and unclear manner. British historian and politician James Bryce remarked that the Constitution’s language illustrated “simplicity, brevity,” and contained a “judicious mixture of definiteness in principle with elasticity in details.”¹²³ The Constitution’s language certainly demonstrates simplicity, but its *elastic* nature has enabled UET proponents to distort founding principles to suit their own purposes. Yoo’s example is written in 21st century vernacular, a time in which we more fully understand the meaning of the language used in his theoretical clause.

There are, though, still clarifications and definitions needed for terms such as: “consent,” “war,” and “imminent danger.” In respect to Yoo’s claim that fixed procedures were never established, I add that the framers also did not establish fixed procedures for the dissolution of the union or processes for states to secede peacefully. They could have easily included these provisions in the Constitution; however, they had no foresight about a secession movement that might lead to a national existential crisis.

Louis Fisher disputes Yoo’s claims in his presidential prerogative analysis, arguing that presidents can act without congressional approval and that this practice has been accepted historically.¹²⁴ However, these actions must be due to unusual or exceptional circumstances, such as if presidents needed to act to protect the nation. This executive judgment applied only to purely defensive actions during emergencies, like sudden

¹²² Ibid, 134

¹²³ Viscount James Bryce, *The American Commonwealth, Vol. I* (New York: The Macmillan Company, 1918), 28.

¹²⁴ Fisher, “Bush and the War Power.”

invasions. Fisher claims that these acts are allowed until Congress can enact retroactive legislation. However, decisions to take the country from peace to war during non-crisis incidents are left to congressional processes.¹²⁵ I maintain that we must not overlook what Congress has or has not done with regard to presidents expanding the bounds of executive war making authority. Congress has conducted little oversight of the President's war power and has failed to regulate the commander-in-chief. It has instead delegated most war making accountability to the President. We must likewise be mindful of what the judiciary largely refuses to do. The courts have not constitutionally examined war authorizations for presidential prerogative issues.¹²⁶

Political scientist Andrew Rudalevige further examines the Bush administration after the 2001 terror attacks through the lens of Arthur Schlesinger's *Imperial Presidency*.¹²⁷ He argues that the Bush administration adjusted the UET to reject checks and balances, attaining remarkable short-term results.¹²⁸ However, presidents have historically exploited flaws in the Constitution in numerous ways. For example, presidents tactically used executive powers after WWII, increasing their advantage as

¹²⁵ Louis Fisher, "Judicial Review of the War Power," *Presidential Studies Quarterly*, 35 (3) (2005): 466-495.

¹²⁶ Ibid. Fisher asserts that there was a period when the courts avoided war powers issues, which began with the Vietnam War and ended with the 2001 terror attacks. Before Vietnam, however, the courts were actively involved in deciding war powers issues during the first 150 years. While Fisher examines the 2001 AUMF—specifically, the Bush administration's claim to be empowered to detain suspected terrorists—he does not consider the congressional authorization itself, specifically the discretionary power it granted the President or its constitutionality.

¹²⁷ See Andrew Rudalevige, *The New Imperial Presidency: Renewing Presidential Power after Watergate* (Ann Arbor: University of Michigan Press, 2005).

¹²⁸ Andrew Rudalevige, "George W. Bush and the Imperial Presidency," in *Testing the Limits: George W. Bush and the Imperial Presidency*, ed. Mark Rozell and Gleaves Whitney (Lanham: Rowman and Littlefield, 2009), 243-268.

a singular actor to act rapidly and assertively, creating a stronger presidency.¹²⁹ A popular method was to interpret constitutional ambiguity in favor of the President.

This demonstrates, I argue, that the Bush administration defined and implemented its own policies and qualified its actions based on arbitrary legal theories. It is a conflict of interest for the executive branch to justify its own actions based on legal rationales developed by executive officials. Legal justifications must originate from either the Constitution or established law. This executive reasoning also did not originate from the judicial branch. The courts had no say in the executive's contrived rules. This constitutes executive branch appropriation of judicial power as well through the issuing of executive legal judgments.

The Bush administration also issued unsubstantiated claims about congressional power. A 2002 OLC memo asserted that Congress "can no more interfere with the President's conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield."¹³⁰ This directly opposes the *Little v. Barreme* decision, which ruled that the President must follow congressional statutes that regulate warfare and the commander-in-chief's use of force. Unfortunately, Congress largely failed to check Bush's attempts to expand his own powers and demonstrated that it would empower him in critical ways with no regard for checks and balances. However, the Supreme Court was slightly more accountable in its executive oversight. The *Hamdi v. Rumsfeld* (2004) and *Hamdan v. Rumsfeld* (2006)

¹²⁹ Ibid, 246.

¹³⁰ U.S. Department of Justice, "Re: Standards of Conduct for Interrogation under 18 U.S.C. §§2340-2340A," Office of Legal Counsel, August 1, 2002.

decisions demonstrated its increased willingness to rule on executive misuses of authority regarding *habeas corpus* issues, which had Civil War precedents.¹³¹

Along with political theories, legal studies are also pertinent to this thesis. Law professors Curtis Bradley and Jack Goldsmith's article, "Congressional Authorization and the War on Terrorism," outlines a practical framework for AUMF analysis.¹³² Bradley was Counselor on International Law in the State Department in 2004, and Goldsmith was Assistant Attorney General in George W. Bush's OLC from October 2003 to July 2004.

Their framework facilitates the conceptualization of AUMFs to determine whether an authorization is either broad or limited. It consists of five criteria: 1) the authorized military resources; 2) the authorized methods of force; 3) the authorized targets; 4) the purpose of the use of force; 5) the timing/procedural restrictions on the use of force.¹³³

They describe these criteria affirming:

In limited authorizations, Congress restricts the resources and methods of force that the President can employ, sometimes expressly restricts targets, identifies narrow purposes for the use of force, and sometimes imposes time limits or procedural restrictions. In broad authorizations, Congress imposes few if any limits on resources or methods, does not restrict targets other than to identify an enemy, invokes relatively broad purposes, and generally imposes few if any timing or procedural restrictions.¹³⁴

Bradley and Goldsmith focus principally on the 2001 AUMF. They evaluate the 2001 AUMF in historical context and compare it with notable authorizations from the past,

¹³¹ See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Ex parte Milligan*, 71 U.S. 2 (1866).

¹³² Curtis Bradley and Jack Goldsmith, "Congressional Authorization and the War on Terrorism," *Harvard Law Review*, 118 (7) (2005): 2047-2133; also see Curtis A. Bradley and Jack L. Goldsmith, "Obama's AUMF Legacy," *The American Journal of International Law*, Vol. 110, No. 628 (2016): 628-645.

¹³³ Bradley and Goldsmith, "Congressional Authorization and the War on Terrorism," 2072.

¹³⁴ *Ibid*, 2078.

including: the 1798 Quasi-War authorizations regarding France, the declaration of war against Germany during the First World War, the 1955 Formosa Resolution, the 1964 Tonkin Gulf Resolution concerning Southeast Asia, the 1983 Lebanon AUMF, the 1991 Persian Gulf War AUMF, the 1993 Somalia AUMF, and the 2002 Iraq War AUMF.

This study is limited, however. It is dated to 2005 and only examines a short period of President Bush's use of the 2001 AUMF. Three different presidential administrations have implemented the AUMF over almost two decades. Now is the appropriate time to re-examine how the AUMF compares to other authorizations, how it has been utilized by different presidents, and how its discretionary provisions have affected executive and legislative constitutional powers. Bradley and Goldsmith compare certain AUMFs but only in general terms: *broad* or *limited*.¹³⁵ Furthermore, they do not examine AUMF usage against ISIS, as the group did not exist in 2005 at the time of the article's publication.¹³⁶

Harvard Law Professor Mark Tushnet evaluates Bradley and Goldsmith's analysis of executive authority in his article, "Controlling Executive Power in the War on Terrorism."¹³⁷ He offers two methods for controlling presidential power: the "separation-of-powers mechanism" and the "judicial-review mechanism."¹³⁸ In the separation-of-powers mechanism, executive regulation is based on the notion that the President can only apply what the legislature approves. This premise assumes that

¹³⁵ This thesis argues that Congress *must* restrict the analytical criteria that Bradley and Goldsmith highlight. When Congress fails to do this in AUMFs, it delegates unconstitutional discretionary power to the executive.

¹³⁶ For information detailing the founding of ISIS, see Chapter Six, 324.

¹³⁷ Mark Tushnet, "Controlling Executive Power in the War on Terrorism," *Harvard Law Review*, Vol. 118 (2005): 2673-2682.

¹³⁸ *Ibid*, 2673.

presidents as single-actors tend to make poor judgments—they either advance too far or not far enough. In the judicial review mechanism, the courts apply two ideas. The first is distributing power between the executive and the legislature, and the second is protecting personal freedoms like Fourth and Fifth Amendment protections for the general public. Tushnet further explains that within “the separation-of-powers approach, the scope of the President’s independent power is narrow, and the restrictions on what Congress can authorize are minor.”¹³⁹ Yet, he is unable to adequately explain why he believes congressional war authorizations are *only* subject to minor restrictions regarding their textual language.¹⁴⁰

Tushnet argues that both the separation-of-powers and judicial review mechanisms are, at present, insufficient in creating a structure to limit the President’s exercise of power. The President always has the power to act first, which puts Congress at an inherent disadvantage. This is exacerbated under discretionary authorizations such as the 2001 AUMF, because the executive is not required to seek further congressional approval to expand or alter the use of force. In these cases, Congress and the courts are accountable for additional oversight. Tushnet also highlights the “rally-round-the-flag” effect.¹⁴¹ This occurs when executive action is popular, desired, and congressionally supported. It is reflected when presidents request AUMFs during periods when Congress will back executive national security responses. These congressional tendencies to rally behind the President further weaken the separation-of-powers control mechanism, as presidents can more easily obtain discretionary war authorizations from Congress.

¹³⁹ Ibid, 2674, note 8.

¹⁴⁰ Mark Tushnet, Personal Interview Conducted by Morgan Baker, Cambridge, Massachusetts, 25 June 2019.

¹⁴¹ Tushnet, “Controlling Executive Power in the War on Terrorism,” 2678.

Furthermore, Tushnet notes that partisan politics play a critical congressional role. The envisioned adversarial system of separate branches dissolves when the President and the legislative majority are of the same political party. This collapse results in a lack of congressional resistance to executive demands. Historically, diversity within political parties mitigated this dysfunction, since opponents within the same political party as the President could defect during congressional votes and support bipartisan efforts to restrict executive power.¹⁴² This enabled greater legislative objectivity concerning separation-of-powers issues.

However, there were two major changes to the system, which now hinder congressional efforts to challenge presidential power. The first change was the 20th century nationalization of political parties under presidential leadership. The second change was increased partisan polarization towards distinct ideologies, which resulted in the weakening of intraparty ideological divisions. As Tushnet explains, “When the government is unified, in the sense that the President and the Congress are in the same party, and that party is itself more unified than ever, Congress will probably authorize anything for which the President asks.”¹⁴³ But, when government is divided between multiple political parties, the President can still get broad authorizations because of the advantages of being able to act first and utilize the rally-round-the-flag effect. This process essentially constitutes executive unilateralism within the parameters of a system intended to separate powers between branches of government.

¹⁴² One example would be the intraparty debates between legislators supporting U.S. neutrality versus those supporting intervention prior to the Japanese attacks at Pearl Harbor.

¹⁴³ Ibid, 2679.

Indeed, Tushnet's listed control mechanisms have deficiencies and have failed to consistently regulate presidents. In contrast to Tushnet, I argue that the scope of the President's independent Article II power is *narrow*—it is limited to the use of force in self-defense against direct attacks and invasions—and that the restrictions on what Congress can authorize are *substantial*. Vague language included within AUMFs is highly authoritative and is thus subject to established constitutional and legal constraints.¹⁴⁴ Congress cannot delegate its constitutionally allocated power to declare war and regulate the armed forces to the President through AUMFs.

Conclusions

The founding debates illustrate the continued significance of textual interpretation, and the Constitution's incomplete and ambiguous nature led to the earliest ideological and partisan divides. The 1787 convention dialogues, *Federalist* essays, ratification debates, and ideological conflicts of the 1790s—all concerning the limits of executive power—influenced the subsequent behavior of presidents and Congress regarding war making. Historians have documented a long record of *unauthorized* presidential war making, while political scientists have offered groundbreaking theories on presidential unilateralism. Legal and constitutional scholars have furthermore analyzed war powers issues and the difficulties of judicial review. Yet, established scholarship has neglected to provide an extensive study of *authorized* war making and the historical impact of discretionary AUMFs on presidential power. This thesis considers these subjects to be critical for a scholarly reinterpretation of U.S. war powers.

¹⁴⁴ These legal constraints include the legislative non-delegation and void-for-vagueness doctrines.

The eminent legal scholar John Hart Ely once asserted that *all* wars, either declared or undeclared, had to be authorized by Congress.¹⁴⁵ This thesis asserts that not only must *all* wars be declared or authorized, they must also be authorized through a *process* that respects constitutional and legal constraints. AUMFs that include vague and discretionary provisions violate established legal doctrines that help maintain constitutionally mandated separation-of-powers principles. These authorizations remove the distinctions between *limited* and *general* war. The result is presidential appropriation of congressional powers to both declare war and regulate the armed forces. War authorizations must regulate the commander-in-chief, not delegate legislative and judicial authority to the President.

¹⁴⁵ Ely, *War and Responsibility*, 3.

Chapter One

Exploring General (*Perfect*) and Limited (*Imperfect*) Warfare: War Declarations and AUMFs (1798-1950)

Allow the President to invade a neighboring nation whenever he shall deem it necessary to repel an invasion, and you allow him to do so whenever he may choose to say he deems it necessary for such purpose, and you allow him to make war at pleasure. Study to see if you can fix any limit to his power in this respect, after having given him so much as you propose.

—Representative Abraham Lincoln
15 February 1848¹⁴⁶

Abraham Lincoln was an exceptional figure at defining political zeitgeists. During an era of American westward expansion, he along with other Whigs criticized President James Polk's provocative use of force within a disputed border region, sparking war with Mexico. For Lincoln, Polk's use of discretion to proclaim a Mexican invasion of U.S. territory, and his subsequent pronouncement of the *existence* of war, represented a precarious enlargement of executive power. Some presidents have dared to venture beyond the bounds of congressional legislation that approved hostilities since the first conflict in 1798. However, many were also more willing to follow what was congressionally intended in war resolutions from 1798 to 1945.

This chapter will examine the executive-legislative relationship in drafting and enacting war resolutions, beginning in 1798 with the Quasi-War against France and ending in 1950 with the *congressionally unauthorized* Korean War. There are frequent references to congressional war resolutions throughout this thesis. Careful attention must be paid, however, to the sections, clauses, and language *within* those

¹⁴⁶ Letter to William Herndon, Lincoln's law partner. Lincoln was an Illinois Whig Party Representative. See "Abraham Lincoln to William H. Herndon," 15 February 1848, *The Papers of Abraham Lincoln Digital Library*, Accessed: 11 August 2020, <https://papersofabrahamlincoln.org/documents/D200458>.

resolutions. War powers scholarship has generally neglected the vague language and discretionary provisions within war resolutions, which carry considerable implications and can even lead to illegitimate or inadvertent wars, as was the case with the 1846 Mexican-American War and 1898 Spanish-American War, respectively. As will be explained hereafter, war resolutions can declare or authorize vastly different hostile actions. Some declare war, while others authorize the use of force—in some historical instances certain resolutions did not even use the word “authorize,” which has its own legal implications. But what constitutes a war resolution, and how is an authorization for use of military force (AUMF) different? This chapter will define both and place them in historical context by examining periods of *declared* and *authorized* wars.

This thesis defines a war resolution as a law; it is a legal statute jointly enacted by Congress and executed by the President. An AUMF is generally an operative clause within a resolution empowering the President to direct the armed forces to execute hostile actions in some manner. Hostilities can include active combat operations, or they can simply be seizures of an enemy’s possessions (including territory, naval vessels, and other property). An AUMF can also be a resolution by itself, containing a preamble, sub-sections, and clauses related to the use of force being authorized. A closer historical examination of Supreme Court rulings, war resolutions, and AUMFs will provide greater clarity regarding governmental war making processes in the past, present, and future.

Early Supreme Court cases during the Quasi-War established the legality and definition of war making. In *Bas v. Tingy* (1800) the Court defined the differences between *perfect* and *imperfect* wars. Justice Bushrod Washington, appointed in 1798

by President John Adams, acknowledged that *perfect* war is one that is declared, because one nation is at war with another, and “all the members of the nation declaring war, are authorized to commit hostilities against all the members of the other, in every place, and under every circumstance.”¹⁴⁷ *Imperfect* war, however, is “more confined in its nature and extent, being limited as to places, persons, and things.”¹⁴⁸ The actors involved in *imperfect* war “are authorized to commit hostilities, act under special authority, and can go no further than to the extent of their commission.”¹⁴⁹

Similarly, Justice Samuel Chase, appointed in 1796 by President George Washington, followed with clarification:

Congress is empowered to declare a general war, or Congress may wage a limited war, limited in place, in objects, and in time. If a general war is declared, its extent and operations are only restricted and regulated by the *jus belli*, forming a part of the law of nations, but if a partial war is waged, its extent and operation depend on our municipal laws.¹⁵⁰

Jus belli means the law or right of war, which defines international conduct during declared wars. Justice William Paterson, appointed by Washington in 1793, concurred with Justices Washington and Chase:

The United States and the French republic are in a qualified state of hostility. An imperfect war, or a war, as to certain objects, and to a certain extent, exists between the two nations, and this modified warfare is authorized by the constitutional authority of our country. It is a war *quoad hoc*. As far as Congress tolerated and authorized the war on our part, so far may we proceed in hostile operations.¹⁵¹

In *Talbot v. Seeman* (1801) the Supreme Court ruled that even though there was no declaration of war against France, Congress had authorized the military seizure of

¹⁴⁷ *Bas v. Tingy*, 4 U.S. 40 (1800).

¹⁴⁸ *Ibid*, 40.

¹⁴⁹ *Ibid*, 40.

¹⁵⁰ *Ibid*, 43.

¹⁵¹ *Ibid*, 45.

French vessels.¹⁵² The Court notably ruled that Congress is legally permitted to authorize military actions without declaring war against another nation.¹⁵³

However, a declaration of war, by itself, does not necessarily give the President any approval to initiate acts of warfare. When one examines resolutions declaring war, distinct statements authorizing the President to use military force have always accompanied the war declaration clause. For example, the 1812 war resolution stated: “That war be and the same is hereby declared to exist” between the United States and Great Britain (the declaration of war) *and* “that the President of the United States is hereby authorized to use the whole land and naval force of the United States” (the AUMF).¹⁵⁴ The declaration is only a statement that the nation is now in a state of war with, as it was historically, another sovereign state. By being at war with another state, other laws of war (international and federal) are invoked.¹⁵⁵ For example, any *new* war declaration would automatically trigger laws affecting: congressional appropriations legislation, agricultural exports, the armed forces, the coast guard, Small Business Administration, unilateral trade sanctions, deferral of civil works projects, the Nuclear Regulatory Commission, the Enemy Alien Act, the National Defense Stockpile, chemical and biological warfare agents, the National Emergencies Act, the Foreign Intelligence Surveillance Act, the Selective Service Act, imports, and neutrality, besides numerous others.¹⁵⁶

¹⁵² Talbot v. Seeman, 5 U.S. 1 (1801).

¹⁵³ Ibid. Also see Edward Keynes, *Undeclared War: The Twilight Zone of Constitutional Power* (University Park: The Pennsylvania State University Press, 1982), 37-38.

¹⁵⁴ “Act of June 18, 1812,” 2 Stat. 755, Declaration of War with Great Britain, War of 1812.

¹⁵⁵ See Jennifer K. Elsea and Matthew C. Weed U.S., *Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications*, Congressional Research Service, RL31133 (April 18, 2014), <https://fas.org/sgp/crs/natsec/RL31133.pdf>.

¹⁵⁶ For a full list and description of legislation, see Jennifer K. Elsea and Richard F. Grimmett, “Declarations of War and Authorizations for the Use of Military Force,” in *Declarations of War and Authorizations for Military Forces*, ed. By Jennifer K. Elsea and Richard F. Grimmett (New York: Nova Science Publishers, Inc., 2009), 44-84.

Thus, the war declaration is merely one specific clause of a resolution, while the AUMF is another. Each of these operative statements serves a distinct legal function. Throughout U.S. history, Congress has *never* enacted a resolution with a war declaration clause without also including an AUMF clause. Warfare can, however, be conducted without using military force. For example, the U.S. could declare war and employ cyber-warfare tactics instead of military force. Yet, the practice of declaring war has largely been discarded globally since the end of the Second World War and the creation of the United Nations in 1945.

Chief Justice John Marshall, who served on the Supreme Court from 1801 to 1835, established it as the authoritative body on constitutional interpretation. This interpretation included examining the proper allocation and execution of war powers. In *Brown v. U.S.* (1814), he described the first declaration of war (1812) in the Court's majority opinion:

That the declaration of war has only the effect of placing the two nations in a state of hostility, of producing a state of war, of giving those rights which war confers, but not of operating, by its own force, any of those results, such as a transfer of property, which are usually produced by ulterior measures of government, is fairly deducible from the enumeration of powers which accompanies that of declaring war.¹⁵⁷

Marshall was highlighting Congress' power to declare war versus its power to regulate captures or prescribe other actions. His description clarifies the function of the declare war clause versus an AUMF or an authorization to make captures. The war declaration changes the state of the nation, and the AUMF then allows force to be carried out by the executive, which Congress regulates or constrains as *it* determines.

¹⁵⁷ *Brown v. U.S.*, 12 U.S. 110, 125-126 (1814).

Justice Joseph Story, nominated in 1811 by President James Madison, authored a dissenting opinion. Story reasoned that the President was allowed control over captures when Congress declared war. It was not necessary for Congress to provide additional authorizations for the President to regulate captures. He stated, “All I contend for is that a declaration of war gives a right to confiscate enemies’ property and enables the power to whom the execution of the laws and the prosecution of the war are confided to enforce that right.”¹⁵⁸ Story claimed that because Congress declared war, but did not set further limits or definitions as to how the war should be conducted, the President was therefore allowed by the wartime law of nations to make seizures.

Both Marshall’s and Story’s interpretations have been meaningful regarding how presidents act during wartime. When Congress does not provide further regulations on captures in a resolution declaring war or authorizing military force, presidents have sometimes exceeded constitutional authority to make captures, establish independent detention facilities, and use military tribunals against enemy combatants or suspected terrorists. For example, President George W. Bush’s administration cited the 2001 AUMF as legal justification for use of Guantanamo Bay Naval Base as a detention center for suspected enemy combatants in the War on Terror. In the case of suspected enemy combatant Yaser Hamdi, the Supreme Court reviewed his detention—first at Guantanamo Bay and later at other U.S. military facilities in Virginia and South Carolina—and ruled that he was entitled to due process in federal courts as a U.S.

¹⁵⁸ Ibid, 147.

citizen.¹⁵⁹ In these types of cases, the Supreme Court has decided what powers the Constitution confers upon the President to capture/detain and what rights detainees have to challenge their detention. President Bush's actions during the War on Terror accordingly fall under Story's broader interpretation of executive authority.

AUMFs and War Declarations, 1798-1945

The U.S. has been involved in various military conflicts since its founding. From 1798 to 1989, one scholar cites 206 cases of military action abroad *without* a declaration of war.¹⁶⁰ The following sections will investigate significant instances when Congress *did* enact an AUMF (including declarations of war). It will also highlight the relationship between the executive and legislative branches in this process. This analysis will not examine the U.S. Civil War, which was neither a war conducted abroad nor a congressionally authorized war prior to hostilities. The Civil War should be considered exceptional, constituting a Southern states rebellion against the U.S. government.¹⁶¹

Quasi-War, 1798-1800

The Quasi-War began during a period of European upheaval, as revolutionary France was at war with the powerful British, Prussian, Austrian, and Russian monarchies, besides other states. George Washington's 1793 Neutrality Proclamation, intended to keep the U.S. out of these wars, resulted in French seizures of American ships. In

¹⁵⁹ Hamdi v. Rumsfeld, 542 US 507 (2004). The Court also ruled that the 2001 AUMF allowed the government to detain enemy combatants. For other landmark War on Terror detention cases, *see* Rumsfeld v. Padilla, 542 U.S. 426 (2004); Rasul v. Bush, 542 U.S. 466 (2004); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Boumediene v. Bush, 553 U.S. 723 (2008).

¹⁶⁰ Donald Westerfield, *War Powers: The President, the Congress, and the Question of War* (Westport: Praeger Publishers, 1996), 197-206. This list includes actions that were authorized congressionally by legal statutes.

¹⁶¹ See William Whiting, *The War Powers of the President and the Legislative Powers of Congress in Relation to Rebellion, Treason and Slavery* (Boston: John L. Shorey, 1863).

response, President John Adams sent a delegation to France to negotiate an agreement to end the seizures. These negotiations, however, resulted in the XYZ Affair; the French solicited a \$240,000 bribe and called for other tributes from the American delegation before any talks would take place.¹⁶² Upon notification, both Adams and Federalist Party members were outraged. Although war-favoring “High” Federalists sought a war declaration, Adams denied their wishes.¹⁶³ Instead, he asked Congress to construct a navy to defend commerce on the seas and the nation’s east coast.¹⁶⁴ He left the matter of authorizing hostilities to Congress, allowing the legislature “to prescribe such regulations as will enable our seafaring citizens to defend themselves against violations of the law of nations, and at the same time restrain them from committing acts of hostility against the powers at war.”¹⁶⁵ During this period, most Federalists in Congress favored Britain over France, but the party only held a slim congressional majority. Republicans, as minority party members, were pro-French and strongly anti-British.¹⁶⁶

¹⁶² Howard P. Nash, Jr., *The Forgotten Wars: The Role of the U.S. Navy in the Quasi War with France and the Barbary Wars 1798-1805* (South Brunswick: A.S. Barnes and Company, 1968), 50.

¹⁶³ Alexander DeConde, *The Quasi-War: The Politics and Diplomacy of the Undeclared War with France, 1797-1801* (New York: Charles Scribner’s Sons, 1966), 89. The High Federalists were Hamilton supporters and thus, pro-British and anti-French. Adams and Hamilton had serious conflicts with each other, which split the Federalist Party into factions supporting either Adams or Hamilton.

¹⁶⁴ John Adams, “Address to a Joint Session of Congress on Relations with France,” May 16, 1797. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 10 February 2018, <http://www.presidency.ucsb.edu/ws/?pid=65636>.

¹⁶⁵ *Ibid.*

¹⁶⁶ For further discussion of the Quasi-War, including domestic political debates and the early development of the U.S. navy, see Gene Allen Smith, “Foreign Wars of the Early Republic, 1798-1816,” in *A Companion to American Military History*, ed. James C. Bradford (Chichester: Blackwell Publishing, 2010), 39-58; Gregory E. Fehlings, “America’s First Limited War,” *Naval War College Review*, Vol. 53, Issue 2 (Summer 2000): 101-143; Patrick Shea, Terence K. Teo, and Jack S. Levy, “Opposition Politics and International Crises: A Formal Model,” *International Studies Quarterly*, Vol. 58, Issue 4 (December 2014): 741-751; David B. Stansbury, “The Quasi-War with France,” *Naval History*, Vol. 6, Issue 3 (Fall 1992): 16; Nathan Perl-Rosenthal, “Private Letters and Public Diplomacy: The Adams Network and the Quasi-War, 1797-1798,” *Journal of the Early Republic*, Vol. 31, Issue 2 (Summer 2011): 283-311.

Due to this partisan divide, Congress enacted several limited measures empowering Adams to expand the military, arm ships, strengthen national defenses, and take direct military actions against France. For example, on 28 May 1798, Congress authorized the seizure of armed French ships sailing from France that intended to antagonize U.S. ships.¹⁶⁷ On 25 June, Congress enacted another authorization for U.S. ships to defend themselves or seize any armed and hostile French ship. Congress formally repealed all French treaties on 7 July.¹⁶⁸ Two days later, Congress enacted an authorization for the navy to seize all armed French ships anywhere and authorized Adams to issue privateer commissions.¹⁶⁹ On 9 February 1799, Congress enacted an authorization for “the seizure on the high seas of vessels of the United States bound or sailing to any port or place of the French Republic” but not “the capture of a vessel sailing from a French port”¹⁷⁰ These limited acts were an effort to disrupt maritime commerce between the two nations and prevent American merchants from unlawfully conducting business with France. Nonetheless, these acts did not authorize a general offensive war against France.

There were, of course, attempts to authorize more offensive military operations against France. On 4 July, High Federalists organized to determine if there were enough votes to force a war declaration through the legislature, but moderate Federalists would only support an undeclared war limited to the seas.¹⁷¹ On 30 June, Federalist Representative Peleg Sprague (NH) suggested authorizing the seizure of all (including unarmed) French ships, but this was rejected by a vote of 41 to 32.¹⁷²

¹⁶⁷ Nash, Jr., *The Forgotten Wars*, 56.

¹⁶⁸ *Ibid.*, 56, 59.

¹⁶⁹ DeConde, *The Quasi-War*, 106.

¹⁷⁰ *Little v. Barrame*, 6 U.S. 170.

¹⁷¹ DeConde, *The Quasi War*, 104.

¹⁷² *Ibid.*, 105.

Sprague then requested a vote for an aggressive offensive war, without declaration. Congress voted 52 to 31 against more direct hostilities.¹⁷³ Ultimately, High Federalists could not gain support for a war declaration from party moderates, who still favored diplomacy with France and would only approve limited military actions.

During the Quasi-War the Supreme Court decided three noteworthy prize cases dealing with executive and legislative war powers. Two have already been reviewed: *Bas v. Tingy* (1800) and *Talbot v. Seeman* (1801). The third case, *Little v. Barrame* (1804), concerned the capture of a Danish ship leaving a French port. Congress had authorized the seizure of American ships heading to, but not leaving, French ports. However, the navy received orders to capture ships sailing both to and from French ports.¹⁷⁴ The Supreme Court ruled that the President could not issue orders that violated congressional statutes regulating acts of warfare.¹⁷⁵ Chief Justice Marshall explained that Congress seemed “to have prescribed that the manner in which this law shall be carried into execution, was to exclude a seizure of any vessel not bound to a French port.”¹⁷⁶ The President as commander-in-chief is limited in his direction of the military by acts of Congress and is bound to only execute the congressional law. This case determined that the President did not have any inherent constitutional power as commander-in-chief to act beyond written law.

Some scholars, however, argue that there has been widespread academic misinterpretation of *Little v. Barrame* and the other Quasi-War prize cases. J. Gregory Sidak argues that these cases do not really explain how war powers should be

¹⁷³ Ibid, 106.

¹⁷⁴ *Little v. Barrame*, 6 U.S. 178 (1804).

¹⁷⁵ Ibid, 177.

¹⁷⁶ Ibid, 177-178.

apportioned between the legislature and the executive.¹⁷⁷ Instead, he claims that these cases deal with national sovereignty and questions concerning captures at sea.¹⁷⁸

Sidak also asserts that these cases do not determine whether Adams could have waged war without the various limited congressional statutes enacted to restrict or forbid specific military actions.¹⁷⁹ While Sidak is correct that these cases provide little illumination regarding presidential unilateralism *without* congressional authorization, his latter statement on regulatory legislation is deficient. *Little v. Barreme* concerned a congressional statute that prescribed (regulated) a specific military action, which Adams violated in his seizure order. The Court ruled against Adams on this very issue. Yet, Adams did not order wider hostilities without congressional authorization. He understood that such actions would be unconstitutional and that moderate Federalists would oppose unilateral war making over peace negotiations.

None of the statutes enacted during the Quasi-War served to increase the President's long-term war power. Since the American founding, Congress was concerned with executive excess, and it mainly prevented unilateral presidential wars by not substantially expanding the armed forces.¹⁸⁰ Thus, during the conflict with France, there was a conscious effort by congressional Republicans to prevent a U.S. military buildup, and allowing Adams the power to expand the military was unprecedented at that time. In the case of the Quasi-War, it was a Federalist Party faction that yearned for war. However, due to these party divisions, the High Federalists could not achieve all objectives, which likely prevented a full war declaration against France.

¹⁷⁷ See J. Gregory Sidak, "The Quasi War Cases—And Their Relevance To Whether 'Letters of Marque and Reprisal' Constrain Presidential War Powers," *Harvard Journal of Law and Public Policy* Vol. 28, Issue 2 (Spring 2005): 467.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid, 482.

¹⁸⁰ David Barron, *Waging War: The Clash Between Presidents and Congress, 1776 to ISIS* (New York: Simon and Schuster, 2016), 43.

Nevertheless, Adams did not gain any enlarged war powers as a result of the limited and specific congressional statutes.

First Barbary War, 1801-1805

The Barbary conflicts occurred in response to state-sanctioned piracy against the U.S. by Algiers, Tripoli, Tunis, and Morocco.¹⁸¹ Pirates captured American ships and demanded ransom payments for the crews. After Thomas Jefferson's inauguration in 1801, he ordered the navy to the Mediterranean to protect U.S. shipping without congressional approval. However, he accepted that he could not order offensive actions without congressional authorization.¹⁸² He defended his actions before Congress on 8 December 1801 and requested an authorization for offensive military actions.¹⁸³ He acknowledged that U.S. naval forces were "unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense."¹⁸⁴

However, Congress did not enact a war declaration after Jefferson's address. On 6 February 1802 the legislature instead enacted an expansive authorization empowering the commander-in-chief "to equip, officer, man, and employ such of the armed vessels of the United States as may be judged requisite of the President" and "instruct the commanders of the respective public vessels aforesaid, to subdue, seize and make prize of all vessels, goods and effects, belonging to the Bey of Tripoli, or to his

¹⁸¹ For further discussion of the First Barbary War, see Frank Lambert, *The Barbary Wars: American Independence in the Atlantic World* (New York: Hill and Wang, 2005); Joshua E. London, *Victory in Tripoli: How America's War with the Barbary Pirates Established the U.S. Navy and Built a Nation* (Hoboken: Wiley, 2005); Gene Allen Smith, "Foreign Wars of the Early Republic, 1798-1816," in *A Companion to American Military History*, ed. James C. Bradford (Chichester: Blackwell Publishing, 2010), 39-58.

¹⁸² Fisher, *President and Congress*.

¹⁸³ Thomas Jefferson, "First Annual Message," December 8, 1801. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 10 February 2018, <http://www.presidency.ucsb.edu/ws/?pid=29443>.

¹⁸⁴ *Ibid*.

subjects.”¹⁸⁵ Furthermore, the act allowed the President to commission privateers and direct the navy to take “all such other acts of precaution or hostility as the state of war will justify, and may, in his opinion, require.”¹⁸⁶ This authorization specifically targeted Tripolitan vessels and permitted hostile naval actions. Yet, it remains the earliest and most evident instance of a discretionary AUMF, setting no time limitations, location restrictions, and empowering the President with discretion to decide the scope of “all such other acts of precaution or hostility.”

These “other acts” of hostility played out during a noteworthy occurrence when a military officer undertook unilateral measures beyond congressional statute. In 1805, General William Eaton led a critical land attack at Derne, around 70-80 miles from Tripoli, and held the city to force peace negotiations.¹⁸⁷ Congress never explicitly sanctioned Eaton’s actions, which included a contract with the exiled ruler of Tripoli, Hamet Caramanli. Eaton led nine other American military personnel along with Hamet’s army of around 400 men and successfully captured Derne.¹⁸⁸ While Eaton acted unilaterally, Jefferson did not conduct an endlessly expanding war with Tripoli or the other Barbary states along the Mediterranean. He did not utilize the congressional authorization—an expansive and vague authorization in its provision of discretionary presidential power—to establish an executive war prerogative for use throughout Northern Africa or elsewhere globally. However, given more extensive armed forces, a President may have been more willing to expand the scope of hostilities under this authorization.

¹⁸⁵ “An act for the protection of the commerce and seamen of the United States, against the Tripolitan Cruisers,” In *Statutes at Large*, 7th Congress, 2 Stat. 129, Sess. I., Ch. 4, (1802), 130.

¹⁸⁶ *Ibid*, 130.

¹⁸⁷ Nash, Jr., *The Forgotten Wars*, 277, 288.

¹⁸⁸ *Ibid*.

War of 1812

Amidst the ongoing Napoleonic Wars, the U.S. attempted to maintain neutrality as a French trading partner. As British disruptions to American naval commerce and the impressment of American sailors into the British Royal Navy intensified, President James Madison felt an increasing level of political pressure to intervene.¹⁸⁹ In a 1 June 1812 congressional address, Madison explained that the nation was still in a state of peace with Great Britain, although Britain was conducting warfare against the U.S.¹⁹⁰ He remarked, “Whether the United States shall continue passive under these progressive usurpations and these accumulating wrongs, or, opposing force to force in defense of their national rights...is a solemn question which the Constitution wisely confides to the legislative department of the Government.”¹⁹¹ Madison added that the French had also been seizing American ships, but he would not make any recommendations to Congress on authorizing hostilities against France, as there was ongoing diplomacy between the two nations.¹⁹² He left all decisions to declare war and authorize the use of military force to Congress. The final vote approving the war declaration was highly divided, the House voting 79 to 49 and the Senate voting 19 to 13.¹⁹³

Executive officials undertook two notable unilateral military actions during the war.

First, Secretary of War General John Armstrong led an attempted invasion of Canada

¹⁸⁹ For further discussion of the War of 1812, see Robert P. Watson, *America's First Crisis: The War of 1812* (Albany: State University of New York Press, 2014); Reginald Horsman, *The Causes of the War of 1812* (New York: Octagon Books, 1979); Gene Allen Smith, “Foreign Wars of the Early Republic, 1798-1816,” in *A Companion to American Military History*, ed. James C. Bradford (Chichester: Blackwell Publishing, 2010), 39-58.

¹⁹⁰ James Madison, “Special Message,” June 1, 1812. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 10 February 2018, <http://www.presidency.ucsb.edu/ws/?pid=65936>.

¹⁹¹ Ibid.

¹⁹² Ibid.

¹⁹³ The first U.S. war declaration was signed on 18 June 1812.

without authorization on 5 September 1813.¹⁹⁴ Madison admonished Armstrong for acting outside of executive orders, and he was ultimately forced to resign in September 1814 after his unsuccessful defense of Washington, which the British burned in August.¹⁹⁵ Nonetheless, Madison failed to expel Armstrong from the executive branch after his illegal military crusade into Canada. Congress concurrently failed to condemn Armstrong's actions, thus allowing this type of unilateralism to go unpunished.

Second, nearing the war's end, General Andrew Jackson successfully repelled a British assault in the Battle of New Orleans. However, Jackson conducted congressionally unauthorized actions, declaring martial law throughout the city and even arresting a federal judge.¹⁹⁶ Jackson asserted that such measures were necessary, but Madison denounced his actions in New Orleans and his unapologetic manner. Madison demonstrated that presidential restraint was possible in retaliatory use of military force by seeking a congressional declaration before changing the state of the nation from peace to war. Yet, Jackson's unilateral actions in New Orleans offered a precedent for military officers taking unauthorized actions, justified by personal discretion over congressional statutes, the Constitution, and even United Nations mandates.¹⁹⁷ Madison failed to publicly condemn, reprimand, and dismiss Armstrong and Jackson, which enabled these types of unilateral actions, justified by so-called necessity and hubris, to gain traction as potentially effective (though hazardous and illegal) military options.

¹⁹⁴ Marcus Cunliffe, "Madison," in *The Ultimate Decision: The President as Commander in Chief*, ed. Ernest R. May (New York: George Braziller, 1960), 38.

¹⁹⁵ Ibid.

¹⁹⁶ Barron, *Waging War*, 95.

¹⁹⁷ For example, during the Korean War General Douglas MacArthur exercised substantial discretion, without congressional authorization, in his use of *offensive* military force beyond the 38th parallel into North Korea.

Mexican-American War, 1846-1848

Unlike the Napoleonic Wars era, the 1820s-1840s represented an evident shift towards U.S. expansion and aggression. U.S. territorial disputes with Mexico increased following the Texas Revolution (1835-1836) and intensified following its 1845 annexation of the Republic of Texas. In 1846, President James Polk sent troops into a contested border region, which prompted hostilities from the Mexican army.¹⁹⁸ On 11 May 1846, Polk claimed in a congressional address, "Mexico has passed the boundary of the United States, has invaded our territory and shed American blood upon the American soil. She has proclaimed that hostilities have commenced, and that the two nations are now at war."¹⁹⁹ Polk also called for "the prompt action of Congress to recognize the existence of the war," yet he never requested a congressional war declaration.²⁰⁰

On 12 May 1846, Congress approved an act *recognizing* that a state of war existed against Mexico (with reference to the prior hostilities), and Polk signed it the following day. The House voted 174 to 14 and the Senate voted 40 to 2 to *recognize*, but not declare, that a state of war existed between the governments. The act included nine sections, constituting a lengthy authorization, including sections on militias and volunteers.²⁰¹ During congressional debates, some legislators questioned the facts of

¹⁹⁸ For further discussion on the Mexican-American War, see Karl Jack Bauer, *The Mexican War, 1846-1848* (New York: Macmillan Publishing Co., 1974); John H. Schroeder, *Mr. Polk's War: American Opposition and Dissent, 1846-1848* (Madison: University of Wisconsin Press, 1973); David S. Heidler and Jeanne T. Heidler, *The Mexican War* (Westport: Greenwood Press, 2006).

¹⁹⁹ James Polk, "Special Message to Congress on Mexican Relations," May 11, 1846. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 10 February 2018, <http://www.presidency.ucsb.edu/ws/?pid=67907>.

²⁰⁰ Ibid.

²⁰¹ "An Act providing for the Prosecution of the existing War between the United States and the Republic of Mexico," In *Statutes at Large*, 29th Congress, Sess. I., Ch.16, (May 13, 1846).

the purported Mexican invasion and Polk's insistence on war. Whig Senator William Archer (VA) argued, "It has been stated on the highest authority that the President of the United States cannot declare war."²⁰² He then remarked:

Does the existence of hostilities on one of the frontiers of the United States necessarily put us in a state of war with any foreign Power? Clearly not. Suppose we have misunderstood the state of things on the Rio Grande, and that the Mexican authorities have acted justifiably under the circumstances: the danger of admitting the doctrine that a state of war can exist except by the constitutional action of the Government of the United States will then be evident.²⁰³

Archer contended that one incident of hostilities does not automatically place the nation in a state of war, and the President cannot change or define the state of the nation simply by his own rhetorical pronouncement. Even John Quincy Adams, then in his late 70s, denounced the congressional act as an illegitimate war declaration, and he criticized the administration's evidence regarding the border hostilities.²⁰⁴ His incredulity was to no avail as the Polk administration employed a shrewd strategy to obtain congressional authorization. It linked the war authorization to a military appropriations bill, which would support an allegedly endangered army unit at the border.²⁰⁵ Furthermore, the administration limited House debate to only two hours, most of which was spent reading Polk's war message and supplementary papers. Legislators had a choice to believe the administration's story, support appropriations, and enact a war authorization, or reject these options and potentially risk endangering U.S. military forces.²⁰⁶ Democratic majority legislators were unwilling to vote against

²⁰² Congressional Globe, 29th Cong., 1st Sess. (1846), 784.

²⁰³ Ibid.

²⁰⁴ Ann Van Wynen Thomas and A.J. Thomas, Jr., *The War-Making Powers of the President* (Dallas: SMU Press, 1982), 11.

²⁰⁵ Bauer, *The Mexican War*, 68.

²⁰⁶ Ibid.

their own President, and Whig minority members recalled the downfall of the Federalist Party following its opposition to the War of 1812.²⁰⁷

Polk, as a preemptive executive actor, defined the border dispute in an unambiguous effort to wage war and expand U.S. territory. Congress became a reactionary actor, subordinate to the President. Polk was never congressionally authorized to send the military to the contested border region. In 1848, Congress censured Polk's actions, stating that the conflict was "unnecessary and unconstitutionally begun by the President of the United States."²⁰⁸ This episode demonstrates a substantial presidential impact on the process to secure congressional authorization, even when the President himself provoked international hostilities. A state of war does not automatically exist as a result of one incident or as the President declares in a congressional address. Polk professed that war existed in his speech, and he guided the legislature in the direction of *recognizing* it through a congressional act—but not, remarkably, as a declared war.²⁰⁹

Spanish-American War, 1898

As the U.S. continued its 19th century territorial and military expansion, its intention to contest European colonial interference in the Americas, under the Monroe Doctrine, became more apparent. The Cuban revolution against the Spanish Empire ultimately produced wider global consequences regarding American

²⁰⁷ Michael H. Hunt, *Ideology and U.S. Foreign Policy* (New Haven: Yale University Press, 1987), 32.

²⁰⁸ Congressional Globe, 30th Cong. 1st Sess. (Jan. 3, 1848), 95.

²⁰⁹ On this point, historians and even the U.S. government continue to label this conflict a declared war. I contend, however, that the record should be revised; Congress never explicitly *declared* war against Mexico. The word "declare" never appears within the text and the formal war declaration statement is absent, which classifies it as an outlier compared to every other historical declaration. Congress authorized the use of force, but it was not a declared war.

interventionism.²¹⁰ On 15 February 1898, the U.S. naval ship *Maine* exploded while stationed in Havana, Cuba, killing 260 men. U.S. officials, including Assistant Secretary of the Navy Theodore Roosevelt and Senator Henry Cabot Lodge (R-MA), blamed Spain for the disaster and helped instigate calls for war.²¹¹ In President William McKinley's 11 April congressional address he requested the legislature "to authorize and empower the President to take measures to secure a full and final termination of hostilities between the Government of Spain and the people of Cuba," and "use the military and naval forces of the United States as may be necessary for these purposes."²¹² McKinley did not request a war declaration against Spain in his address; this was instead a call for a limited authorization to *intervene* militarily in the Cuban-Spanish conflict and implement a ceasefire.

On 20 April, Congress enacted a resolution that recognized Cuban independence, demanded that Spain remove its government and withdraw its military from Cuba, promised that the U.S. would refrain from dominion over Cuba, and authorized the President to use the military "to such extent as may be necessary to carry these resolutions into effect."²¹³ Spain interpreted the AUMF as a war declaration, severed diplomatic relations, and promptly recognized a state of war against the U.S.

McKinley addressed Congress again on 25 April, provided a situational update,

²¹⁰ For further discussion on the domestic and international politics leading to the Spanish-American War, see John L. Offner, "McKinley and the Spanish-American War," *Presidential Studies Quarterly*, Vol. 34, No.1 (March 2004): 50-61. For more on the Spanish-American War, see David Trask, *The War with Spain in 1898* (New York: Macmillan, 1980); Lewis L. Gould, *The Spanish American War and President McKinley* (Lawrence: University Press of Kansas, 1982). For a reexamination of President McKinley's decision-making prior to the war, see Nick Kapur, "William McKinley's Values and the Origins of the Spanish-American War: A Reinterpretation," *Presidential Studies Quarterly*, Vol. 41, No. 1 (March 2011): 18-38.

²¹¹ Barron, *Waging War*, 188.

²¹² William McKinley, "Message to Congress Requesting a Declaration of War With Spain," April 11, 1898. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 10 February 2018, <http://www.presidency.ucsb.edu/ws/?pid=103901>.

²¹³ "Joint Resolution No. 24," In *Statutes at Large*, 55th Congress, Sess. II. (April 20th, 1898), 739.

mentioned his 22 April blockade of Cuba—legally justified, according to McKinley, by the 20 April AUMF—and requested “speedy action” in authorizing a war declaration against Spain.²¹⁴ On the same day, Congress enacted a war declaration by voice vote, and McKinley signed it. This remains the only instance in which Congress enacted a prior AUMF before a war declaration. The 20 April AUMF was a textually unclear ultimatum, broad in its discretionary provisions, and did not prescribe specific military actions with regard to the Cuban-Spanish conflict.

Consequently, Spain misinterpreted this authorization as a direct military challenge, although both nations were heading towards war anyways. If it was not Congress’ original intention to signal war against Spain, it could have first issued a singular ultimatum or reconsidered the wording in the 20 April resolution to exhibit a less threatening posture. But, if Congress did intend to take direct military actions in response to Spanish noncompliance, it should have explicitly stated this in the AUMF, or it should have declared war. The legislature aggravated a volatile situation by enacting a vague AUMF instead of an explicit and limited AUMF instituting a naval blockade or a war declaration.

Despite the obscure process, McKinley waged war against Spain in accordance with the war declaration. He did not assume a prerogative power from the 20 April AUMF to launch further hostilities regionally or globally. The war did, however, result in the U.S. acquiring Puerto Rico, Guam, and the Philippines and led to an occupation of Cuba. Yet, McKinley never justified these imperialist and expansionist actions post-

²¹⁴ William McKinley, "Message to Congress on Relations With Spain," April 25, 1898. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 10 February 2018, <http://www.presidency.ucsb.edu/ws/?pid=103903>.

1898 Treaty of Paris as legal under the 20 April AUMF or the 25 April war declaration. The 20 April AUMF in fact included a prohibition on U.S. “sovereignty, jurisdiction, or control over” Cuba, known as the Teller Amendment.²¹⁵ However, the war declaration included no such restrictions for other territorial acquisitions. The U.S. acquired overseas territories from Spain by the 1898 Treaty of Paris, and it instituted government control of the Philippines by the Army Appropriations Act of 1901.²¹⁶ Therefore, it took legal measures beyond the war declaration for the U.S. government to acquire and control new territories.

World War I, 1917-1918

U.S. entry into the First World War signified an ideological shift away from 19th century territorial expansion. Germany’s 1915 sinking of the *Lusitania* and ensuing unrestricted submarine warfare against American commercial shipping presented an unquestionable threat to U.S. economic security.²¹⁷ Congress enacted two distinct war declarations in 1917, the first on 6 April against Imperial Germany. The House voted 373 to 50 and the Senate voted 82 to 6 to approve the act. The 2 April Senate draft war declaration notably repeated sections of President Woodrow Wilson’s congressional address. For example, Wilson recommended that Congress “take immediate steps not only to put the country in a more thorough state of defense but also to exert all its power and employ all its resources to bring the Government of the

²¹⁵ “Joint Resolution No. 24,” In *Statutes at Large*, 55th Congress, Sess. II. (April 20th, 1898), 739. The Teller Amendment effectively blocked U.S. annexation of Cuba.

²¹⁶ “A Treaty of Peace Between the United States and Spain,” U.S. Congress, 55th Cong., 3d sess., Senate Doc. No. 62, Part 1 (Washington: Government Printing Office, 1899), 5-11; “An Act Making appropriation for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and two,” In *Statutes at Large*, 56th Congress, Sess. II., Ch. 803 (March 2, 1901).

²¹⁷ For further discussion on U.S. entry into World War I, see Rodney P. Carlisle, *Sovereignty At Sea: U.S. Merchant Ships and American Entry Into World War I* (Gainesville: University Press of Florida, 2009); George F. Kennan, *American Diplomacy, 1900-1950* (Chicago: University of Chicago Press, 1951); David M. Kennedy, *Over Here: The First World War and American Society* (Oxford: Oxford University Press, 2004); Kendrick A. Clements, “Woodrow Wilson and World War I,” *Presidential Studies Quarterly*, Vol. 34, No. 1 (March 2004): 62-82.

German Empire to terms and end the war.”²¹⁸ This line was repeated verbatim in the draft declaration, illustrating the significance of Wilson’s rhetoric. However, the final resolution approved by Congress omitted this wording; it instead used standardized language of previous war declarations. In this case, the Wilson administration was more concerned about obtaining the war declaration; the exact wording of the resolution was likely not significant enough to warrant further pressure on Congress. Wilson would implement the provisions mentioned in the draft declaration (defense preparedness and resource mobilization) anyhow, once war was declared.

On 4 December 1917, Wilson delivered another congressional statement to address Austria-Hungary, a key German ally. He explained, “One very embarrassing obstacle that stands in our way is that we are at war with Germany but not with her allies. I therefore very earnestly recommend that the Congress immediately declare the United States in a state of war with Austria-Hungary.”²¹⁹ The House voted 354 to 1 and the Senate voted 74 to 0 to approve the declaration.²²⁰ Although the U.S. had declared war against Germany in April, Wilson understood that military action was prohibited against other unnamed nations or states. He also mentioned that war declarations would be necessary against Turkey and Bulgaria—as they were also members of the Central Powers alliance—yet he judged that they would not directly impede U.S. military actions against Germany and Austria-Hungary due to their geographic locations.²²¹ Ultimately, Congress did not declare war against Turkey and Bulgaria.

²¹⁸ Woodrow Wilson, "Address to a Joint Session of Congress Requesting a Declaration of War Against Germany," April 2, 1917. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 10 February 2018, <http://www.presidency.ucsb.edu/ws/?pid=65366>; see S.J. Res.1, April 2 1917, referred to the Committee on Foreign Relations.

²¹⁹ Woodrow Wilson, "Fifth Annual Message," December 4, 1917. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 10 February 2018, <http://www.presidency.ucsb.edu/ws/?pid=29558>.

²²⁰ Socialist Party Representative Meyer London (NY) was the sole vote against the declaration.

²²¹ *Ibid.*

World War II, 1941-1945

During the interwar period, the U.S. grappled with the socioeconomic crisis of the Great Depression and global ideological security concerns of the 1930s. However, it was not until the Japanese bombing of Pearl Harbor on 7 December 1941—the first major attack on U.S. territory since 1812—that the U.S. committed to formal intervention. President Franklin Roosevelt addressed Congress the following day and promptly called for a war declaration. He added, “As Commander in Chief of the Army and Navy I have directed that all measures be taken for our defense.”²²² The President as commander-in-chief has constitutional authority to issue defensive orders to protect the nation from additional imminent attacks or invasions.²²³ But, Roosevelt could not unilaterally direct *offensive* military actions against Japan without congressional authorization. The House voted 388 to 1 and the Senate voted 82 to 0 to declare war on Japan.²²⁴ On 11 December, Germany declared war on the U.S., and Roosevelt responded, the same day, with a concise congressional speech requesting declarations against Germany and Italy. Congress quickly authorized both unanimously.²²⁵

On 2 June 1942, Roosevelt addressed Congress to request further war declarations against German allied nations: Bulgaria, Hungary, and Romania. He asserted that

²²² Franklin Roosevelt, "Address to Congress Requesting a Declaration of War with Japan," December 8, 1941. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 10 February 2018, <http://www.presidency.ucsb.edu/ws/?pid=16053>.

²²³ See *Martin v. Mott*, 25 U.S. 30 (1827), in which Justice Story defined a limited defensive presidential war power during sudden national emergencies or invasions.

²²⁴ Representative Jeannette Rankin (R-MT) opposed as a pacifist.

²²⁵ Franklin Roosevelt, "Message to Congress Requesting War Declarations with Germany and Italy," December 11, 1941. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 10 February 2018, <http://www.presidency.ucsb.edu/ws/?pid=16058>; S.J. Resolution 119, December 11, 1941; S.J. Resolution 120, December 11, 1941. Rankin abstained from these votes.

although these nations were Nazi puppet regimes—and did not independently or freely choose to declare war on the U.S.—they were nonetheless conducting hostilities against American allies and preparing to extend these actions to the U.S.²²⁶ Congress approved three separate war declarations, all on 4 June, and all three distinct war votes were unanimous.²²⁷ Although these nations had declared war against the U.S. on 13 December 1941, it took several months before a formal American response. Yet Roosevelt, like Wilson in 1917, would not conduct military actions against additional nations without congressional authorization.

Roosevelt never claimed an inherent prerogative as commander-in-chief to wage *offensive* war against all belligerents during the war. Congress enacted distinct war declarations against these nations largely in response to prior enemy declarations issued against the U.S. Neither Roosevelt nor Truman expanded the war beyond the nations specified in the declarations.²²⁸ Roosevelt did, however, cite the 1941 war declaration against Japan and the commander-in-chief power as legal justification to issue Executive Order 9066, which established internment camps for Japanese-Americans.²²⁹ In this instance, Roosevelt flagrantly exceeded the limits of the

²²⁶ Franklin Roosevelt, "Message to Congress on a State of War Between the United States and Hungary, Rumania, and Bulgaria.," June 2, 1942. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 10 February 2018, <http://www.presidency.ucsb.edu/ws/?pid=16265>.

²²⁷ H.J. Resolution 319, June 5, 1942; H.J. Resolution 320, June 5, 1942; H.J. Resolution 321, June 5, 1942.

²²⁸ For further discussion on World War II, see Robert Dallek, *Franklin D. Roosevelt and American Foreign Policy* (New York: Oxford University Press, 1979); David Reynolds, *From Munich to Pearl Harbor: Roosevelt's America and the Origins of the Second World War* (Chicago: Ivan R. Dee, 2001); Robert Divine, *The Reluctant Belligerent: American Entry Into World War II* (New York: Wiley, 1965); Charles Beard, *President Roosevelt and the Coming of the War, 1941: A Study In Appearances and Realities* (New Haven: Yale University Press, 1948); Alexander DeConde, *A History of American Foreign Policy, Volume II: Global Power (1900 to the Present)*, 3rd Edition (New York: Charles Scribner's Sons, 1978). On Truman's foreign policy decisions near the end of World War II, see Alex Roberto Hybel, *U.S. Foreign Policy Decision-Making from Truman to Kennedy* (New York: Palgrave Macmillan: 2014).

²²⁹ Franklin Roosevelt, "Executive Order 9066—Authorizing the Secretary of War To Prescribe Military Areas," February 19, 1942. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 10 February 2018, <http://www.presidency.ucsb.edu/ws/?pid=61698>.

Constitution with respect to the rights of U.S. citizens during wartime.²³⁰ Neither a war declaration nor the commander-in-chief power sanctions the arbitrary detention of U.S. citizens.

Korean War, 1950-1953

The Korean War was a distinct departure from prior periods of conflict. President Harry Truman committed massive numbers of ground forces to defend South Korea, yet Congress never authorized the large-scale conflict. Yet, scholars have neglected the draft war authorization considered by Truman and other key officials. As such, this section will cover his administration's maneuverings during the early days of the war in greater depth.

Truman and his advisors saw the North Korean invasion as evidence of Soviet influence, which had to be countered immediately with massive use of U.S. military assets and sustained as long as necessary, even if that meant escalation of the conflict beyond driving North Korea back across the 38th parallel. The Truman administration saw the attack as a Soviet test of American willingness to defend South Korea; yet, the administration failed to understand that this was a regional war, not a wider Soviet-led conflict. While Josef Stalin may have pre-approved an invasion, it was North Korean leader Kim Il-Sung's decision to wage war against the South.²³¹

²³⁰ The Supreme Court upheld Executive Order 9066 in *Hirabayashi v. U.S.*, 320 U.S. 81 (1943); *Yasui v. U.S.*, 320 U.S. 115 (1943); and *Korematsu v. U.S.*, 323 U.S. 214 (1944). The Fourth Amendment protects the general public from unreasonable searches and seizures. The Fifth and Fourteenth Amendments guarantee due process of law.

²³¹ Shen Zhihua, "Sino-Soviet Relations and the Origins of the Korean War: Stalin's Strategic Goals in the Far East," *Journal of Cold War Studies*, Volume 2, Number 2 (2000): 44.

The U.S. intervened just hours after North Korean forces crossed the demilitarized zone into South Korea in the early morning of 25 June 1950.²³² Truman acted immediately upon receiving notice of the invasion, and the administration made several significant military and war powers decisions in the early days of the war. One of these decisions was taken in the afternoon of 25 June, when State and Defense Department representatives convened and discussed a proposal for military aid to South Korea.²³³ On the same day, the United Nations Security Council (UNSC) approved Resolution 82, which called for North Korean military forces to cease hostilities immediately and withdraw north beyond the 38th parallel.²³⁴ Resolution 82 was approved 9 votes to 0, with 1 abstention (Yugoslavia).²³⁵ It must be noted, however, that the Soviet Union had been absent from the UNSC due to the council inhibiting membership for the communist People's Republic of China.²³⁶ Later that evening, the administration informed General Douglas MacArthur, commander of the U.S. occupation of Japan, about the proposal to aid South Korea with military resources, to authorize him use of naval and air forces, to possibly empower him with total authority over U.S. military activities in Korea, and to obtain further use of force approval from the UNSC.²³⁷

Truman also issued the following orders in a cabinet discussion after dinner:

²³² For further discussion of U.S. involvement in the Korean War, see Bruce Cumings, *The Origins of the Korean War* (Princeton, Princeton University Press, 1981) and *The Korean War: A History* (New York: Modern Library, 2010); Louis Fisher, "The Korean War: On What Legal Basis Did Truman Act?" *The American Journal of International Law*, Vol. 89, Number 1 (January 1995): 21-39; I.F. Stone, *The Hidden History of the Korean War, 1950-1951* (Boston: Little, 1988); David Rees, *Korea: The Limited War* (London, Macmillan, 1964); Steven Casey, *Selling the Korean War: Propaganda, Politics, and Public Opinion in the United States, 1950-1953* (Oxford: Oxford University Press, 2008).

²³³ "Teleconference," June 25, 1950, GEP, Box 71, Folder: Korea-June 25, 1950, HSTPL.

²³⁴ United Nations Security Council Resolution 82, adopted at the 473rd meeting, 25 June 1950.

²³⁵ Ibid.

²³⁶ The Republic of China (Taiwan) was a member of the UNSC at the time.

²³⁷ "Teleconference," June 25, 1950, GEP, Box 71, Folder: Korea-June 25, 1950, HSTPL.

1) MacArthur should send all necessary military supplies to South Korea; 2) MacArthur should also deploy a survey group from Japan to Korea; 3) specified U.S. naval forces should be deployed to Japan; 4) the air force should begin plans to possibly destroy all Soviet bases in the Far East; and 5) the administration should carefully consider where the Soviets might take action next, because they were thought to be behind the North Korean invasion.²³⁸ Additionally, Truman authorized U.S. air forces to destroy North Korean tanks, if needed, and he strongly reinforced the notion that the U.S. was acting under U.N. command.²³⁹ Army Secretary Frank Pace cautioned against sending in ground forces; Navy Secretary Francis Matthews called for quick action, and he believed the administration would receive popular approval; Defense Secretary Louis Johnson was concerned about delegating presidential authority to General MacArthur, and he wanted the instructions to MacArthur to be detailed enough to restrict his discretion.²⁴⁰

The administration assumed that the UNSC resolution enacted that day clearly provided them with ample latitude to intervene in Korea, and they believed that further UNSC resolutions would allow them to expand on the types of permitted military actions. Notably, at no point during this discussion did any administration official raise the possibility or necessity of requesting a congressional war declaration or resolution to sanction the American intervention. Secretary Matthews claimed that the administration would get popular approval, but he did not mention whether it should be through congressional authorization.

²³⁸ "Memo of Conversation," June 25, 1950, DAP, Memoranda of Conversations File, 1949-1953, Box 67, Folder: 2, HSTPL.

²³⁹ Ibid.

²⁴⁰ Ibid.

The Truman administration and congressional leaders held a series of key meetings in the following days, with the first convening on 27 June. Secretary of State Dean Acheson summarized post-invasion developments; specifically, that MacArthur had immediately moved naval and air forces into South Korea to protect American evacuees and had begun to provide military aid (weapons, ammunition, vehicles) to the South Korean military.²⁴¹ However, Acheson neglected a key detail, which Truman was quick to raise—that a special meeting of the UNSC had already taken place and that U.S. military assistance was being provided in accordance with the UNSC resolution enacted during that session.²⁴² Frank Pace added that no ground forces had been deployed into conflict zones.²⁴³ Truman remarked that if South Korea were permitted to fall, the Soviets would eventually conquer all of Asia and cause further chaos in Europe.²⁴⁴

Statements about the administration's actions being in support of U.N. directives, and *not* constituting U.S. actions, was repeated and reinforced throughout the meeting. The administration unequivocally opposed any appearance of the U.S. taking unilateral actions in Korea that might provoke a hostile Soviet reaction. Acheson stated that legislators should not publicly refer to the Soviets as being involved in Korea to give them an opportunity to “back down and call off the North Koreans.”²⁴⁵

Both administration officials and attending legislators viewed the 25 June UNSC resolution as sufficient authorization for further military actions, even if the Soviets

²⁴¹ “Unnamed Summary,” June 27, 1950, GEP, Box 71, Folder: Korea-June 27, 1950, HSTPL.

²⁴² Ibid. Truman was referencing UNSC Resolution 82.

²⁴³ “Memo of Conversation,” June 27, 1950, DAP, Box 67, Folder: 2, HSTPL, 2.

²⁴⁴ “Unnamed Summary,” June 27, 1950, GEP, Box 71, Folder: Korea-June 27, 1950, HSTPL. Truman additionally highlighted the importance of defending Indo-China, the Philippines, and Formosa.

²⁴⁵ Ibid, 8.

vetoed further UNSC resolutions. There was also broad consensus that Korea would be *the* ultimate test of the U.N.'s capacity to resolve international crises. Truman stated that he "was going to make absolutely certain that everything we did in Korea would be in support of, and in conformity with, the decision of the Security Council of the United Nations."²⁴⁶ Neither Truman, nor any legislator, nor anyone else at the meeting raised constitutional concerns regarding the lack of congressional authorization. In fact, the legislators in attendance seemed relieved that the U.S. was taking action under the cover of the U.N., as if this absolved them of accountability should the crisis worsen. The administration prioritized defending South Korea and avoiding a direct military conflict with the Soviets, not congressional assent.

The UNSC also enacted Resolution 83 on 27 June, which recommended that U.N. member states provide any necessary assistance, including use of military force, for South Korea to combat North Korean forces and restore peace.²⁴⁷ The North Korean army captured Seoul, the South Korean capital, on 28 June, and Truman held a press conference to address the situation the following day. He explicitly stated to the press that the U.S. was not at war, he refused to comment on the use of American ground forces, and he emphasized that the U.S. was involved in a "police action" under the U.N.²⁴⁸

30 June was an equally significant date for the administration and Congress.

MacArthur sent a telegram early in the morning stating that the South Korean army

²⁴⁶ Ibid, 7.

²⁴⁷ United Nations Security Council Resolution 83, adopted at the 474th meeting, 27 June 1950. The resolution was approved 7 votes to 1 (Yugoslavia); the Soviets were nonparticipants.

²⁴⁸ "White House Press and Radio News Conference," June 29, 1950, KWF, Box 1, Folder 1, North Korean Aggression: Immediate Evaluations and Reaction, HSTPL.

could not hold and that U.S. ground forces were required to recapture lost territory.²⁴⁹ Additionally, MacArthur stated that, if given further authorization, he would immediately order a regiment into *offensive* combat to destroy North Korean forces in South Korea.²⁵⁰ In response to the message and ongoing communications with MacArthur, Frank Pace called Truman at around 5:00am, and Truman “authorized a regiment to be used in addition to the authorizations of yesterday, to be used at Mac’s discretion.”²⁵¹ At 11:00am, Truman convened a second meeting with congressional leaders for a situational briefing. He notified them that he had authorized U.S. forces to operate north of the 38th parallel in North Korea and that MacArthur would be in charge of any multinational coalition, should other nations provide additional forces.²⁵²

Concurrent with the morning meeting, Truman released a public statement stating that he authorized a naval blockade of Korea, air operations in North Korea, and MacArthur to use specified ground forces.²⁵³ Senator Millard Tydings (D-MD) indicated the importance of a coalition force to prevent the perception that this conflict was “a private American war.”²⁵⁴ Senator Scott Lucas (D-IL) supported this view, adding that the involvement of more nations “would indicate that what we were doing was the United Nations and not a United States action.”²⁵⁵ These statements indicate that the administration and certain legislators in attendance consciously asserted (contrary to reality) that the U.S., as an independent state actor, was not

²⁴⁹ “Secretary Acheson’s Briefing Book,” June 30, 1950, GEP, Box 71, Folder: Korea-June 30, 1950, HSTPL.

²⁵⁰ Ibid.

²⁵¹ “Call from Frank Pace,” June 30, 1950, GEP, Box 71, Folder: Korea-June 30, 1950, HSTPL.

²⁵² “Draft of 11:00 Meeting,” June 30, 1950, GEP, Box 71, Folder: Korea-June 30, 1950, HSTPL.

²⁵³ “11:00 Briefing to Congress and Presidential Release,” June 30, 1950, GEP, Box 71, Folder: Korea-June 30, 1950, HSTPL.

²⁵⁴ “Draft of 11:00 Meeting,” June 30, 1950, GEP, Box 71, Folder: Korea-June 30, 1950, HSTPL, 3.

²⁵⁵ Ibid, 4.

actually involved in Korea, meaning that congressional authorization was not required. However, not everyone in attendance agreed with the administration's actions. Senator Kenneth Wherry (R-NE) disrupted the meeting several times, standing in each case, to ask Truman if he was going to advise Congress before he sent ground forces into Korea. Wherry stated that Congress should be consulted before the President took these kinds of actions, but Truman replied that it was an emergency, requiring immediate action. Wherry then asserted that Congress should be involved prior to any further large-scale military actions and that Truman should not escalate hostilities without congressional approval.

One would expect any meeting involving a U.S. military intervention to logically proceed with serious discussions about a congressional authorization and what it might include. However, Congressman Dewey Short (R-MO), seated behind Truman, stood up and claimed that he represented practically everyone in Congress by saying that legislators would thank Truman for his leadership and for his forthrightness in congressional communications. Short's interjection ended the discussion on a war authorization, and the meeting proceeded with other matters. Vice President Alben Barkley commented that Truman's released statement should have indicated that the President is commanding and ordering the military forces in Korea. However, Truman disagreed with him remarking, "This is all very delicate. I don't want it stated any place that I am telling MacArthur what to do. He is not an American General now, he is acting for the United Nations. It would spoil everything if we said he was just doing what we tell him to do."²⁵⁶ Truman then clarified that MacArthur *was* obviously following presidential orders but that the administration did not want the world to

²⁵⁶ Ibid, 12.

know the exact level of U.S. involvement. The administration replaced the designation of “U.S.” with “U.N.” to conduct unilateral military operations in Korea, while completely eschewing congressional authorization concerns. Although Wherry seriously questioned Truman’s unilateral actions and lack of congressional approval during the meeting, the other legislators present rejected any further discussion on the issue.

The last critical meeting in the Korean conflict’s early days was held on 3 July. Truman, cabinet officials, and Senator Lucas discussed the possibility of the President addressing a joint session of Congress to issue a full report on Korea. They also discussed a Defense Department draft joint resolution approving Truman’s actions.²⁵⁷ The strategy entailed that legislators, not Truman or administration officials, would introduce the resolution. Senator Lucas commented that if the President addressed Congress it might lead to a war declaration. Truman explained that he wanted to avoid appearing to be using extra-constitutional powers or circumventing Congress; yet, he ultimately chose not to address the legislature.²⁵⁸ He knew that a congressional address would likely prompt legislative action, and the administration believed that congressional debates on any war authorization would take considerable time.

Also on 3 July, administration lawyers prepared a brief detailing presidential authority to order U.S. armed forces abroad to repel the North Korean invasion. The brief claimed that Truman was authorized to use force abroad based on the UNSC resolutions, the commander-in-chief power, and the claim that the President has *sole*

²⁵⁷ “Memo of Conversation,” July 3, 1950, DAP, Box 67, Folder: 3, HSTPL.

²⁵⁸ Ibid.

authority to conduct foreign relations.²⁵⁹ The administration drafted a congressional resolution and even prepared a brief detailing their legal arguments for Truman's unilateral measures as President. This demonstrates that the administration had been active in contemplating war-making authority. Yet, Truman desired that any sort of war authorization originate from the legislature; he would not request it. The administration wanted to avoid all actions that might lead Congress to declare war. In this respect, Senator Lucas' earlier remarks appear as though he was an administration official, not a legislator accountable for war-making oversight.

Presidential adviser George Elsey later commented on the decisive meetings during the opening days of the Korean War in a 16 July 1951 memo. He stated, "There was apparently no serious discussion about a Congressional resolution during the week of June 25-30." He also explained how Truman was too preoccupied with strategic-military affairs to "cover up their tracks with Congressional resolutions." It was certain, Elsey claimed, that Truman never would have requested a congressional authorization. There was no strong congressional leader to support war authorization enactment. The most ideal moment was 27 June, yet Elsey believed that even by then it was too late to enact a resolution.²⁶⁰

Elsey's 1951 memo contained several inaccuracies. There was a brief but serious discussion about a congressional authorization during the 30 June meeting. Senator Wherry raised the issue of Truman's unilateralism, without congressional authorization, to groupthink defiance. Dean Rusk, then Assistant Secretary of State

²⁵⁹ "Authority of the President to Repel the Attack in Korea," July 3, 1950, GEP, Box 71, Folder: Korea July 1950, HSTPL.

²⁶⁰ "Memo for Mr. Smith on Congressional Resolution," July 16, 1951, GEP, Box 71, Folder: Korea July 1950, HSTPL.

for Far Eastern Affairs, also had a checklist of questions on 30 June. The first question asked, "Should the President send a message to Congress asking for a joint resolution supporting action taken or to be taken regarding Korea?"²⁶¹ This question may have been listed in direct response to Wherry's disturbance at the 11:00am meeting. Nonetheless, key administration officials were aware of the issue then, taking steps to compose and later discuss a draft congressional resolution on 3 July. Regarding the claim of weak congressional leadership for resolution enactment, it is evident from the 30 June meeting that some legislative leaders were unconcerned with debating a war authorization or even a resolution to *support* past or future presidential actions. Congressman Short thwarted further discussion on the need for congressional authorization after Wherry repeatedly raised the issue.

While Truman expanded presidential power through unilateral military action in Korea, the judiciary did restrain executive authority during the war in a significant manner. In 1952, the Supreme Court decided *Youngstown Sheet and Tube v. Sawyer*, a landmark case concerning Truman's authority to seize steel mills.²⁶² The case involved a dispute between steel worker unions and their employers about wage and price stabilization. The unions planned to strike on 9 April 1952, which would have hindered Truman's ability to manufacture war matériel. However, Truman issued Executive Order 10340 on 8 April, directing the government seizure of steel companies to maintain their operation.²⁶³ The Court needed to resolve whether the

²⁶¹ "Check List #1," June 30, 1950, DAP, Box 67, Folder: 2, HSTPL.

²⁶² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

²⁶³ Harry Truman, "Executive Order 10340—Directing the Secretary of Commerce to Take Possession of and Operate the Plants and Facilities of Certain Steel Companies," April 8, 1952. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 10 February 2018, <http://www.presidency.ucsb.edu/ws/?pid=78454>.

commander-in-chief power and the executive Vesting Clause sanctioned presidential seizures of steel companies without congressional authorization.

The administration claimed that this presidential authority “should be implied from the aggregate of his powers under the Constitution.”²⁶⁴ However, Justice Hugo Black, appointed to the Court in 1937 by Roosevelt, determined in the majority opinion that Truman exceeded constitutional authority in seizing the companies. He explained that no congressional statute authorized the action, and Truman had no Article II power to issue the order.²⁶⁵ Black concluded, “The President’s order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President.”²⁶⁶

Executive orders issued outside the Constitution or congressional statutes are prohibited. This same logic should also apply in cases when presidents order the military abroad without congressional authorization. These actions should be viewed as unconstitutional presidential policies, executed under arbitrary presidential discretion.

Justice Robert Jackson, appointed by Roosevelt in 1941, wrote a concurring opinion widely recognized for its litmus test for presidential authority, which falls into three classifications. Jackson stated:

When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate...When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he

²⁶⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 587.

²⁶⁵ *Ibid*, 585.

²⁶⁶ *Ibid*, 588.

and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least, as a practical matter, enable, if not invite, measures on independent presidential responsibility... When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.²⁶⁷

His test seemed to permit some presidential discretion, especially under congressional authorization. But, as the following legislative delegation cases illustrate, Congress cannot delegate its enumerated lawmaking power to the executive through federal law. Jackson also mentioned the Korean War and warned about presidential unilateralism abroad to implement domestic controls, but he did not comment further on whether Truman exceeded constitutional authority in waging unauthorized war. However, Jackson clarified that the commander-in-chief power does *not* grant a plenary power to act extra-constitutionally or beyond federal law. The *Youngstown* case illustrated unsanctioned presidential aggrandizement with broad executive claims of power. Jackson's opinion is notable for its statement that the President has executive power to act; yet, he must still follow the Constitution and federal laws.

Conclusions

Authorized conflicts from 1798 to 1945 demonstrate several critical points on executive and legislative war powers. First, the Supreme Court distinguished *general* and *limited* wars in three significant cases: *Bas v. Tingy*, *Talbot v. Seeman*, and *Brown v. U.S.* It also determined that the President must follow congressional regulations on war making in *Little v. Barrame*. Second, Congress was more active in regulating the military establishment and the commander-in-chief through statutes limiting and defining hostilities, such as those enacted during the Quasi-War. Third, the judiciary

²⁶⁷ Ibid, 636, 637.

was willing to resolve war making authority and separation-of-powers issues. Justice Story remarked that the Quasi-War was “regulated by the diverse acts of Congress, and of course [had been] confined to the limits prescribed by those acts.”²⁶⁸ During war, presidents can neither exceed the regulations of an AUMF nor can they fail to fully implement all that is specified in a statute. In this regard, the Supreme Court *did* resolve a critical separation-of-powers issue when it ruled that President Adams violated a congressional authorization for limited hostilities.

Fourth, the legislative authorization process transformed as U.S. interests shifted. Early presidents generally stated grievances through congressional addresses and requested legislative action. However, President Polk deviated from this precedent in 1846 when *he* asserted the existence of war, compelling the legislature to authorize an illegitimate war. Fifth, the size of the military establishment, especially before 1880s naval industrialization, greatly restricted presidential war making abroad. During the 19th century, presidents largely did not expand overseas military operations beyond war authorization provisions, including examples such as the discretionary 1802 AUMF. Even if Jefferson had desired to expand the Barbary War, he would have been hampered due to limited numbers of U.S. naval warships and ground forces.

Lastly, Congress was more willing to at least condemn unauthorized presidential use of force with a legislative motion. For example, in 1832 a U.S. navy warship exacted revenge on Quallah Battoo, a Sumatran port, after hostilities between natives and an

²⁶⁸ Barron, *Waging War*, 99; also see Joseph Story, *Commentaries on the Constitution of the United States* (Boston: Hillard, Gray & Co., 1833), Vol. III, 68.

American trading vessel.²⁶⁹ President Andrew Jackson, already infamous for conducting unilateral actions without sanction, brashly stated in an 1831 congressional address: “I forthwith dispatched a frigate with orders to require immediate satisfaction for the injury and indemnity to the sufferers.”²⁷⁰ In this case, Jackson revealed to Congress beforehand that he had ordered unauthorized offensive hostilities. After hearing of the 1832 military engagement, Whig legislators “censured the Democratic administration for waging war without a congressional declaration.”²⁷¹ This was a symbolic act that failed to restrain the President, as pro-Jackson Democrats held House and Senate majorities.

Regarding the Korean War, the Truman administration had numerous opportunities to consult with Congress, and the legislature likely would have enacted either a Korea AUMF—pursuant to UNSC resolutions—or at least a resolution approving Truman’s past and future actions. The administration also recognized early on that some legislators, like Wherry, had serious concerns about Truman’s presidential unilateralism. The administration acknowledged further congressional complaints concerning Truman’s unilateralism in the 3 July meeting; yet, it dismissed these concerns as wholly insignificant for practical purposes. It also drafted a congressional resolution in support of previous and future actions. The fact that Defense Department officials drafted this resolution signifies internal awareness regarding the possibility of congressional authorization or support for the Korean intervention.

²⁶⁹ John Lehman, *Making War: The 200-Year-Old Battle Between the President and Congress Over How America Goes to War* (New York: Charles Scribner’s Sons, 1992).

²⁷⁰ Andrew Jackson, “Third Annual Message,” December 6, 1831. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 10 February 2018, <http://www.presidency.ucsb.edu/ws/?pid=29473>.

²⁷¹ Kenneth J. Hagan, *This People’s Navy: The Making of American Sea Power* (New York: The Free Press, 1991), 103.

Furthermore, the administration was apprehensive about the conflict expanding to Formosa, the Philippines, and Indochina, and there was serious concern that a congressional AUMF or war declaration would precipitate an international crisis with the Soviets. Nevertheless, Truman and Congress could have agreed to enact an off-the-record authorization, set a retroactive date for the resolution to 25 June, and publicly release it later. This would have relieved concerns about Soviet hostilities in direct response to a congressional authorization. Truman, administration officials, and his congressional allies understood, however, that congressional leadership was unwilling to introduce a war authorization or approval resolution. The enactment process would simply add further domestic political impediments to an already challenging international situation and risk escalation with the Soviets.

Nevertheless, Truman's refusal to request a Korean War AUMF led to the largest congressionally unauthorized war in U.S. history. His presidential unilateralism during the war subjected him to extensive criticism and helped established an unconstitutional war making precedent under the commander-in-chief power. Subsequent presidents, particularly Dwight Eisenhower, sought to avoid Truman's disparagement by utilizing a new legislative justification: preemptive and deterrent AUMFs. These vague and broad AUMFs would allow presidents to claim congressional consent yet still exert unilateralism through discretionary war making, outside of legislative and judicial regulation.

Chapter Two

Applicable Legal Doctrines: Legislative Non-delegation, Void-for-Vagueness, and AUMFs

Delegata potestas non potest delegari.

—Legal maxim²⁷²

Ubi jus incertum, ibi jus nullum.

—Legal maxim²⁷³

Moving beyond foreign policy, we must examine the legal principles that underlie war authorizations to contextualize their broader constitutional significance. As the eminent American legal scholar Ernst Freund noted in 1921, “The language of the law always aims at precision, while the language of politics favors vagueness and ambiguity...”²⁷⁴ Freund was directly reflecting upon a legal maxim of *certainty*, which derived from established jurisprudential traditions of applying logical principles to legal processes, such as the writing of coherent laws. Within the Anglo-American common law tradition “it was the practice of courts to refuse to enforce legislative acts deemed too uncertain to be applied.”²⁷⁵ Void-for-vagueness, also titled unconstitutional uncertainty (or simply vagueness doctrine), can concisely be defined as “a law that can be voided as it is unclear or is lacking a thing [t]hat makes it precise.”²⁷⁶ The Supreme Court determined that “a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first

²⁷² Latin translation: “No delegated powers can be further delegated.”

²⁷³ Latin translation: “Where the law is uncertain, there is no law.”

²⁷⁴ Ernst Freund, “The Use of Indefinite Terms in Statutes,” *Yale Law Journal*, Vol. 30, No. 5 (March 1921): 437. Freund was notable for the development of American administrative law.

²⁷⁵ Wayne LaFave, *Substantive Criminal Law* (Thomson Reuters, 2013), §2.3.

²⁷⁶ “Void for Vagueness,” Black’s Law Dictionary Free Online Legal Dictionary, 2nd Edition, <https://thelawdictionary.org/void-for-vagueness/>.

essential of due process...”²⁷⁷ This judicial philosophy constitutes part of the rule of law, which acknowledges that all people “are entitled to be informed as to what the State commands or forbids.”²⁷⁸

The rule of law, an ancient principle, embodies four key pillars. First, the law applies to all people (including the general public, lawmakers, administrators of the law, and other government officials). None are above the law. Second, the law is not arbitrary and is publicized. Third, the law applies to all *equally*. There are no half-measures for individuals of a certain societal status. Fourth, the justice system provides for impartiality, accessibility, and efficiency.²⁷⁹ The rule of law also “is said to limit officials’ discretion and thereby to curb their potential arbitrariness” by “insisting on the specificity and clarity of law.”²⁸⁰ Adherence to the rule of law “is said to be of sheer instrumental value: it endows the law with a measure of efficacy in pursuing whatever goals are assigned to it.”²⁸¹

Like the vagueness doctrine under the rule of law, legal traditions also proscribed the delegation of a legislature’s explicitly allocated power to make laws. John Locke commented on the legislative non-delegation principle in 1690, stating, “The Legislative cannot transfer the Power of Making Laws to any other hands. For it being but a delegated Power from the People...the Legislative can have no power to transfer

²⁷⁷ *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

²⁷⁸ *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

²⁷⁹ “The Four Pillars of the Rule of Law,” Black’s Law Dictionary Free Online Legal Dictionary, 2nd Edition, <https://thelawdictionary.org/article/four-pillars-rule-of-law/>.

²⁸⁰ Meir Dan-Cohen, “Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law,” *Harvard Law Review*, Vol. 97, No. 3 (January 1984): 668.

²⁸¹ *Ibid.*, 668. These clear links between the vagueness doctrine, common law traditions, and the rule of law dispel notions that the vagueness doctrine lacks robustness. See Ryan McCarl, “Incoherent and Indefensible: An Interdisciplinary Critique of the Supreme Court’s ‘Void-for-Vagueness’ Doctrine,” *Hastings Constitutional Law Quarterly*, Vol. 42, No. 1 (Fall 2014): 89.

their Authority of making laws, and place it in other hands.”²⁸² There is an underlying crossover between unconstitutional vagueness and the principle of legislative non-delegation; these two principles can be viewed as doctrinal siblings. In several early cases the Supreme Court invoked “the separation of powers doctrine...to support the proposition that Congress, by the enactment of an ambiguous statute, could not pass the law-making job on to the judiciary.”²⁸³ Thus, both the legislative non-delegation and vagueness doctrines are inseparably linked through historical Supreme Court precedents and fundamental separation-of-powers principles.

Although both doctrines are established within legal philosophy, the complexities of American politics have further complicated issues concerning them, especially regarding the historical development of the administrative state and the nature of regulatory statutes. Both doctrines also represent two key legal principles that form the analytical foundation for the following AUMF case study chapters. In this chapter I propose a new application for the legislative non-delegation and vagueness doctrines: AUMFs. Part I will analyze legislative non-delegation through the history of the administrative state, and Part II will examine the vagueness doctrine and its application to war authorizations. As Harvard Law School Professor Mark Tushnet explains, AUMFs can be considered regulatory legislation; they constrain the use of force in some manner, and Congress can say “quite precise things about how the armed forces should be deployed” in its AUMFs.²⁸⁴ Regulatory statutes such as discretionary AUMFs fall under the scope of the vagueness doctrine, as there is a

²⁸² John Locke, *Second Treatise of Civil Government* (1690), Ch. 11, §141.

²⁸³ McCarl, “Incoherent and Indefensible,” 89.

²⁸⁴ Mark Tushnet, Personal Interview Conducted by Morgan Baker, Cambridge, Massachusetts, 25 June 2019.

clear *procedural due process* concern within these so-called *decision rules*.²⁸⁵

Concurrently, vague AUMFs delegate Congress' powers to declare war and regulate the armed forces to the President.

Part I: Executive Administration and Legislative Delegation

There is an understandable degree of decision-making that must occur for the executive branch to implement laws. The critical questions are: how much independence does the executive branch retain in its decision-making, and what nature or form will these decisions take? Will these actions be executive, legislative, or judicial—or be all encompassing—in nature?

There is strong historical precedent of Congress establishing executive administrative bodies.²⁸⁶ From the founding in 1789 to 1865, Congress enacted laws creating 11 executive agencies.²⁸⁷ Congress established the Interstate Commerce Commission in 1887 with independent regulatory power to handle business matters, such as railroads. Since then, numerous other autonomous executive regulatory bodies have

²⁸⁵ There are two types of due process: substantive and procedural. Substantive due process is concerned with “arbitrariness, lack of fair notification, unlimited police power, uncompensated takings, private abuse of public power, and excessive discretion.” See McCarl, “Incoherent and Indefensible,” 93. Substantive due process also “forbids the prohibition of certain individual liberties, especially those protected by the first amendment—freedom of speech, petition, assembly, and association.” Procedural due process “requires fair notice and explicit standards for adjudication.” Fifth Amendment due process applies to federal laws, and Fourteenth Amendment due process applies to state laws. See Stan Thomas Todd, “Vagueness Doctrine in the Federal Courts: A Focus on the Military, Prison, and Campus Contexts,” *Stanford Law Review*, Vol. 26, No. 4 (April 1974): 856. For definitions of decision rules and conduct rules, see *infra* discussion at 120-121.

²⁸⁶ For information on the development of executive agency rulemaking and legislative delegations of power, see James Hart, *The Ordinance Making Powers of the President of the United States* (Baltimore: Johns Hopkins Press, 1925) and Sotirios A. Barber, *The Constitution and the Delegation of Congressional Power* (University of Chicago Press, 1975).

²⁸⁷ Attorney General's Committee on Administrative Procedure, “Final Report of Attorney General's Committee on Administrative Procedure,” Department of Justice, Washington D.C., January 22, 1941, 8.

developed.²⁸⁸ Five additional agencies were created from 1865 to 1900, and 18 more were established from 1900 to 1929 (17 by congressional acts).²⁸⁹ Between 1871 and 1881 federal employee figures also increased from 53,900 to 107,000, and Congress established the federal civil service during the 1890s.²⁹⁰ Thus, the federal government expanded appreciably from 1865 to 1929. For the Franklin Roosevelt administration and Congress during the 1930s, necessity for new executive agencies to help resolve the Great Depression's financial and social woes trumped constitutional concerns about the delegation of legislative power to the executive branch. Government focus also shifted to what was necessary to manage the massive bureaucracy, not whether it followed strict constitutional separation-of-powers principles.

Historically, the Supreme Court has closely examined legislative delegation issues. Prior to the Great Depression, it decided several landmark cases including: *Wayman v. Southard* (1825), *Field v. Clark* (1892), and *J.W. Hampton, Jr. & Co. v. U.S.* (1928).²⁹¹ In *Wayman*, the Court reviewed a Kentucky state law and the 1789 Judiciary Act, ruling that state legislatures cannot set federal court rules or procedures but that Congress could delegate this rule-making power to the federal judiciary, which would allow the courts to determine their own procedures. The pre-decision case summary stated, "The power of making such regulations is *exclusively* vested in the legislative department, by all our constitutions, and by the general spirit and

²⁸⁸ The President's Committee on Administrative Management, "Report of the President's Committee on Administrative Management in the Government of the United States," (Washington: United States Government Printing Office, 1937), 36.

²⁸⁹ Attorney General's Committee, "Final Report on Administrative Procedure," 8.

²⁹⁰ Martha Derthick, *Agency Under Stress: The Social Security Administration in American Government* (Washington, D.C.: The Brookings Institution, 1990), 12.

²⁹¹ *Wayman v. Southard*, 23 U.S. 1 (1825); *Field v. Clark*, 143 U.S. 649 (1892); *J.W. Hampton, Jr. & Co. v. U.S.*, 276 U.S. 394 (1928).

principles of all free government.”²⁹² Chief Justice John Marshall, in the majority opinion, explained regarding legislative delegation, “It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and *exclusively* legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself.”²⁹³ Marshall added, “The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.”²⁹⁴ Marshall’s statement is perplexing; he claimed that it is unclear which powers *must* be exercised by the legislature, yet the pre-decision case summary stated that Congress retains *exclusive* authority to regulate. Nonetheless, *Wayman* set the first precedent for later cases concerning legislative delegations to the executive, not the judicial branch.

Field v. Clark reviewed the 1890 Tariff Act, which authorized the President to discontinue tariff rates prescribed by the act if he believed other nations had implemented damaging tariffs on U.S. commerce. Justice John Harlan I, writing the majority opinion, ruled that President Benjamin Harrison had not exercised true legislative power because “Congress itself prescribed, in advance, the duties to be levied, collected, and paid” and that “Nothing involving the expediency or the just operation of such legislation was left to the determination of the president.”²⁹⁵ The Court determined that there was no vagueness in the law to be executed by the President, because Congress provided specific statutory criteria.

²⁹² *Wayman v. Southard*, 23 U.S. 1 (1825). Emphasis added.

²⁹³ *Ibid*, 42, 43. Emphasis added.

²⁹⁴ *Ibid*, 43.

²⁹⁵ *Field v. Clark*, 143 U.S. 692-693 (1892).

Harlan additionally claimed that it was constitutional for Congress to enact laws “to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend.”²⁹⁶ This means that Congress can delegate discretionary power to the executive in the finding of facts, according to the law. Yet, the Court assumed that a discretionary power to find or interpret facts, according to a law, is not itself of a legislative nature that should be congressionally exercised. Such laws containing conditional (if/then) or discretionary provisions risk executive misinterpretation and misapplication, especially when there is no further legislative oversight to ensure that the executive is following the law's congressionally intended purpose.

In *Hampton*, the Court further upheld the delegation of legislative power to the executive. Chief Justice William Howard Taft explained:

The field of Congress involves all and many varieties of legislative action, and Congress has found it frequently necessary to use officers of the executive branch within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution, even to the extent of providing for penalizing a breach of such regulations...Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an executive...Again, one of the great functions conferred on Congress by the Federal Constitution is the regulation of interstate commerce and rates to be exacted by interstate carriers for the passenger and merchandise traffic. The rates to be exacted are myriad. If Congress were to be required to fix every rate, it would be impossible to exercise the power at all. Therefore, common sense requires that in the fixing of such rates Congress may provide a Commission, as it does, called the Interstate Commerce Commission, to fix those rates...²⁹⁷

²⁹⁶ Ibid, 694.

²⁹⁷ J.W. Hampton, Jr. & Co. v. U.S., 276 U.S. 406-408 (1928).

Taft's reasoning was quite fallacious here. The Constitution does not, for example, permit the President to declare war, and Congress cannot delegate this *exclusive* Article I power to the executive by federal law, even with clear guidelines or rules. Simply providing specific guidelines for an executive officer to follow in exercising discretion to declare war would not make this statutory delegation constitutional and neither would the justification of necessity during a crisis. Taft's reasoning distorted constitutional separation-of-powers principles into a completely arbitrary philosophy according to perceived necessity or whether Congress no longer feels that it can exercise its own power at any given moment. In this case, there was still a constitutional issue: that the Interstate Commerce Commission, the administrative body that determined facts and promulgated regulations, was a part of the executive branch and not the legislative branch.

This case evokes James Madison's contention during the Pacificus-Helvidius Debates: "To say then that the power of making treaties which are confessedly laws, belongs naturally to the department which is to execute laws, is to say, that the executive department naturally includes a legislative power. In theory, this is an absurdity—in practice a tyranny."²⁹⁸ Following Madison's reasoning, the making of laws is of an *exclusively* legislative nature; thus, the legislative branch, not the executive or judicial, must create all rules and regulations that have the force of law.

These landmark cases upheld the establishment of robust administrative bodies, such as the Interstate Commerce Commission, Federal Trade Commission, and U.S. Tariff

²⁹⁸ James Madison, "Helvidius Number 1," in *The Pacificus-Helvidius Debates of 1793-1794: Toward the Completion of the American Founding*, ed. Morton J. Frisch (Indianapolis: Liberty Fund, Inc., 2007), 59.

Commission. By the 1930s these executive bodies had developed into a substantial bureaucratic apparatus. Roosevelt's Committee on Administrative Management published a 1937 report on these executive agencies and commissions criticizing their unchecked power and the lack of government oversight. The committee explained:

These independent commissions have been given broad powers to explore, formulate, and administer policies of regulation; they have been given the task of investigating and prosecuting business misconduct; they have been given powers similar to those exercised by courts of law, to pass in concrete cases upon the rights and liabilities of individuals under the statutes. They are in reality miniature independent governments set up to deal with the railroad problem, the banking problem, or the radio problem. They constitute a headless "fourth branch" of the Government, a haphazard deposit of irresponsible agencies and uncoordinated powers.²⁹⁹

Roosevelt echoed the committee's criticism of the growing unrestrained executive apparatus, stating in a message to Congress:

There are over 100 separate departments, boards, commissions, corporations, authorities, agencies, and activities through which the work of the Government is being carried on. Neither the President nor the Congress can exercise effective supervision and direction over such a chaos of establishments, nor can overlapping, duplication, and contradictory policies be avoided...The Committee criticizes the use of boards and commissions in administration, condemns the careless use of 'corporations' as governmental instrumentalities, and points out that the practice of creating independent regulatory commissions, who perform administrative work in addition to judicial work, threatens to develop a "fourth branch" of the Government for which there is no sanction in the Constitution.³⁰⁰

The Committee on Administrative Management and Roosevelt were both concerned about this notion of a "fourth branch" of government concentrated with powers from each branch. This report signaled the need for greater congressional oversight of executive administrations, from the bodies established during the 19th century to those created from 1930s New Deal legislation.

²⁹⁹ President's Committee, "Report of the President's Committee," 36.

³⁰⁰ Franklin Roosevelt, "Message to Congress Recommending Reorganization of the Executive Branch," January 12, 1937. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 15 May 2020, <http://www.presidency.ucsb.edu/ws/?pid=15343>.

For example, the 1935 Social Security Act (SSA), one of the most significant and expansive federal laws in U.S. history, became the foundation for the modern welfare state as a result of the Great Depression.³⁰¹ It provides a federal old-age pension, safety nets for vulnerable groups (such as dependent children and disabled people), and some protections against unemployment risks. The SSA also established the Social Security Administration, headed by a commissioner. The legislation's text grants this commissioner extensive legislative powers. It states, "The Commissioner may prescribe such rules and regulations as the Commissioner determines necessary or appropriate to carry out the functions of the Administration."³⁰² This enormous grant of discretionary power gives the commissioner, not the President or members of Congress, broad power to create regulations that function as laws.

However, there were constitutional questions regarding the expansion of federal government authority under the SSA and other New Deal legislation. Two significant Supreme Court cases, *Panama Refining Co. v. Ryan* (1935) and *A.L.A. Schechter Poultry Corp. v. U.S.* (1935), examined the delegation of legislative power to President Roosevelt.³⁰³ In *Panama*, the Court ruled that Congress had, in passing the National Industrial Recovery Act (NIRA), unconstitutionally delegated legislative power to Roosevelt without clear standards and provided him with unrestrained power

³⁰¹ For further discussion of New Deal programs and the 1935 Social Security Act, see Alan Brinkley, "The New Deal Experiments," in *The Achievement of American Liberalism: The New Deal and Its Legacies*, ed. William H. Chafe (New York: Columbia University Press, 2003), 1-20; Anthony J. Badger, *The New Deal: The Depression Years, 1933-1940* (New York: Noonday Press, 1989); Martha Derthick, *Agency Under Stress: The Social Security Administration in American Government* (Washington, D.C.: The Brookings Institution, 1990); Edward Berkowitz, *Robert Ball and the Politics of Social Security* (Madison: University of Wisconsin Press, 2003).

³⁰² Social Security Act §702. [42 U.S.C. 902] (a) (5), http://www.ssa.gov/OP_Home/ssact/title07/0702.htm.

³⁰³ *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495 (1935).

to intervene in the international and interstate oil trade.³⁰⁴ Chief Justice Charles Evans Hughes explained in the majority opinion:

Thus, in every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend. We think that section 9(c) goes beyond those limits. As to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited.³⁰⁵

Hughes determined that some delegation is permitted, but with limits, and those limits must be clearly stated and defined in the law for it to be constitutional. The Court ruled that the NIRA section was vague, unclear, and provided Roosevelt with plenary powers of a legislative nature.

In *Schechter*, the Court reinforced the *Panama* decision and struck down the NIRA, ruling that it exceeded the Constitution's Commerce Clause, which gives Congress the power to regulate foreign and interstate commerce.³⁰⁶ The Court viewed Roosevelt's control over local economies as an excessive federal government intrusion. Congress cannot delegate this power to regulate business to the President through federal law. These judicial decisions illustrated the Court's contempt of perceived federal government central planning to regulate commerce and fix prices and wages. In response, Roosevelt attempted to expand the Supreme Court's membership in 1937 to obtain favorable decisions for his New Deal programs.³⁰⁷ However, his aptly termed "court-packing" plan failed in Congress.

³⁰⁴ *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

³⁰⁵ *Ibid*, 430.

³⁰⁶ *A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495 (1935); U.S. Constitution, Article I, §8, Clause 3.

³⁰⁷ Franklin Roosevelt, "Message to Congress on the Reorganization of the Judicial Branch of the Government," February 5, 1937. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 15

Regarding the SSA, two Supreme Court cases decided its constitutionality: *Steward Machine Co. v. Davis* (1937) and *Helvering v. Davis* (1937). Both cases upheld the SSA based on Congress' power to tax and spend for general welfare.³⁰⁸ In *Steward*, the Court allowed federal government taxation for unemployment compensation. However, the real objective of the SSA section under review was to encourage states to establish their own unemployment compensation; doing so would allow businesses to avoid paying up to 90% of the federal tax.³⁰⁹ This was a highly contentious one-vote majority (5-4) decision, with the conservative minority arguing that the SSA violated state sovereignty by coercing states to create unemployment compensation plans in accordance with the act.³¹⁰

In *Helvering*, the Court upheld the SSA's tax on employers and employees to fund payments for senior citizens. The Court reasoned, in a far less polarized 7-2 decision, that Congress could tax to pay for SSA programs serving the general welfare of the people.³¹¹ Justice Harlan Stone, who voted to uphold the act, allegedly recommended to Secretary of Labor Frances Perkins, the architect of the SSA legislation, to design it based on the congressional taxing power, which would aid its legal defense when a case reached the Supreme Court. According to Perkins, Stone told her in 1934, prior to the SSA enactment, "The taxing power, my dear, the taxing power. You can do

May 2020, <http://www.presidency.ucsb.edu/ws/?pid=15360>; see the Judicial Procedures Reform Bill of 1937.

³⁰⁸ *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); *Helvering v. Davis*, 301 U.S. 619 (1937).

³⁰⁹ "Title IX-Tax on Employers of Eight or More," Social Security Act, Public Law 74-271, 74th Congress, Sess. 1, In *Statutes at Large* Ch. 531, August 14, 1935.

³¹⁰ *Steward Machine Co. v. Davis*, 301 U.S. 599 (1937).

³¹¹ See Article I, §8, Clause 1, which empowers Congress "To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common defence and general Welfare of the United States."

anything under the taxing power.”³¹² Thus, in the case of the SSA, the key legal issue under judicial review was the federal government's taxing power, not a possible delegation of legislative powers to a newly created executive agency.

Issues of agency rulemaking, however, were not fully resolved during the 1930s. Congress enacted the 1946 Administrative Procedure Act (APA) to clarify and provide structure to the agency rulemaking process. The act provides for a general notice of proposed rules, published in the Federal Register, and affords people with an interest in the rule an opportunity to participate in the process by submitting opinions, arguments, or written information.³¹³ The APA, however, does not provide full congressional oversight of rules, and the act itself sanctioned the existence of agency rulemaking. The Supreme Court additionally ruled in *INS v. Chadha* (1983) that Congress could not overturn executive regulations or congressional statutes through the use of unsigned resolutions, a practice known as the legislative veto.³¹⁴

To rectify this lack of oversight, a Republican-controlled Congress enacted the 1996 Congressional Review Act (CRA) to oversee and curb agency regulations.³¹⁵ The CRA established congressional notification requirements for regulations; it requires agencies to submit a report with detailed information about the proposed rule to the House, Senate, and Comptroller General prior to the rule going into effect.³¹⁶ Additionally, the CRA created a congressional review procedure to quickly permit

³¹² Frances Perkins, “The Roots of Social Security,” delivered at Social Security Administration Headquarters, Baltimore, Maryland, October 23, 1962, <https://www.ssa.gov/history/perkins5.html>.

³¹³ 5 U.S.C. §553.

³¹⁴ *INS v. Chadha*, 462 U.S. 919 (1983).

³¹⁵ “Oversight and Insight: Legislative Review of Agencies and Lessons from the States,” *Harvard Law Review*, Vol. 121, No. 2 (2007): 616-617.

³¹⁶ *Ibid.*

Congress to enact a joint resolution blocking regulations from going into effect.³¹⁷

However, these resolutions are rarely used and are inefficient as a congressional monitoring tool; in the ten-year period after CRA passage (1996-2006), Congress introduced 37 resolutions to block regulations, and only one was signed into law.³¹⁸

The APA's layout and the CRA's congressional oversight of agency rulemaking still does not resolve the issue of granting the executive branch a fundamental legislative power through congressional statute. The Constitution never sanctioned this activity; Roosevelt and the Committee on Administrative Management even acknowledged this.

Like executive agency rulemaking, AUMFs can similarly shift power from Congress to the President. Not only has the legislature delegated its authority to the President—both generally, in the national security domain, and in foreign affairs—the President has also delegated authority to his subordinates within executive branch agencies. A defense could be made for these types of delegations under the Constitution's Necessary and Proper Clause, which states: “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”³¹⁹ One might argue that this sanctions congressional delegations of certain Article I functions to the executive if it enables greater legislative efficiency. Yet, this reasoning distorts the clause beyond its intended purpose, which was to permit Congress to enact laws that facilitate the legislative,

³¹⁷ Ibid. Congress must act within 60 days of notification of the proposed regulation.

³¹⁸ Ibid. *See* Senate Joint Resolution 6, Public Law 107-5. 107th Congress, 1st Session, 115 Stat. 7. March 20, 2001. This exceptional instance of Congress enacting this type of resolution was due to the timing of outgoing President Bill Clinton and incoming President George W. Bush. The same circumstances occurred in early 2017 with outgoing President Barack Obama and incoming President Donald Trump; Congress enacted 14 resolutions to block Obama administration regulations.

³¹⁹ U.S. Constitution, Article I, §8, Clause 18.

executive, and judicial branches to conduct *their own prescribed* constitutional duties, not the duties of other branches, with greater ease. Violating this principle destroys the very purpose of separating powers between distinct government branches, and it renders the Constitution subordinate to arbitrary federal laws. The establishment of regulatory agencies and commissions during the 19th century and the urgent need for relief during the Great Depression outweighed strict judicial oversight over separation-of-powers. Consequently, Congress began a steady trend of relinquishing shares of its constitutionally prescribed *legislative* authority, acquiescing to greater executive power.

This highlights another legislative delegation case of the period: *U.S. v. Curtiss-Wright Export Corporation* (1936).³²⁰ Although *Curtiss-Wright* is recognized more for its significance regarding *independent* presidential power, it originally concerned a 1934 resolution delegating discretionary power to Roosevelt to prohibit weapons sales to South American Chaco War belligerents. Curtiss-Wright was charged with violating Roosevelt's prohibition order, but the company challenged the law and executive embargo on the basis that Congress unconstitutionally delegated legislative power to the President that amounted to "unfettered discretion."³²¹ The district court first reviewing the case ruled that the resolution unconstitutionally delegated legislative authority to the President. Necessity for this specific delegation did not

³²⁰ *U.S. v. Curtiss-Wright Export Corporation*, 299 U.S. 304 (1936).

³²¹ *Ibid.*, 315. Roosevelt only claimed authority for his prohibition order from the congressional resolution, not from any inherent presidential power. See Franklin Roosevelt, "Proclamation 2087—Forbidding the Shipment of Arms to the Combatants in the Chaco," May 28, 1934. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 16 May 2020, <https://www.presidency.ucsb.edu/node/208841>.

justify its constitutionality. The district court decision included no assertions about any reserved powers inherent in the President.³²²

The case then progressed directly to the Supreme Court. In their briefs, neither the Justice Department nor Curtiss-Wright's representatives raised arguments concerning an inherent or independent presidential authority; both focused on the issue of legislative delegation. The Justice Department argued that the law provided sufficient guidelines for the President without the levels of unrestricted discretion exhibited in *Panama* and *Schechter* the previous year.³²³ In a 7-1 decision, the Court ruled to uphold the congressional resolution delegating authority to the President.³²⁴

Justice George Sutherland, writing the majority opinion, examined the delegation issue yet also provided additional claims—in what has been classified as excessive *obiter dicta*—of independent presidential powers external to the case at hand.³²⁵ Justice Sutherland explained, “The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs.”³²⁶ Sutherland was attempting to distinguish the federal government's foreign relations power from its domestic relations authority, and he claimed that Congress could delegate greater discretion to the President in matters concerning foreign relations that would not be

³²² Louis Fisher, “The Law: Presidential Inherent Power: The ‘Sole Organ’ Doctrine,” *Presidential Studies Quarterly*, Volume 37, Number 1 (2007): 144.

³²³ *Ibid*, 144.

³²⁴ Justice Harlan Stone abstained from participating in the case or decision due to illness.

³²⁵ *Obiter Dictum* is a judicial statement “said in passing” that does not affect the court's ruling. “Obiter Dictum,” Black's Law Dictionary Free Online Legal Dictionary, 2nd Edition, <https://thelawdictionary.org/obiter-dictum/>.

³²⁶ *U.S. v. Curtiss-Wright Export Corporation*, 299 U.S. 315-316.

allowed domestically. Sutherland then added sweeping claims about the President's inherent powers in foreign relations, asserting:

It is important to bear in mind that we are dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.³²⁷

Sutherland's use of the phrase "sole organ," and his theory of extra-constitutional presidential foreign relations power has been the subject of extensive scrutiny.³²⁸ The term originated from a speech given by John Marshall when he was a House Representative in 1800.³²⁹ Marshall was defending President John Adams' singular authority to *apply* the Jay Treaty and comply with an extradition request from the British, and he used "sole organ" to highlight the President's fundamental role as the administrator of policy—in this instance a treaty between the U.S. and another nation. Marshall "never claimed the President had some independent power; he was

³²⁷ Ibid, 319-320.

³²⁸ See Julius Goebel, Jr., "Constitutional History and Constitutional Law," *Columbia Law Review*, Volume 38, Number 4 (1938): 555-577; C. Perry Patterson, "In re the United States v. the Curtiss-Wright Corporation," *Texas Law Review*, Volume 22, Number 3 (1944): 286-308; James Quarles, "The Federal Government: As to Foreign Affairs, Are Its Powers Inherent As Distinguished from Delegated?" *Georgetown Law Review*, Volume 32, Number 4 (1944): 375-383; David Levitan, "The Foreign Relations Power: An Analysis of Mr. Sutherland's Theory," *Yale Law Journal*, Volume 55, Number 3 (1946): 467-497; Charles Lofgren, "*United States v. Curtiss Wright Export Corporation*: An Historical Reassessment," *Yale Law Journal*, Volume 83, Number 1 (1973): 1-32; Louis Henkin, "The President and International Law," *The American Journal of International Law*, Volume 80, Number 4 (1986): 930-937; Michael Glennon, "Two Views of Presidential Foreign Affairs Power: *Little v. Barrame* or *Curtiss-Wright*?" *Yale Journal of International Law*, Volume 13, Number 5 (1988): 5-20; Louis Fisher, "Presidential Unilateral Actions: Constitutional and Political Checks," *Congress and the Presidency*, Volume 43, Number 3 (2015): 304.

³²⁹ 10 Annals of Congress 613-614 (1800).

defending President John Adams for turning over to England an individual charged with murder.”³³⁰ His defense included no conception of an inherent power to formulate treaties, act without congressional authorization, or act in absence of a treaty.³³¹

Sutherland wholly misinterpreted Marshall’s speech and misconstrued his “sole organ” comment completely out of context. Marshall asserted that the President functions as an “*instrument of communication* with other governments.”³³²

Sutherland’s opinion, however, implied that the President held inherent privileges and was immune from checks and balances in foreign affairs; it was a categorical departure from the American founding, which rejected the British monarch’s royal prerogatives and unilateral powers. Yet, Sutherland included other misstatements in his opinion, and he even contradicted statements from his earlier publications. For example, he claimed in *Curtiss-Wright* that the Senate was powerless to intervene in the treaty negotiation process, but he previously claimed in his 1919 book *Constitutional Powers and World Affairs* that senators played an active role in treaty negotiations with the President.³³³ For example, the Senate was recurrently consulted before treaty negotiations during George Washington’s presidency, and pre-negotiation consultations have intermittently occurred since Washington’s tenure in office.³³⁴ The Senate has also effectively used its power of advice and consent to

³³⁰ Louis Fisher, Personal Phone Interview Conducted by Morgan Baker, London, UK, 13 June 2019.

³³¹ Louis Fisher, “The Scope of Inherent Powers,” in *The Polarized Presidency of George W. Bush*, ed. George Edwards III and Desmond King (Oxford: Oxford University Press, 2007), 34.

³³² Edward Corwin, *The President*, 4th ed. (New York: New York University Press, 1957), 178.

³³³ Fisher, “*The Law: Presidential Inherent Power*,” 148; George Sutherland, *Constitutional Powers and World Affairs* (New York: Columbia University Press, 1919), 122-124.

³³⁴ John Bassett Moore, *A Digest of International Law, Volume V* (Washington, D.C.: Government Printing Office, 1906), 196-197; Samuel Crandall, *Treaties, Their Making and Enforcement* (New York: Columbia University Press, 1904), 51-61.

amend negotiations, and Congress can also use its appropriations power to impact treaty negotiations.³³⁵

The *Curtiss-Wright* decision ultimately became the platform for Sutherland to exceed the legal issue of the case (legislative delegation) and assert broad claims of presidential unilateralism. Recall that the case examined a law affecting American arms sales abroad. In this case the law was a regulation prohibiting such sales, which categorizes it as a regulation on foreign commerce. Note that Congress holds the power to regulate interstate and foreign commerce.³³⁶ Sutherland's claim about a lack of congressional authority in regards to foreign relations was categorically erroneous. Congress employs a great deal of power in foreign relations and retains constitutional duties in external affairs.³³⁷ While the President is empowered to negotiate treaties, the Senate provides advice and decides ratification.³³⁸ Equally, the Senate provides advice and consent for the appointment of ambassadors, ministers, and consuls. The Senate can use its advising authority to compel the President to include or omit certain treaty terms. Presidential refusal to follow Senate advice can potentially result in non-ratification of the prospective treaty.

Also consider that Congress holds the power to declare war, authorize military force, regulate the armed forces, and call militias into action to execute laws and repel foreign invasions.³³⁹ It also holds the power to collect taxes, raise money, and set

³³⁵ Goebel, Jr., "Constitutional History and Constitutional Law," 572.

³³⁶ See U.S. Constitution, Article I, §8, Clause 3.

³³⁷ Jonathan Masters, "U.S. Foreign Policy Powers: Congress and the President," *Council on Foreign Relations*, 2 March 2017, Accessed 14 May 2020, <https://www.cfr.org/backgrounder/us-foreign-policy-powers-congress-and-president>.

³³⁸ See U.S. Constitution, Article II, §2, Clause 2.

³³⁹ Ibid, Article I, §8, Clauses 11, 14, and 15.

appropriations for countless matters related to foreign policy.³⁴⁰ Congress can likewise impose sanctions against foreign nations.³⁴¹ Congressional committees have extensive authority to conduct oversight and investigate foreign affairs and national security.³⁴²

The legislature can furthermore establish and regulate executive departments or agencies involved in foreign relations, enact laws to overrule their decisions, and even restrict agency jurisdiction.³⁴³ Sutherland's notion that Congress has either no role or a diminished role in foreign affairs is entirely unsupported by historical evidence. One can easily review the established, enumerated, and well-defined congressional foreign relations powers within the constitutional text. His theory of plenary presidential power in foreign affairs persisted until the 2015 Supreme Court case *Zivotofsky v. Kerry*, which supplanted the "sole organ" precedent with an equally expansive model of exclusive presidential power.³⁴⁴ In *Zivotofsky* the Court ruled that a section of the Foreign Relations Authorization Act (FRAA) was unconstitutional because it infringed upon the President's exclusive power to grant or withhold formal

³⁴⁰ Ibid, Article I, §8, Clause 1.

³⁴¹ Congress has enacted laws to sanction Cuba, Venezuela, the Russian Federation, North Korea, Iran, and many others. Recent notable examples include the 1996 Cuban Liberty and Democratic Solidarity (Libertad) Act (Helms-Burton Act), the 2014 Venezuela Defense of Human Rights and Civil Society Act, and the 2017 Countering America's Adversaries Through Sanctions Act.

³⁴² There is an assumption that Congress has a lawmaking purpose for such oversight and investigations. See *McGrain v. Daugherty*, 273 U.S. 135 (1927).

³⁴³ For example, the 1947 National Security Act created the National Security Council and Central Intelligence Agency, and the 2002 Homeland Security Act created the Department of Homeland Security. See also Sidney Shapiro and Robert Glicksman, "Congress, the Supreme Court, and the Quiet Revolution in Administrative Law," *Duke Law Journal*, Volume 37, Number 5 (1988): 819-878.

³⁴⁴ Fisher, Personal Phone Interview; *Zivotofsky v. Kerry*, 576 U.S. 1059 (2015). For other Supreme Court precedents in the establishment of broad presidential power, see Louis Fisher *Supreme Court Expansion of Presidential Power: Unconstitutional Leanings* (Lawrence: University of Kansas Press, 2017).

recognition of foreign states—including matters relating to passports and consular reports.³⁴⁵

The Court’s ruling followed President George W. Bush’s 30 September 2002 signing statement of the FRAA. Bush stated that certain sections of the act, “if construed as mandatory rather than advisory, would impermissibly interfere with the President’s constitutional authorities to conduct the Nation’s foreign affairs, participate in international negotiations, and supervise the unitary executive branch.”³⁴⁶ In the majority opinion Justice Anthony Kennedy added, however, that “substantial powers of Congress over foreign affairs” existed, which appeared to be a partial renunciation of Sutherland’s all-encompassing presidential foreign relations power in *Curtiss-Wright*.³⁴⁷ The *Zivotofsky* decision not only reinforced claims of exclusive presidential power in foreign affairs, it also supported President Bush’s claims of plenary presidential power and a unitary executive.

So how does presidential and executive agency rulemaking relate to the debate on executive versus congressional war powers? Consider this hypothetical question: can Congress enact a federal law creating an executive agency empowered to create rules and regulations concerning all aspects of war making—including declarations of war, AUMFs, and other regulations for the armed forces—thus, removing Congress from any future war making debates or decisions? The surprising answer is: probably.

Would it be constitutional? Most legal scholars would say “no,” as this would

³⁴⁵ *Zivotofsky v. Kerry*, 576 U.S. 1059 (2015). The section directed the State Department to, upon request, list the birthplace as Israel for U.S. citizens born in Jerusalem. See §214(d) of the “Foreign Relations Authorization Act, Fiscal Year 2003,” P.L. 107-228—September 30, 2002.

³⁴⁶ George W. Bush, “Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003,” September 30, 2002. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 27 May 2020, <https://www.presidency.ucsb.edu/node/213776>.

³⁴⁷ *Zivotofsky v. Kerry*, 576 U.S. 1059 (2015).

explicitly delegate Article I powers to declare war and regulate the armed forces to the executive branch.³⁴⁸ The federal judiciary would likely exercise restraint in reviewing any legal issues resulting from the creation of this executive agency, and any sort of litigation emphasizing these issues would likely never reach the Supreme Court. Essentially, this new agency's existence and its regulations could not be legally challenged or questioned, especially if both the executive and legislative branches agreed on this agency's creation at the time of enactment. The judiciary would likely view any war powers issues as so-called "political questions" to be resolved by the executive and legislative branches.

Hindering oversight further, the APA includes a significant exception to rulemaking notification and public participation process requirements. It exists when "there is involved a military or foreign affairs function of the United States."³⁴⁹ In the case of agency rules relating to foreign policy, there would be a distinct lack of congressional and public oversight and participation. This hypothetical agency would be both autonomous and highly powerful as an executive body. Given a suitably ambiguous title—for example, the "International Conflict Commission"—this new agency would be empowered to create any such rules and regulations regarding warfare with the legal force of federal law, literally substituting for congressional war declarations and AUMFs. There is nothing in the Constitution's text that explicitly prohibits legislation to establish this hypothetical agency.

³⁴⁸ The U.S. Constitution explicitly gives Congress both of these powers. *See* Article I, §8, Clause 11 and Article I §8, Clause 14.

³⁴⁹ 5 U.S.C. §553.

However, a logical analysis of the Constitution should lead to skepticism regarding how Congress could delegate its powers to declare war and regulate the armed forces to the executive branch outside of constitutional amendment. A federal law establishing this agency would essentially serve as a constitutional amendment, and such a law would violate separation-of-powers principles. However, given the history of congressional power being shifted to the executive branch through administrative rulemaking, the possibility of the executive appropriating further legislative power, especially Congress' powers to declare war and regulate the armed forces, remains highly concerning.

Part II: Void-for-Vagueness

Along with legislative delegation, it is important to examine in greater depth the implications of a second legal doctrine relevant to the expansion of presidential power. The void-for-vagueness doctrine “has nonconstitutional roots in the common-law practice of the judiciary to refuse enforcement to legislative acts deemed too uncertain to be applied.”³⁵⁰ For over a century, the Supreme Court has determined whether words and phrases within state and federal laws “are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law.”³⁵¹ Applications of the vagueness doctrine began in the U.S. during the late 19th century when the Court ruled that “it would certainly be dangerous if the legislature

³⁵⁰ Note, “The Void-for-Vagueness Doctrine in the Supreme Court,” *University of Pennsylvania Law Review*, Vol. 109, No. 1 (1960): 67. For further reading on the vagueness doctrine and other relevant legal doctrines, see Ralph Aigler, “Legislation in Vague or General Terms,” *Michigan Law Review*, Vol. 21, No. 831 (1923): 831-851; Note, “Constitutional Law, Void for Vagueness: An Escape from Statutory Interpretation,” *Indiana Law Journal*, Vol. 23, No. 272 (1948): 272-285; Rex Collings, Jr., “Unconstitutional Uncertainty—An Appraisal,” *Cornell Law Review*, Vol. 40, No. 2 (1955): 195-237; Jefferson Fordham and J. Russell Leach, “Interpretation of Statutes in Derogation of the Common Law,” *Vanderbilt Law Review*, Vol. 3, No. 438 (1950): 438-455; Karl Llewellyn, “Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed,” *Vanderbilt Law Review*, Vol. 3, No. 395 (1950): 395-406; Note, “Due Process Requirements of Definiteness in Statutes,” *Harvard Law Review*, Vol. 62, No. 77 (1948): 77-87.

³⁵¹ *Champlin Refining Co. v. Corporation Commission of Oklahoma*, 286 U.S. 210, 243 (1932).

could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large.”³⁵²

Vagueness doctrine originated from substantive due process, and it was applied in many early 20th century economic regulation cases.³⁵³ Economic laissez-faire was held in high regard during this period, and the vagueness doctrine was successfully cited at the Supreme Court to overturn economic controls.³⁵⁴ However, the Court refused to apply vagueness doctrine to other matters, such as freedom of speech and other First Amendment civil liberties. This changed after the New Deal Court began, when it progressively considered vagueness in more cases, especially those concerning statutes restricting and criminalizing certain speech, behaviors, or actions of citizens.³⁵⁵ In many cases the Court based its statutory vagueness decisions partly on whether the defendant exhibited *scienter*—criminal intent or knowledge of wrongdoing. Vagueness has remained highly significant in First Amendment cases since the New Deal era, prohibiting the suppression of speech based on vague grounds.³⁵⁶

Regardless of the era or type of case, vagueness doctrine specifically highlights questions about whether a statute is a *conduct rule* (a direct regulation of personal conduct) or a *decision rule* (an authorization for an official to execute the law that

³⁵² U.S. v. Reese, 92 U.S. 214, 221 (1876).

³⁵³ Note, “The Void-for-Vagueness Doctrine in the Supreme Court,” 74. Many of these economic cases appear during the 1920s. See *supra* note 285 for definitions of substantive and procedural due process.

³⁵⁴ *Ibid.*, 77. See U.S. v. L. Cohen Grocery Co., 255 U.S. 81 (1921) and *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927), two significant and often referenced 1920s economic cases concerning vagueness.

³⁵⁵ Note, “The Void-for-Vagueness Doctrine in the Supreme Court,” 75.

³⁵⁶ Judge Duane Benton, Personal Interview Conducted by Morgan Baker, Kansas City, Missouri, 18 June 2018.

also provides some level of procedural discretion).³⁵⁷ Legal scholar Daniel Gifford outlines a framework of hypothetical decision rules—in this instance for traffic police officers who must administer the regulations. Officers can be given three choices:

- 1) Regulate traffic as you see fit.
- 2) Regulate traffic so as to avoid congestion.
- 3) Regulate traffic so that it alternates between two minutes' movement in a north/south direction and three minutes' movement in an east/west direction.³⁵⁸

In this framework the level of discretion decreases as the traffic officers are given more specific rules to implement. There is no guidance in rule 1 (the officer has total discretion), rule 2 allows the officer to use best judgment with a particular instructive purpose, and rule 3 reduces the application of the rule to a specific assignment (essentially no discretion for the officer). By understanding this framework we can qualitatively evaluate statutory parameters that provide officials with certain levels of discretion to execute the law. The Supreme Court has notably overturned laws providing too much discretion to officials who administer the law.³⁵⁹ It has stated that a “vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.”³⁶⁰

Despite Supreme Court precedents overturning discretionary statutes for administrative officials, the vagueness doctrine's scope and limits are not well defined

³⁵⁷ McCarl, “Incoherent and Indefensible,” 74.

³⁵⁸ Daniel Gifford, “Discretionary Decisionmaking in the Regulatory Agencies: A Conceptual Framework,” *Southern California Law Review*, Vol. 57, No. 1 (1983): 101-138.

³⁵⁹ See *Gelling v. Texas*, 343 U.S. 960 (1952). Justice Felix Frankfurter determined that the Texas city ordinance in question violated the due process clause of the Fourteenth Amendment.

³⁶⁰ *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982).

within the judiciary.³⁶¹ As applied by the courts, the vagueness doctrine is used more as a tool to review due process concerns such as fair notice and the arbitrary application of statutes against individuals. The courts primarily determine case outcomes based on fair notice and arbitrary application variables, not on specific questions of linguistic and philosophical vagueness.³⁶² The doctrine is generally applied when a statute impacts an individual's protected rights without acknowledgment. This does not mean that the doctrine is automatically applied when a statute contains high levels of linguistic vagueness or is particularly uncertain. These statutes can, of course, be voided under the vagueness doctrine, but courts are primarily focused on whether the statute infringes upon constitutionally protected rights. There seems to be, however, a precondition that the law in question does contain more uncertainty for the Supreme Court to accept vagueness arguments.³⁶³ The law will indeed provide "less warning to anyone who should bother to consult it, laying down fewer lines of restraint upon the caprice of juries, agencies, and judges..."³⁶⁴ Nonetheless, the Court still grapples with varying interpretations regarding limits on the doctrine's application.

Similarly, legal scholars have long debated the extent to which the vagueness doctrine should be applied. Ryan McCarl contends that the vagueness doctrine itself is incoherent, quite narrow, and thus should only be applied by the courts in limited circumstances. He adds that the vagueness doctrine's incoherence lies in the fact that it has nothing to do with vagueness as a linguistic term or philosophical concept. Vagueness, according to McCarl, is "pervasive in ordinary communication" and

³⁶¹ McCarl, "Incoherent and Indefensible," 86.

³⁶² *Ibid.*, 88.

³⁶³ Note, "The Void-for-Vagueness Doctrine in the Supreme Court," 88.

³⁶⁴ *Ibid.*, 88.

“pervasive in the law.”³⁶⁵ He additionally claims, “The rule of law values of fair notice and non-arbitrariness that the doctrine aims to promote are problems posed by legal indeterminacy in general, not vagueness in particular.”³⁶⁶ As such, he argues, “due process principles applied in vagueness cases are not designed to eliminate vagueness (or indeterminacy) itself.”³⁶⁷ The doctrine, according to McCarl, is actually applied when a law affects a fundamental right, without proper recognition, leading to courts overturning it. Lastly, McCarl argues that the doctrine should remove the term *vagueness* from its title; he believes that the term’s inclusion leads to confusion about what the doctrine is actually proscribing: a lack of fair-notice and arbitrariness, which are both key for substantive due process.³⁶⁸

However, McCarl neglects to acknowledge that rule of law and due process requirements entail principles of clarity and coherence in laws. Vagueness doctrine certainly incorporates linguistic and philosophical vagueness, since it is ultimately the words within laws that must clearly notify citizens, while also be interpreted and applied properly by administrators of the law and judges. The lack of acknowledgment, or use of certain statutory language with the potential to affect fundamental rights, constitutes a linguistic and philosophical representation of vagueness in every sense. Distinguished legal scholar Lon Fuller even remarked that “laws should ideally be generally applicable, publicly promulgated, non-retroactive, *understandable*, non-contradictory, possible to comply with, stable across time, and *actually administered or enforced as written*.”³⁶⁹ Fuller’s claim covered the principles

³⁶⁵ McCarl, “Incoherent and Indefensible,” 87.

³⁶⁶ Ibid, 88.

³⁶⁷ Ibid, 88.

³⁶⁸ Ibid, 76, 90, 93.

³⁶⁹ Fuller quoted in McCarl, “Incoherent and Indefensible,” 89. Emphasis added. See Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964), 33-38.

expressed by McCarl but also included requirements of understandability and consistency. Certainly, desires for understandability and straightforward legal enforcement include employing the concepts of linguistic and philosophical vagueness when such statutory language is drafted, interpreted, and administered. Vagueness, uncertainty, ambiguity, abstraction, and all other linguistic substitutes for the term unmistakably hinder efforts to produce statutory understandability, clarity, and transparency.

Vagueness doctrine encapsulates more than just fair warning requirements for citizens potentially impacted by abstract laws and the protection of fundamental rights. The doctrine's application is furthermore not limited to criminal laws.³⁷⁰ It also covers fair notice for officials and administrators to avert arbitrary applications of the law. Officials must be able to understand what the statutory language commands for proper and consistent execution. Other scholars such as Stan Thomas Todd support this view. He contends that the vagueness doctrine is supported by both substantive and procedural due process: "A substantial requirement of statutory specificity and narrowness is applicable in any context in which the due process clause applies."³⁷¹ This requirement "means that a law must be neither vague nor overbroad."³⁷² Meir Dan-Cohen agrees and extends specificity requirements to include decision rules, adding, "Only decision rules are addressed to and acted upon by officials, and only decision rules must be clear and specific in order to constrain officials' discretion and contain their power."³⁷³ McCarl, while highlighting and evaluating *substantive* due

³⁷⁰ Todd, "Vagueness Doctrine in the Federal Courts," 888.

³⁷¹ Ibid, 856.

³⁷² Ibid, 856.

³⁷³ Dan-Cohen, "Decision Rules and Conduct Rules," 661.

process issues, failed to consider significant *procedural* due process concerns for the officials who must administer the law, specifically decision rules.

There are countless types of decision rules, but this thesis focuses on vague statutes that authorize the President as commander-in-chief to use military force and provide excessive levels of discretion to exercise executive power. As noted earlier regarding decision rules, the Supreme Court has recognized that the “vagueness doctrine also requires that a law provide explicit standards for those who apply it,” to prevent “the attendant dangers of arbitrary and discriminatory application.”³⁷⁴ As such, vagueness doctrine *can* be applied to AUMFs, and I will note several significant points in this respect. First, AUMFs are regulatory legislation; they fall within the bounds of the vagueness doctrine and both substantive and procedural due process.³⁷⁵ My reasoning is based on *Connally v. General Construction Co.* (1926), which stipulated that laws considered under the vagueness doctrine include those forbidding or requiring acts. AUMFs are grants of official but limited power; they authorize use of the military but restrict the commander-in-chief’s actions in certain distinguishable ways from acts declaring war; therefore, the President is required to behave in certain ways while using military force. AUMFs are also *decision* rules because they authorize officials to execute the law and provide a certain degree of discretion to accomplish the task of using military force. As previously stated, decision rules must be specific and clear to limit discretion in executive application.

Second, vagueness doctrine applies to the President as commander-in-chief. Being an executive officer, even the President has rights to procedural due process as an

³⁷⁴ *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972).

³⁷⁵ *See supra* note 284.

administrator of the law. The Supreme Court has designated clear statutory prohibitions as “the first essential” and “a basic principle” of due process.³⁷⁶ This means that the President, as commander-in-chief, must be clearly notified as to what limits and proscriptions have been set on the use of military force in an AUMF. Yet, AUMFs have historically failed to provide fair notice to the President that force cannot be used against anyone, anywhere, by any means of force, for an unlimited period of time. In essence, they have failed to clearly define their prohibitions.

Third, the Supreme Court has been unable to supervise the administration of these statutes; thus, it cannot delimit those AUMFs that have been too sweepingly applied. Under the 2001 AUMF, for example, the President decides the states, groups, and individuals responsible for the 9/11 attacks and takes whatever actions he deems necessary against them. In this case, the President was granted discretion without a requirement to determine facts and present them for both fair notice and oversight. A suspected terrorist—accused of associating with terror organizations or individuals and either detained indefinitely at Guantanamo Bay Prison or killed by a targeted strike—has no fair warning to avoid association with certain groups or individuals, because these groups are not specifically mentioned within the text of the law as those responsible for 9/11 or listed as targets of the use of force. Additionally, so-called “associated forces”—those allegedly linked to the terror groups responsible for 9/11—are subject to change based on the President’s preferences and determinations.

By allowing the President to determine who was responsible for 9/11, and thus allowing him to decide which actors fall within the AUMF’s scope, the legislature

³⁷⁶ *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

abdicated its power to regulate the armed forces, as force can be used against anyone the President decides, in any manner he decides. Furthermore, if the President is enabled to decide what types of force may be used, where it may be used, and for how long it may be used, then Congress relinquishes its regulatory power and the AUMF no longer limits the President and executive branch. The wording of these AUMFs, as interpreted, is so vague and indefinite as to permit, within the scope of its language, power equivalent to that authorized by a declaration of *general* war. Lastly, the appropriate audiences impacted by the law in question should be considered when applying vagueness doctrine. For whom exactly is the law vague? In the case of AUMFs, the law is vague for Congress, the judiciary, and even the President as commander-in-chief. Presidential application of these vague and discretionary AUMFs results in highly arbitrary, erratic, and unpredictable actions.

Some legal scholars have argued that the Supreme Court should review the use of vague or indefinite terms in grants of official power.³⁷⁷ But what has the Court done historically to resolve issues of unconstitutional statutory vagueness, and what options does the Court have to resolve vagueness issues in AUMFs? The Court has applied and can apply four different approaches to resolve vagueness cases. First, the Court can narrowly re-interpret a vague law (and either apply it or not). This method is called “judicial gloss,” and the Court can apply it to decision rules.³⁷⁸ Second, it can invalidate specific sections or clauses of statutes. It can likewise decide whether an official falsely interpreted the statute and invalidate that specific application of power.³⁷⁹ Third, it can void the entire statute. Fourth, the Court may refuse to even

³⁷⁷ See Freund, “The Use of Indefinite Terms in Statutes,” 439.

³⁷⁸ Dan-Cohen, “Decision Rules and Conduct Rules,” 659.

³⁷⁹ Freund, “The Use of Indefinite Terms in Statutes,” 451.

apply vagueness doctrine if it accepts arguments that statutory vagueness is necessary.³⁸⁰ Historically, the Court has exercised its power to narrowly interpret and supervise the administration of congressional legislation.³⁸¹ Only under special conditions has the Court reevaluated federal laws for vagueness, and in most cases it has only invalidated specific misapplications of the law.³⁸² It is extremely rare that the Court has declared an entire federal statute unconstitutional.

However, the Court can also exercise judicial restraint and refuse to hear cases concerning vagueness. Many federal courts have already invoked the political question doctrine when Congress and the President are involved, and this might certainly be the case when it comes to AUMFs. The courts do not want to become involved “unduly in the operation of these institutions by applying vagueness doctrine, for in applying the doctrine the courts effectively direct the institutions to redraft their own regulations.”³⁸³ The notion is that legislatures must be allowed to use general and broad language; requiring Congress to specify every instance to be covered by a law “would practically nullify the legislative authority” by forcing the legislature to try to attain an unachievable level of definiteness in statutory language.³⁸⁴ The courts may also decide that executive officers “have expertise in determining the appropriateness of particular forms of conduct regulation within their realms that the judiciary does not possess and that it is not the federal courts’ function to become enmeshed in the internal workings of the military...”³⁸⁵ Arguments of necessity and judicial restraint are the most likely inhibitors to federal courts applying

³⁸⁰ Todd, “Vagueness Doctrine in the Federal Courts,” 888

³⁸¹ Note, “The Void-for-Vagueness Doctrine in the Supreme Court” 83.

³⁸² Ibid, 83.

³⁸³ Todd, “Vagueness Doctrine in the Federal Courts,” 888.

³⁸⁴ Note, “The Void-for-Vagueness Doctrine in the Supreme Court,” 95.

³⁸⁵ Todd, “Vagueness Doctrine in the Federal Courts,” 887.

vagueness doctrine; however, many courts have rejected judicial restraint arguments when it comes to due process concerns.

Although vagueness cases are generally uncommon, the Supreme Court has recently decided several noteworthy cases concerning this issue. In *Johnson v. U.S.* (2015), the Court ruled that a section of the Armed Career Criminal Act was unconstitutionally vague and violated the Fifth Amendment.³⁸⁶ In *Sessions v. Dimaya* (2018) the Court ruled in a 5-4 decision that a specific section of the Immigration and Nationality Act defining violent crime was unconstitutionally vague and violated due process.³⁸⁷

Justice Neil Gorsuch joined the liberal wing of the Court for the decision but added some significant points. He countered Justice Clarence Thomas' "originalist concerns about vagueness doctrine, pointing to several historical texts to justify the doctrine's application."³⁸⁸ Gorsuch argued: "far from violating the separation of powers, vagueness doctrine was *required* by it, in that overbroad laws impermissibly delegate legislative power to courts to decide what the law should be in practice."³⁸⁹ Gorsuch commented that it is not the Supreme Court's duty to legislate and essentially decide how laws should be exercised.

Thomas disagreed and claimed that separation-of-powers should exclude due process and use other constitutional provisions.³⁹⁰ Yet, he was incorrect in his claims that separation-of-powers excludes due process. For separation-of-powers to balance power it must utilize all constitutional provisions, including due process. Gorsuch was

³⁸⁶ *Johnson v. U.S.*, 576 U.S. 591 (2015).

³⁸⁷ *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

³⁸⁸ The Supreme Court-Leading Cases, "Fifth Amendment—Due Process—Void-for-Vagueness Doctrine—*Sessions v. Dimaya*," *Harvard Law Review*, Vol. 132, No. 1 (November 2018): 370.

³⁸⁹ *Ibid*, 370.

³⁹⁰ *Ibid*, 371.

correct in asserting that separation-of-powers requires vigorous judicial analysis utilizing the vagueness doctrine. However, he has been criticized for his desire to expand the doctrine's application as part of separation-of-powers. Critics claim that this enlargement risks the Court exceeding its constitutional boundaries and becoming an activist body, thus taking on the role of the legislature in making the law.³⁹¹

Following *Dimaya*, the Court decided *U.S. v. Davis* (2019), a case dealing with a similar vagueness issue.³⁹² Gorsuch joined the liberal wing in another 5-4 decision to invalidate a U.S. Code section (dealing with crimes and criminal procedures) for unconstitutional vagueness.³⁹³ These recent cases, while significant regarding how the Court handled issues of vagueness concerning substantive due process for criminal statutes and Gorsuch's separation-of-powers interpretation, do not provide substantial illumination of how the Court might decide procedural due process for separation-of-powers issues.

Regarding war powers, cases dealing with the President's authority to use force have already become practically immune from judicial scrutiny. Thus, any judicial review for AUMF textual vagueness is highly unlikely. As Ryan McCarl explains, "If a statute is deemed to infringe only non-'fundamental' liberties, as the vast majority of statutes do, it is virtually impervious to constitutional challenge."³⁹⁴ This is a disturbing outcome when it comes to separation-of-powers—AUMFs can potentially allow arbitrary and indiscriminate application of the use of force without judicial review—regarding both procedural due process concerns for the official who administers the law (the commander-in-chief) and substantive due process for the

³⁹¹ Ibid, 373.

³⁹² *U.S. v. Davis*, 139 S. Ct. 2319 (2019).

³⁹³ See 18 U.S.C. §924(c)(3)(B).

³⁹⁴ McCarl, "Incoherent and Indefensible," 91-92.

people impacted by the law's application. Thus, even if the Court accepted review of an AUMF, it would probably never overturn the law completely based on the vagueness doctrine, only a specific statutory section or a particular application (or misapplication) of the law by the President.

Conclusions

This chapter has analyzed two legal doctrines that illustrate alarming separation-of-powers issues within certain federal laws. Regarding the growth of executive power and development of the administrative state, the Supreme Court upheld transfers of legislative power and rulemaking to the executive branch within certain frameworks. Arguments of both necessity and almost two centuries of precedent have led to a general consensus accepting this practice, and executive rulemaking appears to be firmly set. Concerning statutory vagueness, the Court has invalidated sections of federal statutes or specific applications of the law found to be unconstitutionally vague.

However, the Court tends to avoid vagueness questions when cases do not present clear deprivations of fundamental liberties. This means that many constitutional dilemmas deserving of judicial review (including separation-of-powers issues) are neglected, which results in the enlargement of presidential power. There is an evident risk that biased “or overreaching exercises of state authority may remain concealed beneath findings of fact impossible for the Court to redetermine when such sweeping statutes have been applied to the complex, contested fact constellations of particular cases.”³⁹⁵ The convoluted nature of presidential decision-making and political

³⁹⁵ Note, “The Void-for-Vagueness Doctrine in the Supreme Court,” 80.

necessity only further impedes judicial review of war powers issues for legislative delegation and unconstitutional vagueness.

Together the legislative delegation and vagueness doctrines provide substantial illumination about AUMFs. AUMFs are indeed regulatory statutes; however, when they are vague, they *can* impermissibly delegate legislative power to the President. Stan Todd explains that when a vague statute is enacted the legislature “in effect shifts the lawmaking authority to the judiciary or to the law’s administrators.”³⁹⁶ Yet, this conflicts with requirements that decision rules such as AUMFs be clear and explicit in their prohibitions for executive administrators, including the commander-in-chief. The President is not exempt from the rule of law, but the Supreme Court has avoided examining vagueness questions concerning the President’s power to wage war under discretionary AUMFs.

Both Congress and the judiciary must be better informed about procedural due process requirements for decision rules. Just as the general public has rights to fair notice under substantive due process, so too does the President have rights to procedural due process as an administrator of the law. Federal courts may be more willing to review AUMFs for legislative delegation and vagueness if they are informed of these concerns as a part of separation-of-powers requirements, the rule of law, and constitutionally protected fundamental rights of substantive and procedural due process. Judicial decisions to enforce the rule of law and due process would set clear boundaries for presidential use of military force when Congress enacts vague AUMFs and aid in separation-of-powers restoration.

³⁹⁶ Todd, “Vagueness Doctrine in the Federal Courts,” 859.

Chapter Three

A “Dangerous Drift”: the Eisenhower Administration, Deterrence, and the Establishment of Discretionary AUMFs³⁹⁷

In a situation such as now confronts us, and under modern conditions of warfare, it would not be prudent to await the emergency before coming to the Congress. Then it might be too late.

—President Dwight D. Eisenhower³⁹⁸

The end of the Second World War in 1945 and onset of the Cold War nuclear arms race precipitated a novel doctrine of presidential war powers. During the Second World War Presidents Franklin Roosevelt and Harry Truman exercised greater discretion over decisions concerning the use of armed force. Truman’s decision to use atomic weapons against Japan in August 1945, without further congressional authorization, is one of the best examples demonstrating this enhanced power.³⁹⁹ This expanded executive power continued through the post-war period into the Cold War as presidents deployed military forces and intelligence agents overseas without legislative approval specific to any combat missions.⁴⁰⁰ Many congressional,

³⁹⁷ Title quotation from "Memo of the Discussion at the 232nd Meeting of the NSC," January 21, 1955, EPPUS, AWF, NSC Series, Box 6, Folder: 232nd Meeting of NSC, January 20, 1955, DDEPL, 14.

³⁹⁸ Dwight Eisenhower, "Special Message to the Congress Regarding United States Policy for the Defense of Formosa," January 24, 1955. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 8 March 2019, <http://www.presidency.ucsb.edu/ws/?pid=10355>.

³⁹⁹ The President has retained complete discretion over any potential use of nuclear weapons since the end of the Second World War. Congress has not enacted any resolution limiting presidential use of nuclear weapons. See Stephen Mulligan, *Legislation Limiting the President’s Power to Use Nuclear Weapons: Separation of Powers Implications*, Congressional Research Service (November 3, 2017), <https://fas.org/sgp/crs/nuke/separation.pdf>; Robert Singh, "The United States Congress and Nuclear War Powers: Explaining Legislative Nonfeasance," *The Journal of Legislative Studies*, Volume 24, Number 3 (2018): 299.

⁴⁰⁰ Larry Ceplair, "The Foreign Policy of Wayne L. Morse," *Oregon Historical Quarterly*, Vol. 113, No. 1 (Spring 2012): 6. Congress enacted the National Security Act of 1947 (NSA), which created the National Security Council (NSC), Central Intelligence Agency (CIA), and Department of Defense (under which the armed forces were reorganized). The CIA is accountable to the President via the NSC. Covert or clandestine activities were supposedly authorized from the 1947 NSA provision allowing, "...such other functions and duties related to intelligence affecting national security as the National Security Council may from time to time direct." See John Prados, *Presidents’ Secret Wars: CIA and Pentagon Covert Operations from World War II through Iranscam* (New York: William

academic, and media liberal internationalists claimed during this period that the Second World War could have been prevented had Roosevelt been authorized to immediately confront Nazi Germany during the 1930s European crisis.⁴⁰¹

These liberal internationalists ultimately prevailed over a group of congressional conservatives labeled as “antiquated isolationists,” those who wanted to restrict a plenary or discretionary presidential war power.⁴⁰² This liberal internationalist conception of expanded presidential power placed the President and executive branch in the central position to act on foreign policy and conflict resolution matters, thereby displacing and rendering the legislature’s obligations arbitrary unless essential. Presidents had, of course, taken unilateral military action without congressional authorization during the 20th century prior to both World Wars and the start of the Cold War.⁴⁰³ However, those interventions, and those of the 19th century, did not involve long-term military commitments or massive deployments of U.S. ground forces.⁴⁰⁴ The trend of removing the restrictions on presidential war powers and

Morrow, 1986) and *Safe for Democracy: the Secret Wars of the CIA* (Chicago: Ivan R. Dee, 2006); “National Security Act of 1947,” 80th Congress, 1st Session, Ch. 343, 61 Stat. 495, July 26, 1947, 498.

⁴⁰¹ Stanley Karnow, *Vietnam: A History* (Harmondsworth: Penguin Books, 1984).

⁴⁰² Ibid, 359. For more on the development of post-war liberal internationalism, including President Truman’s distinct shift away from Woodrow Wilson’s and Franklin Roosevelt’s foreign policies and conceptions of presidential power, see Elizabeth Spaulding, *The First Cold Warrior: Harry Truman, Containment, and the Remaking of Liberal Internationalism* (Lexington: University Press of Kentucky, 2006), 9-35. Spaulding notably highlights Truman’s reliance on collective defense—demonstrated by his support for the North Atlantic Treaty Organization (NATO)—which would have been prohibited under the League of Nations and was external to multinational organizations such as the United Nations. However, Spaulding overstates the degree to which Truman involved Congress in foreign policymaking during the early Cold War period, when in fact Congress provided the executive branch with wide discretion to implement the Truman Doctrine, the Marshall Plan, NATO, U.N. resolutions concerning the Korean War, etc.

⁴⁰³ Karnow, *Vietnam*, 359. Karnow cites the examples of William McKinley, who sent five thousand American troops to China in 1900-1901 as part of a multinational coalition to suppress the Boxer Rebellion, and Woodrow Wilson, who sent U.S. military forces into Mexico in 1914 and 1916 during the Mexican Revolution.

⁴⁰⁴ This thesis does not directly focus on issues regarding presidential deployments of the military without congressional authorization. However, as discussed earlier, the Constitution and historical ratification debates include no conception for the President to take unauthorized military actions (the largely consensus-based exceptions being presidential actions in response to foreign invasions, imminent attacks, or internal rebellions).

providing the President with authority to take immediate action against external threats thus accelerated during the post-war period into the 1950s and early 1960s due to the perceived expansion and menace of Soviet communism. Truman's deployment of U.S. military forces in June 1950 to fight the Korean War, without congressional authorization, established the contemporary notion of legislative acquiescence to a presidential war prerogative.

Like Truman, Eisenhower faced severe foreign policy difficulties worldwide, in the Far East, the Middle East, Latin America, and elsewhere. Yet Eisenhower, unlike Truman, altered American foreign policy strategy—namely, the method in which the U.S. would contain communism globally—concurrent with his domestic political objective of *reducing* defense expenditures.⁴⁰⁵ His so-called “New Look” defense program stressed deterrence, especially through the possession of nuclear weapons, to maintain American global leadership, promote peace, and contain communism abroad.⁴⁰⁶ Deterrence meant dissuading enemy aggression by threatening the use of force or massive retaliation, which would theoretically aid in avoiding potential large-scale conflicts. This strategy meant reductions in overall defense, especially cutbacks on conventional forces, with a reliance on the use (or threatened use) of nuclear weapons through long-range bombers and intercontinental ballistic missiles.⁴⁰⁷ These defense reductions would coincide with Eisenhower's ambition to limit the growth of the federal government. Democrats favoring higher defense spending opposed this

⁴⁰⁵ Iwan Morgan, *Eisenhower Versus the Spenders: the Eisenhower Administration, the Democrats and the Budget, 1953-60* (London: Pinter Publishers, 1990), 34.

⁴⁰⁶ Colin Dueck, *Hard Line: The Republican Party and U.S. Foreign Policy Since World War II* (Princeton: Princeton University Press, 2010).

⁴⁰⁷ Ibid.

strategy, criticizing the ostensible lack of “flexibility, and therefore credibility, in the case of small war situations, limited interventions and local crises.”⁴⁰⁸

The strategy also meant that Eisenhower and his executive officials needed greater discretion to make swift decisions, potentially of an existential nature. Eisenhower could have tried to execute his deterrence strategy without congressional authorizations, relying on the war powers precedent established by Truman during the Korean War. However, as will be described in the following sections, Eisenhower placed a significant amount of political value on preemptive congressional AUMFs. As historian Andrew Johns explains, “Given the domestic political difficulties associated with a declaration of war, not to mention the international tensions of the Cold War, the congressional resolution offered a convenient alternative.”⁴⁰⁹ War authorizations and provocative rhetoric threatening the use of nuclear weapons would financially cost the Eisenhower administration nothing compared to massive spending increases in the defense budget. These types of resolutions would also neither declare a general war against a named enemy nor authorize an explicit military response, in a specific place, for a stated time period. They would instead allow the President to decide what actions, if any, should be taken without further restrictions. Eisenhower believed these types of authorizations would enhance his deterrence strategy in Asia and prevent further forfeitures to communism.

⁴⁰⁸ Morgan, *Eisenhower Versus the Spenders*, 36.

⁴⁰⁹ Andrew Johns, "Opening Pandora's Box: The Genesis and Evolution of the 1964 Congressional Resolution on Vietnam," *The Journal of American East-Asian Relations*, Vol. 6, No. 2/3 (Summer-Fall 1997): 181.

This chapter, the first of four case studies examining AUMFs, will focus on the congressional authorizations of the 1950s.⁴¹⁰ Part one will analyze the First (1954-1955) and Second (1958) Taiwan Strait Crises, and part two will explore the 1958 Lebanese Crisis. The chapter will examine the 1955 Formosa Resolution and 1957 Middle East Resolution, which, respectively, authorized Eisenhower to use military force and provided him sufficient discretion to interpret the resolution's language to use force without further congressional authorization. The most important factor about these resolutions was the level of preemptive discretion afforded to the President. I will answer several key questions regarding the expansion of presidential war power and AUMFs. What was the purpose of the 1955 and 1957 resolutions? How did Eisenhower and his administration interpret and implement them? How could other presidents have employed the resolutions? More specifically, did they provide unconstitutionally vague discretion to the President that the law regarding the use of force could not be executed consistently?

This chapter argues that the congressional enactment of the 1950s resolutions created archetypal templates for future broad and discretionary AUMFs. The 1957 Middle East Resolution similarly illustrates how an AUMF could be enacted for non-specified military actions *in futuro*. The Eisenhower administration established a precedent for succeeding 20th and 21st century presidents to seek executive

⁴¹⁰ This chapter will not provide in-depth analysis of 1950s foreign policy dilemmas involving the Eisenhower administration such as the end of the Korean War, the 1954 Guatemalan coup d'état, the Indochina conflict (Chapter Four will examine the administration's 1954 draft AUMFs to intervene at Dien Bien Phu), the 1953 Iranian coup d'état, and various Middle East conflicts. For further reading on those conflicts and how Eisenhower dealt with them, see Edward Keefer, "President Dwight D. Eisenhower and the End of the Korean War," *Diplomatic History*, Vol. 10, No. 3 (Summer 1986): 267-289; David Anderson, *Trapped By Success: The Eisenhower Administration and Vietnam, 1953-1961* (New York: Columbia University Press, 1991); Stephen Rabe, "Dulles, Latin America, and Cold War Anticommunism," in *John Foster Dulles and the Diplomacy of the Cold War*, ed. Richard Immerman (Princeton: Princeton University Press, 1990), 159-187; Roby Barrett, *The Greater Middle East and the Cold War: U.S. Foreign Policy under Eisenhower and Kennedy* (New York: I.B. Tauris, 2010).

empowering AUMFs. Instead of regulating the President's use of military force, these AUMFs instead delegated blank check power to the commander-in-chief to conduct unrestricted warfare. The discretionary statutory language removed the delineation between a declared *general* war and an undeclared *limited* war. Therefore, as enacted by Congress, these AUMFs enabled the President to define whether the nation was to conduct a general war and delegated Congress' powers to declare war and regulate the armed forces to the President, both of which violated the void-for-vagueness and legislative non-delegation doctrines.⁴¹¹

Part I: First (1954-1955) and Second (1958) Taiwan Strait Crises and the Formosa Resolution

U.S. foreign policy towards East Asia and the Pacific region was altered prior to Eisenhower taking office in January 1953. Two noteworthy events significantly impacted the Eisenhower administration during the 1950s. The first event was the Korean War, lasting from 25 June 1950 to the signing of the armistice on 27 July 1953. While Truman dealt directly with the initial North Korean invasion and subsequent Chinese Communist intervention resulting in a stalemate, Eisenhower was left to finalize the arrangements to end the war and construct a forthcoming foreign policy for a transformed East Asian political landscape.

The second event was the end of the mainland Chinese Civil War (1946-1950), which pitted Mao Zedong's Chinese Communist Party (CCP) against Chiang Kai-shek's Kuomintang (KMT) or Chinese Nationalist Party. Mao and the People's Liberation Army defeated Chiang Kai-shek's Nationalist forces on mainland China in 1949, with

⁴¹¹ See Chapter Two for a detailed explanation of the legislative delegation and vagueness doctrines and relevant analogous examples.

Mao establishing the People's Republic of China (PRC) on 1 October. Chiang Kai-shek and the remaining Nationalists moved off the mainland primarily to the island of Formosa (Taiwan) but also to several smaller offshore islands (Pescadores, Quemoy, Matsu, Tachen Islands, and others). The twenty-five Nationalist-held islands constituted the remaining Republic of China (ROC).⁴¹² This move off the mainland did not end hostilities between the PRC and ROC, and the Eisenhower administration had to decide how to react to a seemingly imminent Chinese Communist invasion of Nationalist-held territory in 1954-1955 and again in 1958.

Both events would shape the Eisenhower administration's thinking regarding the expansion of communism in Asia and beyond, what the U.S. response would be, and the potential impact on American prestige globally. Eisenhower wanted to avoid another conflict like the Korean War, or worse, a war against the Soviet Union. One month prior to the French defeat at Dien Bien Phu in Indochina, Eisenhower publicly revealed his administration's thoughts on the threat of communism to Asia and beyond during a 7 April 1954 press conference. He described what he termed the "falling domino" theory: "You have a row of dominoes set up, you knock over the first one, and what will happen to the last one is the certainty that it will go over very quickly."⁴¹³ He then listed the nations and millions of people threatened by the progressive expansion of communism, including Indochina, Burma, Thailand, Indonesia, Japan, Formosa, the Philippines, Australia, and New Zealand.⁴¹⁴ Although the Eisenhower administration supported it, this "domino theory" had been

⁴¹² Robert Accinelli, "Eisenhower, Congress, and the 1954-55 Offshore Island Crisis," *Presidential Studies Quarterly* Volume 20, No. 2, Eisenhower Centennial Issue (Spring, 1990): 330.

⁴¹³ Dwight Eisenhower, "The President's News Conference," April 7, 1954. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 8 March 2019, <https://www.presidency.ucsb.edu/node/233655>.

⁴¹⁴ *Ibid.*

established by the Truman administration.⁴¹⁵ Succeeding presidential administrations continued to support the principle that Asia was at risk should just one nation fall to communism.

During the Korean War, Truman placed the U.S. Navy's 7th Fleet in the Taiwan Straits to prevent Chinese Communist attacks on Formosa, but this also prevented Chiang Kai-shek's Nationalist forces from re-invading mainland China. Eisenhower, upon taking office, lifted the naval blockade to permit Nationalist offensive attacks on the mainland and to pressure the Communists to accelerate Korean War armistice negotiations.⁴¹⁶ In August 1954 Chiang Kai-shek placed Nationalists troops on the Quemoy (also called Kinmen or Jinmen) and Matsu Islands, which prompted a Communists artillery bombardments of both islands' military installations.⁴¹⁷ On 3 September, the Communists increased bombardment intensity.⁴¹⁸

There were questions within the Eisenhower administration about whether the bombardment was merely a propaganda tactic or the prelude to an invasion of the islands. At the 9 September National Security Council (NSC) meeting Eisenhower and top defense officials discussed the forces already on the islands and whether U.S. military assistance should be provided. The Chinese Nationalist forces on Quemoy had U.S. training, and the Nationalists planned to deploy, if necessary, additional

⁴¹⁵ James Arnold, *The First Domino: Eisenhower, the Military, and America's Intervention in Vietnam* (New York: William Morrow and Company, 1991), 83.

⁴¹⁶ Nancy Bernkopf Tucker, *Strait Talk: United States-Taiwan Relations and the Crisis with China* (Cambridge: Harvard University Press, 2009), 13.

⁴¹⁷ The Quemoy Islands are about 2 kilometers (1.2 miles) from the Chinese mainland. The Matsu Islands are around 19 kilometers (11.8 miles) from the mainland. The Nationalists also occupied the Tachen (Dachen) Islands, another small archipelago, located 322 kilometers (200 miles) north of Taiwan.

⁴¹⁸ Accinelli, "Eisenhower, Congress, and the 1954-55 Offshore Island Crisis," 330.

forces to the island in the event of an invasion.⁴¹⁹ Defense Secretary Charles Wilson acknowledged at the meeting that the Nationalists exerted great effort to hold these islands, yet he did not believe the U.S. should commit to defending them without clear recognition that all three branches of the military would become involved.⁴²⁰ Wilson did not believe that a military conflict with the Chinese Communists would be a partial war. He opposed waging a war over such “doggoned little islands.”⁴²¹ Secretary of State John Foster Dulles took the opposite view, arguing that the U.S. should conditionally assist the Nationalists to defend the islands if they were militarily defensible. U.S. prestige would appreciably depreciate if it committed to defending the islands but lost them in a conflict.

Wilson then asked how the U.S. would end a war with Communist China, given that it was not accustomed to fighting limited or undeclared wars. He was effectively asserting that the U.S. would be committing an act of war if it put ground forces on Quemoy or used airstrikes against the Chinese Communist artillery conducting the bombardment. Wilson claimed that these actions would require congressional authority, yet he remained skeptical about whether they were in the national interest at that moment.⁴²² Arthur Flemming, Director of the Office of Defense Mobilization, also inquired whether Eisenhower would need congressional approval to act on Quemoy. Attorney General Herbert Brownell, Jr. explained that the President can and must do whatever is necessary for defense of the U.S.; however, he thought it was highly advisable, policy-wise, to seek congressional authorization, if there was

⁴¹⁹ "Memo of Discussion at the 213th Meeting of the NSC," September 10, 1954, EPPUS, AWF, NSC Series, Box 6, Folder: 213th Meeting of NSC, September 9, 1954, DDEPL.

⁴²⁰ Ibid.

⁴²¹ Ibid, 7.

⁴²² Ibid.

enough time.⁴²³ Admiral Arthur Radford, Chair of the Joint Chiefs of Staff (JCS), favored executive expediency and argued that dealing with Congress would likely be prolonged. He claimed that Congress would eagerly support the actions suggested by the JCS, and he warned that the islands could fall to the Communists if Eisenhower was required to spend time trying to obtain congressional authorization.

The statements by Attorney General Brownell highlight the legal maneuverings within the executive branch. Brownell did not present any specific interpretation of executive war powers favoring presidential primacy; yet, he believed that a war authorization would basically supplement any decision to use force but left the option open of unauthorized executive action if the administration could justify it as necessary for national security.

The administration also deliberated another issue concerning military aid to Formosa. At the 12 September NSC meeting Dulles explained that Chiang Kai-shek desired a defense treaty with the U.S. Chiang was fully aware of Nationalist defensive vulnerabilities, claiming that the U.S. had defense treaties with other free nations in the region and that ROC treaty exclusion was why Formosa felt so isolated. The Eisenhower administration, however, focused primarily on the ongoing bombardment and which islands to defend should the Chinese Communists attempt to seize them. Wilson supported defending only Formosa and the Pescadores out of belief that the offshore islands would probably involve the U.S. in an escalating war with Communist China.⁴²⁴ Radford, who continued to press for offshore islands defense,

⁴²³ Ibid.

⁴²⁴ "Memo of Discussion at the 214th Meeting of the NSC," September 13, 1954, EPPUS, AWF, NSC Series, Box 6, Folder: 214th Meeting of NSC, September 12, 1954, DDEPL.

claimed that the U.S. could defend the Tachen and Matsu islands without attacking mainland China. However, airstrikes targeting Chinese Communist airfields would be necessary to defend Quemoy.⁴²⁵ Eisenhower replied that he would need congressional authorization to conduct mainland airstrikes, in accordance with the Constitution. He added that if he did not obtain congressional authorization for such actions, there would be “logical grounds for impeachment.”⁴²⁶

Dulles suggested an alternative option for the administration to pursue. The U.S. could request a UNSC injunction to maintain the status quo of territory held by the Communists and Nationalists. Dulles claimed that the U.S. would still benefit, even if the Soviets vetoed the resolution, because Communist China would be acting against the will of a U.N. majority. If the Soviets did not veto the resolution, then it could lead to regional stabilization. Eisenhower was more interested in a U.N. resolution to authorize defense of the offshore islands and thought that additional congressional authorization might then be unnecessary. Dulles disagreed, arguing that Americans would not presently support such action without explicit congressional authorization. He believed that a U.N. resolution would help pressure Congress to authorize the use of military force to defend the islands. But Eisenhower desired more than simply approval for defensive military actions. If Eisenhower used the military abroad, he would “give them the right to go wherever the attack on them came from.”⁴²⁷ His statement illustrates that he would have, if he deemed it necessary, escalated the conflict to a general war with China on the mainland. Any such general war with Communist China would have required using ground forces.

⁴²⁵ Ibid.

⁴²⁶ Ibid, 8.

⁴²⁷ Ibid, 11.

Seeking a UNSC resolution could also potentially backfire on the administration.

Wilson explained at the 6 October NSC meeting that the U.N. could threaten the U.S. hold on Formosa or the other offshore islands.⁴²⁸ He proposed a new strategy: the U.S. would not assist Chiang's defense of the offshore islands but instead compel him to withdraw Nationalist forces. In return, the U.S. would sign a defense treaty with the Nationalists to defend Formosa and the Pescadores.⁴²⁹ Although several officials suggested strategies to assist the Nationalists, the administration undertook specific efforts to baffle the Chinese Communists about its strategy and which islands it would defend using force. As the crisis progressed, however, the administration realized the need to elucidate its intentions regarding the defense of Nationalist-held territory.

By December, the administration had initiated policy negotiations. On 2 December the U.S. and Taiwan signed a mutual defense treaty (MDT) in Washington.⁴³⁰ Articles VI and VII dealt with location and military force, stating that the treaty would apply to Taiwan and the Pescadores; additionally, Taiwan accepted the use of U.S. military force in all forms (land, air, and sea) for defensive purposes “in and about Taiwan and the Pescadores.”⁴³¹ Article V specified that both nations would respond to “armed attack in the West Pacific Area” according to constitutional processes, and Article X affirmed that the treaty would remain in force indefinitely unless either signatory provided a one-year termination notice.⁴³² Concerning location, the MDT did not

⁴²⁸ "Memo of the Discussion at the 216th Meeting of the NSC," October 7, 1954, EPPUS, AWF, NSC Series, Box 6, Folder: 216th Meeting of NSC, October 6, 1954, DDEPL.

⁴²⁹ Ibid.

⁴³⁰ See “Mutual Defense Treaty Between the United States and the Republic of China,” December 2, 1954, *The Avalon Project*, Accessed 14 March 2019. http://avalon.law.yale.edu/20th_century/chin001.asp.

⁴³¹ Ibid.

⁴³² Ibid.

mention whether Quemoy, Matsu, or the other offshore islands were included within the territorial defensive zone or whether they fell within a zone “in and about” Taiwan or the Pescadores.⁴³³ This MDT language seemed to preclude any defensive U.S. intervention on behalf of those offshore islands. The MDT signing was a critical statement of the U.S. commitment to defend Formosa and the Pescadores, boosting Nationalist morale.

Following the public signing of the MDT, the Eisenhower administration discussed Chinese Communist reactions. During the 9 December NSC meeting Dulles described very bitter Communist sentiments; they accused the U.S. of occupying Formosa indefinitely.⁴³⁴ He added that the Communists characterized the MDT as highly provocative and an act of war. This was apparently similar to the Chinese Communist language used just prior to their North Korean intervention.⁴³⁵ While they did not presently have the capability to invade Formosa, they could certainly assault the smaller offshore islands.

The crisis deepened in January 1955, as the Chinese Communists once again intensified their offshore islands hostilities. On 10 January 50 Communist aircraft began raids on the Tachen Islands, primarily against Nationalist ships stationed in the harbor.⁴³⁶ Chiang Kai-shek predicted an impending full-scale Communist assault, and Chinese Communist foreign minister Zhou Enlai threatened that an invasion of

⁴³³ Quemoy is 110 kilometers (68 miles) and the Matsu Islands are at the farthest 170 kilometers (106 miles) from Taiwan.

⁴³⁴ "Memo of the Discussion at the 228th Meeting of the NSC," December 10, 1954, EPPUS, AWF, NSC Series, Box 6, Folder: 228th Meeting of NSC, December 9, 1954, DDEPL.

⁴³⁵ Ibid.

⁴³⁶ "Memorandum From the Chief of Naval Operations (Carney) to the President's Special Assistant For National Security Affairs (Cutler)," 11 January 1955, *FRUS, 1955-1957, Volume II*, Accessed online: 6 April 2019, <https://history.state.gov/historicaldocuments/frus1955-57v02/d6>.

Formosa was “imminent.”⁴³⁷ The administration convened with selected congressional leaders the following day to discuss the situation and decide how to react. The group mentioned Senator Wayne Morse (D-OR), who had been assigned to the Senate Committee on Foreign Relations.⁴³⁸ As a legislator, Morse was unconventional on foreign policy matters. He consistently challenged both Republicans and Democrats about their abandonment of congressional foreign policy responsibilities and their acquiescence to the executive branch’s encroachment on Congress’ power to declare war.⁴³⁹ For the Eisenhower administration, Morse’s assignment to the Foreign Relations Committee potentially threatened to impede the congressional enactment of executive-desired foreign policies. It was particularly concerned about future committee briefings including sensitive national security material, and it speculated whether it should restrict committee access to information.⁴⁴⁰

While Morse could attempt to obstruct the administration’s policies using his committee seat, the group decided that he could be contained without withholding information. Eisenhower added that committee “soft spots” could be remedied by taking three actions: 1) directing executive department heads to discuss the problem with the committee chair and ranking minority member; 2) providing sensitive information to only the chair and ranking minority member; and 3) making an

⁴³⁷ Quote from Stephen Ambrose, *Eisenhower: The President, Volume Two* (London: George Allen and Unwin, 1984), 231; quote originally from *The New York Times* on 1 January 1955.

⁴³⁸ "Legislative Leadership Meeting Supplementary Notes," January 11, 1955, EPPUS, AWF, LMS, Box 1, Folder: Legislative Meetings 1955 (1) [January-February], DDEPL. Morse joined the Democratic Party in 1955; he was a Republican Party Senator from 1944 to 1952, but he left the party and served as an independent from 1952 to 1955.

⁴³⁹ Ceplair, “Foreign Policy.”

⁴⁴⁰ "Legislative Leadership Meeting Supplementary Notes," January 11, 1955.

abbreviated presentation to the full committee.⁴⁴¹ These statements signify several important aspects of executive-legislative relations on foreign policymaking. First, the Eisenhower administration surveyed for specific committee members who might oppose its policy agenda and developed strategies to block or suppress these legislators. Second, the administration would go to great lengths to block the dissemination of critical national security information to full congressional committees, if it suspected a member might obstruct or oppose. Third, legislators were unwilling to challenge executive privilege to withhold information from Congress. Congressional committees are responsible for debating and scrutinizing potential legislation. The executive branch's capability to influence the direction and limits of legislative debate, as demonstrated here in 1955, would prove critical during succeeding debates (or lack thereof) on presidential use of military force.

At the 13 January NSC meeting CIA Director Allen Dulles briefed the attendees about the Communist attacks on the Tachen Islands. These attacks were the strongest since the bombardment of Quemoy began in September.⁴⁴² Concurrent with the attacks on the Tachen Islands, there was also a congressional debate concerning MDT ratification. An allegedly secret memo circulated by the Democrats criticized MDT ratification because it would officially recognize Formosa and the Pescadores as ROC territories. This recognition could benefit the Communists, since they would claim, upon any attempt to invade, that the conflict was a civil war, thus leading to questions regarding whether outside nations could intervene. Secretary Dulles alleged that former Truman administration officials (Dean Acheson, Adrian Fisher, Myron

⁴⁴¹ Ibid, 1.

⁴⁴² "Memo of the Discussion at the 231st Meeting of the NSC," January 14, 1955, EPPUS, AWF, NSC Series, Box 6, Folder: 231st Meeting of NSC, January 13, 1955, DDEPL.

Cowen, Paul Nitze, Benjamin Cohen, and possibly Thomas Finletter) authored the memo, and he claimed that these individuals wanted to cast doubt on and disrupt the implementation of Eisenhower's foreign policy.⁴⁴³ The memo was particularly concerning because it might generate congressional skepticism against any administration foreign policy, not simply the MDT. As the administration had been discussing whether to request an AUMF, any increase in criticism could potentially result in drawn-out debates or a watering-down of the AUMF, which would constrain Eisenhower's ability to use military force against Communist China.

On 19 January, Eisenhower met with Secretary Dulles to discuss his desire for a resolution authorizing the President to use force to defend, specifically, Formosa and the Pescadores.⁴⁴⁴ Dulles thought, however, that Quemoy and Matsu should be added, but Eisenhower strongly opposed the inclusion of those offshore islands. He instead preferred the inclusion of vague and non-specific language for the smaller islands in an authorization, which would allow the President to decide whether or not to defend Quemoy and Matsu.⁴⁴⁵ The administration believed this would intentionally confuse the Chinese Communists and deter them from attempts to seize additional territory.

Eisenhower also gave a press conference that day, and he was asked straightaway to address the ongoing Chinese Communist assault of the Tachen Islands. He stated that these smaller Tachen islands under attack were not essential to the defense of Formosa or the Pescadores, and reminded reporters that the MDT, pending Senate

⁴⁴³ Ibid.

⁴⁴⁴ Ambrose, *Eisenhower: The President*.

⁴⁴⁵ Ibid.

ratification, would commit the U.S. to the defense of Formosa and the Pescadores.⁴⁴⁶

While small groups of pro-Nationalist guerrillas occupied the smaller Tachen islands, an entire division of Nationalist military forces occupied the larger ones. *Washington Post* reporter Edward Folliard pressed Eisenhower for information about an alleged American detachment stationed on one of the Tachen islands and whether the administration would forsake them with an impending Communist invasion.⁴⁴⁷

Eisenhower responded that he was not sure if Americans were still on the islands, but after conferring with White House Press Secretary James Hagerty, he affirmed that there were “four or five men on one of the islands, I think.”⁴⁴⁸ However, he did not answer the question regarding whether the administration would abandon or evacuate Americans from the islands.

To recap, the Chinese Communists intensified their bombardment of Quemoy and Matsu in early September 1954, and they began to progressively seize some of the smaller Tachen islands in early January 1955. At the 20 January NSC meeting, held the day following the press conference, offshore islands discussions reached a critical point, requiring a strategic executive response. The administration’s reaction needed to be carefully crafted to express a firm U.S. defensive commitment for Nationalist-held Formosa and the smaller offshore islands. Yet, any response also needed to seek crisis reduction to prevent a full-scale war with Communist China.

It was evident that Nationalist forces and the last remaining U.S. personnel needed evacuation from some of the smaller islands. CIA Director Allen Dulles predicted that

⁴⁴⁶ Dwight Eisenhower, “The President’s News Conference,” January 19, 1955. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 19 March 2019, <https://www.presidency.ucsb.edu/node/233400>.

⁴⁴⁷ Ibid.

⁴⁴⁸ Ibid.

the recent Communist seizure of Ichiang (Yijiang) Island in the Tachen archipelago would soon lead to advances towards the larger Tachen islands. With the seizure of Ichiang the Communists were now in position to shell the larger Tachen islands 7.5 miles away.⁴⁴⁹ Since the U.S. had not committed to protecting these smaller islands, Dulles recommended that the administration reconsider its policy of refusing to intervene for their defense. If the U.S. assisted the Nationalists' Tachen Islands evacuation, it would have to recommit to defending other offshore islands such as Quemoy and Matsu, which could be protected by U.S. air power, unlike the Tachen Islands.⁴⁵⁰ Thus, the administration considered a new strategy: use U.S. military forces to aid the Tachen evacuation, commit military assistance in defending Quemoy and Matsu, and prevent a regional decline of American prestige by expediting MDT ratification.

Secretary Dulles and Radford met with congressional leaders just prior to the NSC meeting; the council discussed what had transpired therein. In attendance were the chairs and ranking members of the House Foreign Affairs and Senate Foreign Relations and Armed Services Committees, House Majority Leader John McCormack (D-MA), House Minority Leader Joseph Martin, Jr. (R-MA), Deputy Senate Majority Leader Earle Clements (D-KY)—Clements substituted for Senate Majority Leader Lyndon Johnson at the meeting—and Senate Minority Leader William Knowland (R-CA). This group discussed the ongoing offshore islands situation, but there was also considerable discussion of Eisenhower's authority to use military force to assist the Tachen evacuation and defend Quemoy. Dulles labeled Eisenhower's authority as "now rather vague" in this respect; he claimed that the President's power originated

⁴⁴⁹ "Memo of 232nd Meeting of the NSC," January 21, 1955.

⁴⁵⁰ Ibid.

from the Korean War, although Eisenhower's war powers had been "subject to considerate attrition" since the armistice agreement.⁴⁵¹

Dulles' interpretation of presidential war powers seemingly claimed residual power from previous conflicts. Yet, his assertion that the Korean War provided Eisenhower with authority to use military force in a separate foreign policy dilemma, and different Asian region, was an unconstitutional overstatement of presidential war powers. Congress never authorized Truman to use military force in Korea; instead, he claimed authority to intervene based on UNSC resolutions.⁴⁵² Regarding the offshore islands crisis, there were no UNSC resolutions authorizing force to combat a Chinese Communist seizure of the islands. Dulles, clearly backtracking on his previous claim of authority, then explained to congressional leaders that the U.S. might have to use its armed forces in the Tachen evacuation. Since this withdrawal might involve hostilities with the Chinese Communists, he thought it would be prudent for Congress to clearly authorize Eisenhower to use military force to defend Formosa and related areas in the region. He added that Eisenhower would still seek congressional authority to use force even if the MDT had already been ratified. According to Dulles, however, Eisenhower would still act if Congress was not in session or if time was insufficient for congressional debate and AUMF enactment.

Dulles was certain, based on his meeting with legislative leaders, that Congress would quickly enact legislation empowering Eisenhower with all needed authority, but he thought it might be necessary for Eisenhower to address a joint congressional session

⁴⁵¹ Ibid, 11.

⁴⁵² Truman claimed that his use of American military force was a police action under the authority of the United Nations. He repeatedly stressed that his use of armed force was a U.N., not U.S., action.

for an appeal.⁴⁵³ In response, Eisenhower inquired about congressional views on his strategy and possible use of force. According to Radford, House Majority Leader McCormack claimed that the President already had all the authority to defend the offshore islands, without any further congressional authorization.⁴⁵⁴ Eisenhower thought the best strategy was to announce the Tachen evacuation and declare a U.S. commitment to defend Formosa and the islands “in front of it” (Quemoy and Matsu).⁴⁵⁵ The administration’s comprehensive strategy would include: a commitment to defend Formosa and the Pescadores, an attempt to defend Quemoy and Matsu, an effort to use the U.N. to preserve the status quo of the Nationalist’s hold over the offshore islands, the supplying of military equipment and training to the Nationalists, and a prohibition against any Nationalist military operations against mainland China, unless approved by Eisenhower.⁴⁵⁶

This strategy presented many risks for conflict escalation. National Security Advisor Robert Cutler raised the issue of the extent for which U.S. forces would be used. He suggested that U.S. forces would almost certainly have to conduct operations on mainland China to successfully defend Quemoy and Matsu, and these operations could potentially lead farther inland. Thus, he argued that a commitment to defending Quemoy and Matsu would increase the risk of a general war with Communist China on the mainland. Eisenhower disagreed with Cutler’s initial assessment, asserting that this proposed strategy would decrease, not increase, the risk of conflict with the Chinese Communists. Cutler repeated his arguments, but Eisenhower believed that “if the Chinese Communists wanted to make general war out of anything the United

⁴⁵³ "Memo of 232nd Meeting of the NSC," January 21, 1955.

⁴⁵⁴ Ibid. McCormack was a devoted anti-communist legislator, serving from 1928 to 1971.

⁴⁵⁵ Ibid, 12.

⁴⁵⁶ Ibid.

States did, there was nothing we could do to prevent it.”⁴⁵⁷ Defense Secretary Wilson asked Eisenhower about whether he thought the President held authority to use military force to aid the Tachen evacuation. Eisenhower replied, “in any case it was necessary to draw the line.”⁴⁵⁸

This statement was significant, since Eisenhower appeared to be setting his own personal limits to presidential power. It was evident that he sought to avoid a large-scale war with the Chinese Communists. Yet, given any Communist attempt to seize Quemoy/Matsu, he was willing to wage general war, potentially on mainland China. Little discussion was held concerning the scale of such a conflict, but Eisenhower appeared committed to obtaining congressional authorization for a conflict of any scale. While NSC officials considered circumstances that could lead to a potential general war with the Chinese Communists, there was a significant lack of discussion about the need for a congressional war declaration.

This was not inconsequential, as the administration might conduct military actions classified as *general* in nature. However, it opposed a preemptive war declaration. Eisenhower and key officials were keenly aware that this could trigger an automatic Soviet intervention on behalf of the Chinese Communists. They instead sought a deterrent AUMF against a Chinese Communist invasion of the offshore islands, one empowering the President with full authority to use force, if necessary. Any desired congressional resolution concerning the crisis would thus need to authorize presidential use of force but not provoke a Soviet intervention.

⁴⁵⁷ Ibid, 13.

⁴⁵⁸ Ibid, 17.

Regarding congressional involvement in the offshore islands crisis, the most critical NSC meeting occurred on 21 January, during which the administration sought to finalize its strategy. Eisenhower indicated that he spoke with House Minority Leader Joseph Martin, Jr. (R-MA) and House Speaker Sam Rayburn (D-TX) the previous day, and he explained that Rayburn echoed House Majority Leader McCormack's interpretation of presidential power—that Eisenhower held inherent authority to defend the offshore islands.⁴⁵⁹ Rayburn and McCormack thought the House would support whatever action Eisenhower took, and Rayburn even advised against a joint congressional resolution to authorize force, because this would effectively affirm that the President did *not* have the power to act immediately.

Although Rayburn was an opposition Democratic Party leader within Congress, he recommended that Eisenhower “take whatever action he deemed necessary, and thereafter ask for Congressional approval of such action.”⁴⁶⁰ He additionally assured the administration that this retroactive authorization would “go through the House in 45 minutes, without a word of criticism of the President.”⁴⁶¹ While Eisenhower did not believe that he needed further congressional authority to evacuate the Nationalists from the offshore islands, he thought approval was needed to conduct *offensive* actions during an evacuation, if necessary. Secretary Dulles and Vice President Richard Nixon agreed with this assessment; Dulles thought obtaining an AUMF was more appropriate, and Nixon stated that Eisenhower would be vulnerable to the same criticism as Truman during the Korean War, if he acted without any authorization (including retroactive). Nixon even advised Eisenhower to at least *request* a

⁴⁵⁹ "Memo of the Discussion at the 233rd Meeting of the NSC," January 24, 1955, EPPUS, AWF, NSC Series, Box 6, Folder: 233rd Meeting of NSC, January 21, 1955, DDEPL.

⁴⁶⁰ Ibid, 2.

⁴⁶¹ Ibid, 2.

congressional authorization even if he conducted military actions prior to AUMF enactment. This would at least demonstrate that Eisenhower attempted to involve Congress in the process. The administration ultimately settled on a presidential statement, instead of a personal appearance before Congress, to state U.S. objectives and formally request an AUMF.⁴⁶²

In this astonishing case, the President and Vice President took a more restrained view of executive power to use force than opposition party leaders in Congress. Rayburn and McCormack's conception that any congressional AUMF would diminish inherent presidential power raises questions about why any previous Congress ever bothered to authorize presidential use of force. Why did previous administrations seek congressional approval prior to taking military action? Were those administrations not admitting that the President does not hold inherent authority to use force without congressional consent? If the President has full authority to take whatever actions he deems necessary, then why does the Constitution enumerate Congress' power to declare war and grant letters of marque? Should presidents attempt to exercise these and other legislative powers as well? If Rayburn and McCormack believed that the President as commander-in-chief has full authority to do whatever he deems necessary, then Congress wasted valuable time approving military actions. Under this expansive interpretation of executive power, the legislature's check on presidential war making authority would be rendered meaningless, and it raises further questions regarding the seemingly arbitrary legislative practice—as understood under this conception—of authorizing some conflicts but not others. In this instance, even Nixon

⁴⁶² Ibid.

warned against unauthorized war making, as this would subject Eisenhower to the same reproach as Truman.

The NSC then discussed a draft congressional authorization, composed by State Department Legal Adviser Herman Phleger and Assistant Attorney General James Lee Rankin. Phleger was the legal counselor for Secretary Dulles, and they previously deliberated whether Eisenhower had inherent authority or if congressional authorization was needed. Phleger cited previous resolutions that used the word "authorize," which seems to raise doubts about inherent presidential authority. He strongly recommended that Eisenhower seek congressional authorization.⁴⁶³ This legal conception is especially important since it originated from an executive branch lawyer. The administration's draft AUMF stated:

That the President of the United States be and hereby is authorized to employ the Armed Forces of the United States as he deems necessary for the specific purpose of securing and protecting Formosa and the Pescadores against armed attack, this authority to include the securing and protection of such related portions and territories of that area now in friendly hands and the taking of such other measures as he judges to be required or appropriate in assuring the defense of Formosa and the Pescadores. The resolution shall expire when the President shall determine that the peace and security of the area is reasonably assured by international conditions created by action of the United Nations or otherwise, and shall so report to the Congress.⁴⁶⁴

Eisenhower supported the draft AUMF and "favored keeping its text general enough to allow him the necessary freedom of action."⁴⁶⁵ Harold Stassen, Director of the U.S. Foreign Operations Administration, sought to avoid an authorization containing language causing any needless limitation of the President's commander-in-chief powers, which would negatively impact the administration's responses to any future

⁴⁶³ William Gibbons, *The U.S. Government and the Vietnam War: Executive and Legislative Roles and Relationships*, Part I: 1945-1960 (Princeton: Princeton University Press, 1986).

⁴⁶⁴ Ibid, 277-278.

⁴⁶⁵ "Memo of the Discussion at the 233rd Meeting of the NSC," January 24, 1955, 5.

scenarios. Eisenhower agreed but reminded Stassen that it was also critical to prevent fissures with Congress and public opinion.⁴⁶⁶ He explained that he would take whatever actions were necessary in an emergency “to protect the vital interests of the United States,” even if those actions “should be interpreted as acts of war,” and that he “would rather be impeached than fail to do his duty.”⁴⁶⁷

On 24 January, Eisenhower sent a message to Congress regarding the offshore islands crisis. It claimed that Formosa and the Pescadores had been within allied ROC control since the end of the Second World War and that the 1954 crisis had been caused by Chinese Communist aggression. He also asserted that losing Formosa to the Communists would cause security and economic problems for friendly Pacific nations, and it would disrupt U.S. efforts to achieve its foreign policy objectives for peace and stability.⁴⁶⁸ He mentioned the pending MDT ratification, which would commit the U.S. to the defense of the Nationalists on Formosa and the Pescadores, and he added that the Chinese Communists themselves used rhetoric describing their seizures of the smaller Tachen islands as a prelude to the ultimate goal of defeating the Nationalists on Formosa. Eisenhower professed that his commander-in-chief power provided inherent authority for some actions, but he did not specifically indicate what they were. He only added that he would not hesitate to take action in an emergency to protect U.S. national security. Yet, his message formally requested a congressional resolution to “clearly and publicly establish the authority of the President as Commander-in-Chief to employ the armed forces of this nation promptly

⁴⁶⁶ Ibid.

⁴⁶⁷ Ibid, 5.

⁴⁶⁸ Eisenhower, “Special Message to the Congress,” January 24, 1955.

and effectively for the purposes indicated if in his judgment it became necessary.”⁴⁶⁹

Claiming an inherent presidential authority and then asking for congressional confirmation in an AUMF proved a clever tactic.

Eisenhower neglected to mention several critical details about his foreign policy strategy on the offshore islands. For example, he did not specify where he planned to conduct military actions; he enlarged the regional scope to include “closely related localities” to Formosa, but this did not explicitly include Quemoy and Matsu.⁴⁷⁰

Secretary Dulles told British Ambassador Sir Roger Makins that the President sought “limited use” of the armed forces in a 21 January State Department meeting, yet Eisenhower did not request a *limited* authorization or indicate specific actions he wanted Congress to authorize in his 24 January message. Instead, he sought authority to “engage in whatever operations may be required to carry out” defense of Formosa.⁴⁷¹ In fact, his congressional message did not include the word “limited” even once to characterize the actions he might take to defend Formosa or the other offshore islands. He did recommend that the AUMF include an expiration clause, but it would be discretionary—the AUMF would terminate after the President determined the islands were secure and reported this fact to Congress. Everything was kept intentionally vague to confuse the Chinese Communists as to what measures the U.S. might take, including the possible use of nuclear weapons. With these statements Eisenhower sought to take full presidential accountability for the crisis, which, he

⁴⁶⁹ Ibid.

⁴⁷⁰ Ibid.

⁴⁷¹ “Memorandum of a Conversation, Department of State, Washington, January 21, 1955, 10:30 a.m.” Department of State, Central Files, 793.00/1–2155. Top Secret, Accessed online: 2 April 2019, <https://history.state.gov/historicaldocuments/frus1955-57v02/d27>; Eisenhower, “Special Message to the Congress,” January 24, 1955.

argued, would increase deterrence against attacks on Formosa and the other offshore islands.

Within minutes of receiving Eisenhower's message, the House Foreign Affairs Committee (HFAC) unanimously voted to approve, without amendment, the administration-drafted Formosa Resolution and send it to the House floor for a vote. The House overwhelmingly approved H.J. Res. 159 the following day, voting 410-3.⁴⁷² Several legislators had reservations about the resolution but either voted for it or abstained. Representative Chester Holifield (D-CA) thought the authorization provided a blank check to the President, yet he voted for enactment; Sidney Yates (D-IL) also voted in favor but complained that Congress was hastily acting without all the necessary information; Clare Hoffman (R-MI) abstained because he considered the authorization equivalent to a war declaration and unjustified. Speaker Rayburn stated that the President already had constitutional authority and that the resolution should not be considered as a precedent to restrict the commander-in-chief's future authority to act. HFAC Chairman James Richards (D-SC) added that the resolution was not a war declaration; yet, he claimed that the resolution would authorize attacks on the Chinese mainland—he asserted that a full-scale invasion would not be authorized. Representative Graham Barden (D-NC) opposed the resolution because he believed the administration had not provided enough information to warrant a resolution authorizing military actions that could be equivalent to those under a declared war.⁴⁷³

⁴⁷² "Defense of Formosa, Pescadores." In *CQ Almanac 1955*, 11th ed., 277-80. Washington, DC: Congressional Quarterly, 1956. Accessed 26 June 2018, <http://library.cqpress.com/cqalmanac/cqal55-1353305>. Representatives Graham Barden, Timothy Sheehan, and Eugene Siler voted against the resolution.

⁴⁷³ Ibid.

The House floor debates clearly established that individual legislators held widely different interpretations of the resolution's provisions for the use of force. For Rayburn, the resolution was just a confirmation of congressional support for pre-existing presidential authority. For Richards, the resolution sanctioned unspecified attacks on the mainland, although the resolution did not explicitly include these provisions. For others, however, the resolution was a blank check authorization without limitations that could result in a conflict with the Chinese Communists equal to the recent 1950-1953 Korean War. Consequently, the resolution exemplified numerous constitutional issues, specifically its vague and unspecified provisions as to what forces would be used, where they would be used, the targets they would be used against, and the duration of their use.

While the House promptly approved the authorization without prolonged debate, the Senate scrutinized the bill extensively. Secretary Dulles and JCS Chairman Radford presented the administration's case for the resolution beginning on 24 January in the first of three executive joint sessions of the Senate Foreign Relations and Armed Services Committees. Dulles argued that a congressional failure to provide Eisenhower with clear authority to act would risk either: 1) a major war with the Chinese Communists and potentially the Soviet Union as well or 2) the abandonment of strategic positions in the western Pacific.⁴⁷⁴ The joint committee contemplated whether it should restrict the President's authority to only defending Formosa and the Pescadores. It also debated the resolution's potential impact on Congress' constitutional war powers. Dulles testified that, although Eisenhower claimed that he did not need the resolution to take action, there was still "some doubt whether the

⁴⁷⁴ *Executive Sessions of the Senate Foreign Relations Committee Historical Series, Volume VII*, 84th Congress, 1st Session, 1955, (Washington, D.C.: U.S. GPO, 1978).

President could take the action that might be necessary without the approval of Congress,” and, by enacting the resolution, Congress would resolve this constitutional war powers issue and demonstrate government consensus.⁴⁷⁵ Senator Alben Barkley (D-KY) asked Dulles if the resolution was a predated war declaration. Dulles responded, “Certainly, Senator, the President does not interpret this as a declaration of war, and if there were a situation to arise which in his opinion called for a declaration of war, he would come back again to the Congress.”⁴⁷⁶ However, Dulles appeared to contradict this statement about the need for additional congressional authority when Barkley asked whether it would be necessary for the President to obtain a war declaration, should the U.S. become involved in an escalating conflict. Dulles responded:

I would be surprised if there was in this situation a declaration of war, because if war comes about, it will be created by the actions primarily of others and not of ourselves, and will be a fact even before it comes to Congress. That was the case of course with the war with Japan. There was a war there before the matter got to Congress, and the same was true in the case with the First World War where Congress recognized that a state of war had been created by the hostile acts of the Germans in sinking our ships and the like. So that I would doubt whether there would be a technical declaration of war. But if the situation developed which required additional forces, additional money, which would be the case if there was anything like large-scale hostilities that developed, certainly the President would come back here to Congress.⁴⁷⁷

His statement was factually incorrect. Japan attacked the U.S. at Pearl Harbor on 7 December 1941, but the attack did not automatically place the nation in a state of war. President Roosevelt informed Congress about the attack; it deliberated the situation upon receiving that information, and then Congress, not the President, voted to declare war against Japan on 8 December. The same can be said of the 1917 war

⁴⁷⁵ Ibid, 87.

⁴⁷⁶ Ibid, 104. Senator Barkley had previously served under President Truman as Vice President from 1949 to 1953.

⁴⁷⁷ Ibid, 105.

declaration against Imperial Germany.⁴⁷⁸ When asked about a potential Soviet intervention during an escalating conflict with the Chinese Communists, Dulles commented regarding a war declaration or further congressional authorization, “Well, I don’t think it would be necessary, but I am sure he would do it. As I say, it was not necessary probably to come to Congress to get a declaration that there was a state of war with Japan.”⁴⁷⁹ Dulles seemed to indicate that Eisenhower would return to Congress if the situation escalated into what could be defined as a large-scale conflict, like those of declared wars. However, he unmistakably believed that the President was not required to seek a congressional war declaration. His egregious misconception of historical facts and preceding war declarations presented a highly diminished congressional role in the exercise of its constitutional power to declare war. Senator Estes Kefauver (D-TN) even questioned, “Well, where is the limit? How do we know what the President is going to do?”⁴⁸⁰ Dulles delivered a truly astonishing response:

One can never know what he does, what he is going to do, except there comes a time when you have got to trust somebody to exercise a judgment, and if when we know of a concentration there [of Chinese Communist forces on the mainland] we then bring the question before the Congress and we have a debate of a few days as to what the Congress is going to decide about that concentration, I can tell you that then it will be too late.⁴⁸¹

⁴⁷⁸ See “Joint Resolution Declaring that a state of war exists between the Imperial Government of Japan and the Government and the people of the United States and making provisions to prosecute the same,” 8 December 1941, Public Law 328, 77th Cong. 1st Sess., Ch. 561, 795; “Joint Resolution Declaring that a state of war exists between the Imperial German Government and the Government and the people of the United States and making provisions to prosecute the same,” 6 April 1917, S.J. Res. 1, 65th Cong. 1st Sess., Ch. 1, 1. The 1941 declaration of war did not include language making it retroactive to the 7 December attacks, in which case Dulles would have been correct in his statement. For example, Congress declared war against Spain in 1898 on 25 April but explicitly stated within the act that the state of war existed, retroactively, beginning on 21 April. Only Congress can make a determination of when the nation enters state of war or when the war formally begins; neither the President nor any other branch of government can change the state of the nation from peace to war.

⁴⁷⁹ *Executive Sessions of the Senate Foreign Relations Committee, Volume VII*, 106.

⁴⁸⁰ *Ibid.*, 91.

⁴⁸¹ *Ibid.*, 91.

Dulles was proposing to give the President power equivalent to that held by the British King, a conception that was unequivocally rejected by the American founders when they drafted the Constitution. Yet, the committees did not further debate whether this resolution's indeterminate provisions might lead to executive aggrandizement. Both committees instead issued a final report after sending the resolution to the Senate for full floor debate. The report recommended no geographic restrictions because they would hinder a flexible response to unanticipated future circumstances.⁴⁸² This statement left the possibility of future escalation, and possibly an invasion of the Chinese mainland, up to the President.

Although Eisenhower may not have defined the resolution as equivalent to a war declaration—Eisenhower even had Press Secretary James Hagerty issue a persuasive public statement to the Senate that he would only use force for defensive actions—a different President could have taken a vastly different interpretation, proceeded to wage a full-scale war, and justified his actions based on the Formosa Resolution and powers as commander-in-chief.⁴⁸³ Depending on crisis circumstances, even Eisenhower could have altered his own interpretation based on the resolution's vague textual language. Illustrating this possibility for altered future executive interpretations, Dulles even remarked during the hearings, “Now of course these situations change and fluctuate, and I wouldn’t want to say that the position that we would feel like taking today would necessarily be the same position we take a year from now or 2 years from now or 5 years from now.”⁴⁸⁴ The administration openly

⁴⁸² “Defense of Formosa, Pescadores,” *CQ Almanac* 1955.

⁴⁸³ Ambrose, *Eisenhower: The President*.

⁴⁸⁴ *Executive Sessions of the Senate Foreign Relations Committee, Volume VII*, 86.

admitted that its interpretation and military response was subject to change. This would, as the administration claimed, allow for the most flexible military response.

Several Senators disliked the expansive language, and the resolution was extensively debated. Senators William Langer (R-ND), Herbert Lehman (D-NY), and Hubert Humphrey (D-MN) offered substantive amendments. Langer proposed restricting the use of force to within 12 miles of the mainland and only to evacuate troops or civilians. Lehman and Humphrey proposed limiting the use of force to only the defense of Formosa and the Pescadores.⁴⁸⁵ Senator Morse argued that the resolution gave the President “a predated authorization” to go to war, resulting in Congress delegating its power to declare war. Lehman claimed that the U.N. should deal with the crisis and that the Formosa Resolution would lead Congress to “abdicate its responsibilities and...place them, unlimited, undefined, unspecified and unreservedly, in the hands of the President.”⁴⁸⁶ Langer questioned whether the President could use the resolution as a “blank check to send armed forces” hundreds of miles inside mainland China, to which Senator Stuart Symington (D-MO) replied that this type of action would be left “to the judgment of the President.”⁴⁸⁷ Ultimately, the Senate rejected all proposed amendments and enacted the executive-drafted Formosa Resolution on 28 January, voting 85-3.⁴⁸⁸ On 5 February the U.S. Navy assisted the Nationalists' Tachen evacuation without any military confrontation with the Chinese Communists. The Senate ratified the MDT on 9 February, Eisenhower signed it two days later, and it became effective on 3 March.

⁴⁸⁵ “Defense of Formosa, Pescadores,” *CQ Almanac 1955*. Langer was a longstanding foreign policy isolationist and opposed military interventions overseas.

⁴⁸⁶ Ibid.

⁴⁸⁷ Ibid.

⁴⁸⁸ Senators Morse, Langer, and Lehman voted against enactment. Eisenhower signed the Formosa Resolution on 29 January.

Although Congress enacted the Formosa Resolution and ratified the MDT, the threat of war persisted. Both Eisenhower and Secretary Dulles caused domestic political unrest when they publicly stated that the administration would consider the use of small tactical nuclear weapons during a confrontation with the Chinese Communists. Eisenhower commented during a 16 March press conference, "Now in any combat where these things can be used on strictly military targets and for strictly military purposes, I see no reason why they shouldn't be used just exactly as you would use a bullet or anything else."⁴⁸⁹ On 30 March Eisenhower convened with a bipartisan group of House leaders, and they discussed the enacted Formosa Resolution. Secretary Dulles claimed that the swift and near-unanimous congressional enactment of the resolution was working to deter Communist military action. House Majority Leader McCormack was unsure about what should be done to resolve the situation; however, he said that Congress had given Eisenhower full discretion to act and that he would support him regardless of whether or not he agreed with his final decision.⁴⁹⁰ The following day, Eisenhower met with Senate leadership, and presented the same information on the situation. Senator Lyndon Johnson (D-TX) stated, "We are going to do everything we can to be helpful to the President and to assist him when he asks assistance."⁴⁹¹ Although Eisenhower acted to maintain congressional support for his ambiguous offshore islands defense strategy, congressional and public opinion was split on the possibility of going to war with the Chinese Communists. Top Democratic

⁴⁸⁹ Dwight Eisenhower, "The President's News Conference," March 16, 1955. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 8 April 2019, <https://www.presidency.ucsb.edu/node/234055>.

⁴⁹⁰ "Bipartisan Congressional Luncheon Meeting," March 30, 1955, EPPUS, AWF, LMS, Box 1, Folder: Legislative Meetings 1955 (2) [March-April], DDEPL.

⁴⁹¹ "Bipartisan Congressional Luncheon Meeting," March 31, 1955, EPPUS, AWF, LMS, Box 1, Folder: Legislative Meetings 1957 (2) [March-April], DDEPL.

leaders continued to support the administration, but other legislators began to reconsider the policy, given the anxious atmosphere of a potential war.

A critical break in the crisis occurred when Chinese Communist foreign minister Zhou Enlai issued a 23 April statement that the Communists were ready to discuss a resolution to the offshore islands crisis with the U.S.⁴⁹² Subsequently, on 3 May Eisenhower convened with a bipartisan group of congressional leaders, and they discussed a promising diplomatic resolution to the crisis. Secretary Dulles explained that the Chinese Communists likely would have conducted offensive actions to seize Formosa and the smaller Nationalist-held islands, but they failed to get external support. Other Asian nations evidently pressured Zhou Enlai to resolve the situation peacefully, and he ultimately removed threats of force from Communist propaganda against the Nationalists on Formosa. The Eisenhower administration agreed to discuss a ceasefire with the Communists, but Dulles claimed that there was only a slim chance for anything more than a *de facto* ceasefire from any peace discussions. If this *de facto* ceasefire could be maintained, according to Dulles, then the crisis would essentially be over.⁴⁹³

This ceasefire lasted until 23 August 1958, when the Chinese Communists launched another heavy artillery bombardment of Quemoy, beginning the Second Taiwan Strait Crisis. Was this bombardment the final preparation for the anticipated Communist invasion of Quemoy and then Formosa? The administration could not be certain, but Eisenhower was authorized to take whatever actions he felt necessary to defend the

⁴⁹² "Defense of Formosa, Pescadores," In *CQ Almanac 1955*.

⁴⁹³ "Bipartisan Legislative Leadership Meeting," May 3, 1955, EPPUS, AWF, LMS, Box 2, Folder: Legislative Meetings 1955 (3) [May-June], DDEPL.

Formosa region. Eisenhower could bomb mainland artillery batteries, blockade the coastline, or take whatever military actions he wanted. Again, he was not limited to airstrikes, he could have deployed ground forces onto mainland China and justified his actions based on the Formosa Resolution, specifically, the language authorizing the defense of “related positions and territories of that area now in friendly hands and the taking of other such measures as he judges to be required or appropriate...”⁴⁹⁴

Mao Zedong decided to bombard Quemoy in 1958 to serve several purposes. First, the bombardment would divert American attention from the Middle East conflict in Lebanon and show Chinese Communist solidarity with Arab nationalism. Second, provoking a minor conflict over the offshore islands would inspire support for domestic CCP reforms, such as the Great Leap Forward. Third, the U.S. commitment to defending the offshore islands would be tested and the U.S. would be forced to waste resources. But more importantly, it would allow the Chinese Communists to fortify their military infrastructure—including the introduction of jet fighters, missiles, and other equipment—in the Fujian region and allow them to gain air superiority along the southeast coastline.⁴⁹⁵ In contrast to the crisis of 1954-1955, Mao notified Chiang Kai-shek in advance of the planned shelling of Quemoy.⁴⁹⁶

Eisenhower ultimately deployed the U.S. Navy to reinforce the offshore islands. He approved the transfer of heavy artillery (eight-inch howitzers) to Quemoy so the Nationalists could return fire, and he armed Nationalist aircraft with AIM-9

⁴⁹⁴ “Joint Resolution Authorizing the President to employ the Armed Forces of the United States for protecting the security of Formosa, the Pescadores and related positions and territories of that area,” 29 January 1955, In *Statutes at Large*, H.J. Res. 159, 84th Congress, 1st Session, Ch. 4, 7.

⁴⁹⁵ Xiao Ruping and Hsiao-Ting Lin, “Inside the Asian Cold War Intrigues: Revisiting the Taiwan Strait Crises,” *Modern Asian Studies*, Vol. 52, No. 6 (2018): 2125. Fujian Province is the mainland region directly west of Taiwan across the Taiwan Straits.

⁴⁹⁶ Ibid. PRC newspapers printed that a bombardment was imminent 12 hours prior to the shelling; however, the Nationalist forces on Quemoy were still caught by surprise because the Chinese Communists frequently issued similar threats.

Sidewinder air-to-air missiles.⁴⁹⁷ These new missiles gave the Nationalists decisive air superiority over the Communists. The Chinese Communists greatly reduced the bombardment of Quemoy beginning on 6 October after Soviet pressure to avoid an escalating conflict and the depletion of artillery ammunition.

These two crises illustrate an important aspect about congressional war authorizations that merits consideration. There is a substantial difference between what the administration claimed it would use the AUMF for versus what it actually authorized. Suppose Eisenhower or a later President decided that a full-scale invasion of the Chinese mainland was required to ensure the security of Formosa, this act would be justified under the vague and discretionary Formosa Resolution provisions.

Eisenhower held complete discretion, as authorized by the AUMF, to conduct whatever military actions he deemed necessary. This included the possible use of nuclear weapons, and it did not preclude the deployment of U.S. ground forces to Formosa, Quemoy, Matsu, or even mainland China. The Formosa Resolution embodied presidential discretion over all aspects of war making (size of force, type of force, location, enemy targets, time limits) and over the legislative process. The enacted resolution was completely unaltered; Congress took no responsibility in the drafting of the AUMF. The most significant point is that a different President could have, and most likely would have, acted very differently than Eisenhower did with the Taiwan Strait Crises, under the Formosa Resolution. These vague and discretionary AUMFs simply cannot be applied consistently, as one President will interpret and employ the AUMF much differently compared to another President. The Formosa Resolution was repealed in 1974 during a wave of congressional pushback against

⁴⁹⁷ Tucker, *Strait Talk*.

President Nixon's overreach of another vague and discretionary AUMF, the 1964 Gulf of Tonkin Resolution, which had seemingly authorized large-scale military action in Vietnam and Southeast Asia.⁴⁹⁸

Part II: Arab Nationalism, the Eisenhower Doctrine, and the 1957 Middle East Resolution

The Eisenhower administration also contended with accelerating Middle East unrest during the 1950s. With the rise of Arab nationalism and anti-colonialism also came an increase in Soviet regional influence. The U.S. sought to globally contain every perceived power expansion by its primary adversary. The Middle East was particularly important to the U.S. and its allies for the region's vital oil resources. From the Eisenhower administration's perspective, any Soviet intervention leading to Arab states capitulating to communism would disrupt Western oil markets access. Eisenhower believed that the Soviets desired to seize Middle Eastern oil and pipelines, control the Suez Canal, and ultimately destabilize the West.⁴⁹⁹

Focus centered on Egypt because of Gamal Abdel Nasser's rise to power. Nasser had been instrumental in securing full Egyptian independence from the British after the 1952 coup d'état.⁵⁰⁰ On 26 July 1956 Nasser nationalized the British and French-owned Suez Canal and blocked Israeli shipping through the waterway. In response, Israel, followed by the British and the French, invaded Egypt in October to seize the canal; however, the U.S. forced the British and French to withdraw their forces. The Anglo-French withdrawal produced a regional power vacuum, one that the Soviets

⁴⁹⁸ See §3 of Public Law 93-475, 26 October 1974, 1439. The 1964 Gulf of Tonkin Resolution was repealed on 12 January 1971. See §12 of Public Law 91-672, 84 Stat. 2053, 2055.

⁴⁹⁹ Dwight D. Eisenhower, *Waging Peace, 1956-1961* (Garden City: Doubleday and Company, 1965).

⁵⁰⁰ William Hitchcock, *The Age of Eisenhower: America and the World in the 1950s* (New York: Simon and Schuster, 2018).

could possibly fill. To counter this, Eisenhower developed a strategy to maintain the independence of the Arab states and thwart any international communist infiltration.

Eisenhower and Secretary Dulles discussed the strategy in an 8 December telephone conversation, and Dulles was authorized to begin drafting a resolution to submit to Congress in January. The Eisenhower administration had earlier considered seeking a Middle East AUMF in March 1956, and this resolution would have authorized the President to use military force to respond to both Israeli and Arab aggression.⁵⁰¹

During a 4 April press conference, Eisenhower was even asked whether he would order U.S. forces to war in the Middle East without congressional authorization. He indicated his views on presidential war powers, stating:

I have announced time and time and time again I will never be guilty of any kind of action that can be interpreted as war until the Congress, which has the Constitutional authority, says so. Now I have said this so often that it seems to me almost ridiculous to ask me the question. Look, how can a war be conducted? You have got to have troops, you have got to have draft laws, you have got to have money. How could you conduct a war without Congress? Their Constitutional power is to declare war, and I am going to observe it. Now, there are times when troops, to defend themselves, may have to, you might say, undertake local warlike acts, but that is not the declaration of war, and that is not going to war, and I am not going to order any troops into anything that can be interpreted as war, until Congress directs it.⁵⁰²

It seemed clear that Eisenhower would seek some form of congressional authorization before taking extensive military actions in the Middle East and elsewhere. Questions remained about how he defined “local warlike acts,” but the press did not inquire further on this matter. Eisenhower had a particular interpretation of presidential war

⁵⁰¹ Salim Yaqub, *Containing Arab Nationalism: The Eisenhower Doctrine and the Middle East* (Chapel Hill: University of North Carolina Press, 2004).

⁵⁰² Dwight Eisenhower, “The President's News Conference,” April 4, 1956. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 15 April 2019, <https://www.presidency.ucsb.edu/node/233083>.

powers, which was substantially different from Harry Truman's and would remain uniquely distinct from succeeding presidents.

When the Suez Crisis began in late July, the administration had already prepared a draft AUMF to submit to Congress and its strategy to secure congressional support for enactment. The administration decided that a resolution should be tied to “Communist imperialism,” since many legislators would refrain from opposing anticommunist legislation; additionally, the administration was advised not to seek a resolution that would specifically name the countries under U.S. defense.⁵⁰³

On 1 January 1957 Eisenhower met with a bipartisan group of congressional leaders, including: Senators William Knowland (R-CA), Lyndon Johnson (D-TX), Leverett Saltonstall (R-MA), William Fulbright (D-AR), and Representatives Sam Rayburn (D-TX) and Joseph Martin, Jr. (R-MA). The group reviewed the Middle East situation, focusing on Soviet efforts to influence vulnerable regional states. Secretary Dulles explained that, because of U.S. actions taken during the Suez Crisis, national prestige improved with Middle Eastern states but declined with traditional European allies such as the British and French. Despite soured European relations, Dulles emphasized that the U.S. must continue to strengthen local forces to ensure its deterrent power against the Soviets.⁵⁰⁴ He argued that time should not be wasted to resolve the crisis, and he wanted Congress to prioritize enacting a resolution to authorize economic aid and the use of military force in the Middle East. Eisenhower added that the U.S. would have to accept regional Soviet territorial gains, unless

⁵⁰³ Yaqub, *Containing Arab Nationalism*, 80.

⁵⁰⁴ "Notes on Presidential-Bipartisan Congressional Leadership Meeting," January 1, 1957, EPPUS, AWF, LMS, Box 2, Folder: Legislative Meetings 1957 (1) [January-February], DDEPL.

military forces were immediately deployed to stop them. Any regional losses would be devastating for Western Europe because of its dependence on Middle Eastern oil. Thus, the U.S. had to demonstrate to the world that it would take action, if necessary.

Recalling the 1954-55 Taiwan Strait Crisis, Eisenhower claimed that, if Congress provided him with authority to act, he might never have to use it.⁵⁰⁵ The objective was to deter Soviet aggression through a resolution of congressional support, which would demonstrate a unified government fully backing its President. Representative Leo Allen (R-IL) implied that this resolution would be similar to the 1955 Formosa Resolution. Eisenhower agreed with Allen and reiterated a key phrase he used during the offshore islands crisis, that “in modern war there might not be time for orderly procedures; it was necessary to make our interest clear in advance.”⁵⁰⁶ He then asked Speaker Rayburn whether the House could swiftly begin resolution debate. Rayburn replied that this could be done once the House was organized politically. Representative Martin suggested that the House move quickly to enact the resolution, since Senate deliberations would be lengthier.⁵⁰⁷

Questions remained, however, about how Eisenhower would specifically use such a resolution. Would he take preemptive military actions against the Soviets? Could he launch *offensive* actions against the Soviets under the proposed resolution? Dulles assured the congressional leaders present that Eisenhower would only act at the request of an invaded nation, similar to other international and regional defense arrangements. Yet, Senator Richard Russell, Jr. (D-GA) asserted that enactment of

⁵⁰⁵ Ibid.

⁵⁰⁶ Eisenhower, *Waging Peace*, 179.

⁵⁰⁷ "Notes on Presidential-Bipartisan Congressional Leadership Meeting," January 1, 1957.

this proposed resolution should not imply that the U.S would only wage a “small war.”⁵⁰⁸ It is not clear whether Russell assumed that an AUMF would sanction a general war against the Soviets, but he never indicated that Eisenhower would need to further obtain a congressional war declaration, should a Middle East confrontation with the Soviets escalate in scale.

Eisenhower personally appeared before Congress on 5 January to describe the Middle East situation and appeal for national support. He described the regional history of Western European colonial domination and how Middle Eastern nations had progressed towards greater autonomy and independence since the First World War.⁵⁰⁹ He then spoke about his desire for a congressional resolution, which included three key measures: 1) permit U.S. economic assistance for any Middle East nation to uphold its independence; 2) allow the President to provide military assistance to regional nations requesting aid; 3) authorize the President to use the armed forces to assist nations requesting intervention to combat international communism; and 4) allow the President to use funding under the 1954 Mutual Security Act for economic and defensive military ends.⁵¹⁰

Following the address, the administration submitted its draft resolution to Congress, which became H.J. Resolution 117. Eisenhower sought a vague resolution without set geographic limitations to empower him with discretion to define the area of concern. The administration rationalized its desire for ambiguity by claiming that a resolution setting explicit limits would lead the Soviets to simply seize territory beyond defined

⁵⁰⁸ Ibid, 6.

⁵⁰⁹ Dwight Eisenhower, “Special Message to the Congress on the Situation in the Middle East,” January 5, 1955. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 12 April 2019, <https://www.presidency.ucsb.edu/node/233161>.

⁵¹⁰ Ibid.

boundaries. Eisenhower also specifically requested \$200 million dollars for Middle East economic and military aid, without restrictions.

Akin to the 1954-1955 offshore islands crisis, the Eisenhower administration astutely waited until after national elections to seek a congressional resolution. This would decrease the likelihood of partisan political battles and increase congressional consensus. The administration was also strategic in timing congressional consideration of the resolution. On 8 January White House Assistant Staff Secretary L. Arthur Minnich sent a memo to Bureau of the Budget Director Percival Brundage to discuss when the resolution should be scheduled for congressional consideration. Minnich thought the resolution should get primary congressional attention, after which the legislature would debate a tax bill, civil rights legislation, and an amendment to the Refugee Relief Act, all of which would likely be more divisive along partisan lines compared to the Middle East resolution.⁵¹¹ Therefore, the Middle East resolution should be considered first to ensure the highest level of bipartisan congressional consensus. Minnich also thought the House would swiftly act on the resolution and not wait to consult with the Senate. He noted that the Senate would probably seek to amend the resolution with a termination clause, possibly through a concurrent joint resolution provision set for a specific date.⁵¹²

The HFAC began several public and executive session hearings on the resolution beginning on 7 January. The administration draft included an AUMF clause for the Middle East. Yet, Secretary Dulles argued in his testimony on the first day of hearings

⁵¹¹ "Minnich to Brundage," January 8, 1957, EPPUS, AWF, LMS, Box 2, Folder: Legislative Meetings 1957 (1) [January-February], DDEPL.

⁵¹² Ibid.

that the resolution was not, as some legislators claimed, a pre-dated war declaration. Former Secretary of State Dean Acheson testified on 10 January that the proposed policies within the resolution were both needless and insufficient. He asserted that the President held inherent power to use force within the Middle East and that seeking congressional authorization was unnecessary. He additionally claimed that the resolution would not resolve more important issues such as the Suez crisis, Soviet-backed subversive activities, and Arab-Israeli disputes.⁵¹³ Despite Acheson's criticism, the HFAC voted 24-2 to send the bill to the floor for full consideration on 24 January.⁵¹⁴

However, the HFAC made several amendments to the original administration draft, including: a requirement that Middle East states request assistance, a \$30 million dollar appropriations limit for each state, a prohibition against Middle Eastern states using such funds to finance U.S. military upkeep, a requirement for the President to issue congressional reports bi-annually (instead of annually), and a clause allowing Congress to terminate the legislation by concurrent resolution.⁵¹⁵ The House approved the Middle East Resolution on 30 January, voting 355-61. Yet, there was greater opposition to this resolution compared to the 1955 Formosa Resolution, when only 3 House legislators opposed that bill.

As in 1955, the Senate held another series of joint hearings with the Foreign Relations and Armed Services Committees, both publicly and in executive sessions from 14 January to 4 February. The joint committee approved Senator Mike Mansfield's (D-

⁵¹³ Yaqub, *Containing Arab Nationalism*.

⁵¹⁴ "'Eisenhower Doctrine' for the Middle East." In *CQ Almanac 1957*, 13th ed., 05-573-05-579. Washington, DC: Congressional Quarterly, 1958, Accessed: 13 April 2019. <http://library.cqpress.com/cqalmanac/cqal57-1345257>.

⁵¹⁵ Ibid.

MT) proposed amendment to alter the wording on the use of force from, “The President is authorized to employ the Armed Forces” to “the U.S. is prepared to use armed forces.”⁵¹⁶ Mansfield also added a key statement in the preceding phrase that the U.S. regarded “as vital to the national interest and world peace the preservation of the independence and integrity of the nations of the Middle East.”⁵¹⁷ He argued that the President already held constitutional authority to use force as commander-in-chief and that Congress, by using the term “authorized,” would establish doubt regarding inherent presidential authority to use force elsewhere globally.

But not every Senator agreed with Mansfield’s broad interpretation of presidential power. Senator Morse proposed an amendment requiring the President to notify Congress prior to using military force and to obtain congressional approval either before or after (if case of an emergency) hostilities. The joint committee rejected Morse’s proposal, and it also rejected an amendment proposed by Senator Carl Curtis (R-NE) to set an expiration date of 15 March 1961.⁵¹⁸ Mansfield professed an exceptionally distorted interpretation of presidential power. He claimed that war resolutions should omit terms such as “authorize” and be as vague as possible to provide the President with prerogative powers to act anywhere, anytime. This thesis asserts an opposing perspective, that war resolutions must clearly “authorize” the President to use military force. Additionally, AUMFs *require* explicit regulations, restrictions, and guidelines to properly define them, direct the commander-in-chief in using *limited* force, and preclude unconstitutional delegations of congressional war powers. The administration even included the word “authorize” in its original draft.

⁵¹⁶ *Executive Sessions of the Senate Foreign Relations Committee Historical Series, Volume IX*, 85th Congress, 1st Session, 1957, (Washington, D.C.: U.S. GPO, 1979), 363.

⁵¹⁷ *Ibid*, 363.

⁵¹⁸ ““Eisenhower Doctrine” for the Middle East.” In *CQ Almanac 1957*.

Why request an authorization if you claim that you are inherently authorized? This fact raises suspicion regarding the administration's and Mansfield's claims of inherent presidential power to use force *without* authorization or exceed enumerated AUMF limits.

Despite substantial amendments, the administration continued its pursuit of a discretionary resolution. Eisenhower met with congressional leaders on 5 February, and the group discussed when Senate floor consideration would begin and how much bipartisan support the resolution would likely receive. They also discussed whether an explicit time limit amendment would be approved. Senator Knowland believed the joint committee hearings would be finished by the end of that week.⁵¹⁹ Senator Saltonstall thought that the economic assistance provisions might gain more support if they were subject to time restrictions. He was confident, however, that the military assistance authorization and use-of-force provisions had enough Senate support and would not be time-limited.⁵²⁰ Eisenhower emphasized his desire for the highest level of discretion and flexibility, since the Middle East situation was so tenuous.

Senate resolution debate was extensive, and Senator Fulbright addressed the body on 11 February with a lengthy discourse opposing the resolution. Fulbright, noticeably infuriated by the administration's strong-arm tactics to secure resolution enactment, accused it of being deceitful in legislative meetings and forcing Congress to act outside of normal procedures. He claimed:

⁵¹⁹ "Legislative Leadership Meeting," February 5, 1957, EPPUS, AWF, LMS, Box 2, Folder: Legislative Meetings 1957 (1) [January-February], DDEPL.

⁵²⁰ "Minnich to Brundage," February 5, 1957, EPPUS, AWF, LMS, Box 2, Folder: Legislative Meetings 1957 (1) [January-February], DDEPL.

The whole manner of presentation of this resolution—leaks to the press, speeches to specially summoned Saturday joint sessions, and dramatic secret meetings of the Committee on Foreign Relations after dark one evening before the Congress was even organized, in an atmosphere of suspense and urgency—does not constitute consultation in the true sense. All this was designed to manage Congress, to coerce it into signing this blank check.⁵²¹

Fulbright further castigated the resolution's provisions on the use of force:

It asks for a blank grant of power over our funds and Armed Forces, to be used in a blank way, for a blank length of time, under blank conditions, with respect to blank nations, in a blank area. We are asked to sign this blank check in perpetuity or at the pleasure of the President—any President. Who will fill in these blanks? The resolution says that the President, whoever he may be at the time, shall do it. And that is not all it says. It says that in filling in the blanks, the President need not consult, much less be accountable to any other constitutional organ of government. He shall be the counsel, the judge, and the jury of the national interest...And finally, he shall decide autonomously when his autonomous powers shall expire.⁵²²

His statements exemplify the constitutional dilemma with vague war resolutions, that they are completely undefined and leave clarification of the most vital legislative criteria to the President's discretion—discretion that is itself subject to capricious executive interpretations of presidential war powers. Senator Fulbright even used a legal phrase of historical judicial significance, the so-called notion of “filling in the blanks.” The Supreme Court used this phrase in its landmark case, *Wayman v. Southard* (1825), which dealt with legislative delegation in the development of the executive administrative state and agency rulemaking.⁵²³ Fulbright provided a practical analogy to illustrate what powers the resolution would delegate to the President. He claimed that the resolution was akin to Congress enacting a law authorizing the President to appoint ambassadors, cabinet officials, and Supreme

⁵²¹ U.S. Congress, *Congressional Record*, 85th Cong., 1st Sess., Vol. 103, Part 2 (Washington, D.C.: U.S. GPO, 1957), 1856.

⁵²² *Ibid*, 1856.

⁵²³ See *Wayman v. Southard*, 23 U.S. 1 (1825). Executive agencies are empowered to create rules that have the force of law.

Court Justices without Senate confirmation.⁵²⁴ This would clearly violate the Constitution by delegating the Senate's Article I power to provide consent for presidential nominees. The federal judiciary would also likely determine such a law to be an unconstitutional delegation of legislative power to the executive branch.

Fulbright realized how Congress was delegating its power to declare war through the Middle East Resolution, albeit in an unforeseen manner. He further noted that the bill under consideration was a joint resolution, which would become a federal statute upon enactment and carry with it the force of law. However, Fulbright neglected to emphasize that *only* constitutional amendments can modify the Constitution to provide the executive branch with this power. He added, "I see nothing wrong, to speak of, in the President's speech, although it was not the subject of my minute examination. But I think we should make a distinction between a speech and a law."⁵²⁵ Fulbright was thus able to delineate the difference between the administration's rhetoric about how it would professedly employ an ambiguous resolution versus what the resolution's text actually authorized.

Eisenhower convened with congressional leaders again on 26 February. The group discussed Senate enactment issues, specifically that Senators Morse and Joseph O'Mahoney (D-WY) were disrupting the legislative process. They argued that the nation needed more time and information to consider the bill. Senator Knowland still thought the resolution had enough support for enactment, but he noted that around 20 Democrats opposed the possible use of force. Some Southern Democrats like Senator Russell supported the plan to use force but opposed the economic assistance policy;

⁵²⁴ *Congressional Record*, 85th Cong., 1st Sess., Vol. 103, Part 2.

⁵²⁵ *Ibid*, 1863.

likewise, some Republicans also opposed providing economic aid to the Middle East.⁵²⁶ This meant that, unlike the 1955 Formosa Resolution—which did not include funding for economic and military assistance in the Asian Pacific region—a greater number of Senators, like their House counterparts, would have different motives to oppose the Middle East Resolution and its \$200 million dollars in appropriations.

The Senate approved the resolution on 5 March, voting 72-19. The amended Senate bill was sent back to the House, which enacted it on 7 March.⁵²⁷ The most noteworthy sections of the resolution dealing with military assistance and the use of force are excerpted here. Section one stated:

That the President be and hereby is authorized to cooperate with and assist any nation or group of nations in the general area of the Middle East desiring such assistance in the development of economic strength dedicated to the maintenance of national independence.⁵²⁸

Section two specified:

The President is authorized to undertake, in the general area of the Middle East, military assistance programs with any nation or group of nations of that area desiring such assistance. Furthermore, the United States regards as vital to the national interest and world peace the preservation of the independence and integrity of the nations of the Middle East. To this end, if the President determines the necessity thereof, the United States is prepared to use armed forces to assist any such nation or group of nations requesting assistance against armed aggression from any country controlled by international communism: Provided, That such employment shall be consonant with the treaty obligations of the United States and with the Constitution of the United States.⁵²⁹

Section five prescribed presidential bi-annual reporting requirements to Congress, and section six provided expiration provisions, detailing:

⁵²⁶ "Legislative Leadership Meeting," February 26, 1957, EPPUS, AWF, LMS, Box 2, Folder: Legislative Meetings 1957 (1) [January-February], DDEPL.

⁵²⁷ The House approved the Senate version 350-60. Eisenhower signed the final bill on 9 March.

⁵²⁸ "Joint Resolution To promote peace and stability in the Middle East," 9 March 1957, Public Law 87-5, 71 Stat. 5.

⁵²⁹ Ibid.

This joint resolution shall expire when the President shall determine that the peace and security of the nations of the general area of the Middle East are reasonably assured by international conditions created by action of the United Nations or otherwise except that it may be terminated earlier by a concurrent resolution of the two Houses of Congress.⁵³⁰

Was section two an AUMF? Is being *prepared* to use force, should the President determine a need for it, the same as *authorizing* the use of force? The resolution did not provide further clarification on this clause's meaning, but the language of this clause was nearly identical as that used in the 1955 Formosa Resolution's AUMF provision. Recall that the original administration-drafted resolution also intended to "authorize" presidential use of military force.

Nonetheless, Congress did not include any requirement for the President to obtain specific authorization each time he decided that force was necessary for potentially numerous Middle Eastern conflicts. It is fascinating to compare section two, which detailed the military aid program and use of force provisions, to section three that concerned economic and military aid appropriations. Unlike section two, section three was extensive, with numerous clauses limiting the executive branch's use of the appropriations for its Middle East policy. Congress enumerated explicit regulations on how much and for what purpose the appropriations could be used. These regulations were specific enough that the executive branch would even have to comply with reporting requirements to congressional committees on its appropriations use.

Eisenhower first applied the Middle East Resolution in April 1957 when he deployed the U.S. Navy Sixth Fleet to the Mediterranean to deter an alleged communist threat to Jordan. King Hussein, the Jordanian monarch, accepted \$10 million dollars in

⁵³⁰ Ibid.

economic assistance. By May 1957 the U.S. had promised around \$120 million dollars for economic and military resources to several Middle East states.⁵³¹

Eisenhower employed the Middle East Resolution most noticeably in July 1958, when he deployed 14,000 U.S. Marines to Lebanon. Lebanese President Camille Chamoun requested U.S. military assistance to prevent his regime from collapsing. His request was in response to an escalating civil war, manifested through a diverse range of internal political factions (transcending religious lines) and their opposition against Chamoun's suspected ambition to rewrite and exceed constitutionally prescribed term limits to maintain his hold on the presidency. Before Chamoun could publicly announce his intention to amend the constitution, however, a highly critical anti-government journalist was assassinated on 8 May 1958. This prompted opposition groups to demand his immediate resignation and further led to protests, strikes, riots, and violent clashes between the Lebanese army and anti-Chamoun militants.⁵³² After Chamoun's many appeals for U.S. military support, Eisenhower finally ordered the landing of U.S. forces at Beirut to sustain his regime on 15 July 1958. Eisenhower claimed the Soviets facilitated the internal conflict by sending "arms, money and personnel" across the Syrian border into Lebanon.⁵³³

Senator Fulbright questioned whether there was a genuine threat of a communist uprising in Lebanon to justify a military intervention under the Middle East Resolution. Eisenhower countered that he had inherent presidential authority to take action; he did not explicitly cite the Middle East Resolution as legal justification.⁵³⁴

⁵³¹ "“Eisenhower Doctrine” for the Middle East." In *CQ Almanac 1957*.

⁵³² Yaqub, *Containing Arab Nationalism*.

⁵³³ Dwight Eisenhower, "Statement by the President following the Landing of United States Marines at Beirut," July 15, 1958. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 6 March 2019, <https://www.presidency.ucsb.edu/node/233763>.

⁵³⁴ Gibbons, *The U.S. Government and the Vietnam War*.

He did, however, repeatedly cite verbatim a specific clause from the Middle East Resolution—the Mansfield amendment regarding “national interest” and “preservation of the independence and integrity” of Middle East nations—in three separate public statements on 15 July 1958, and he used its enactment to amplify his own power with respect to suppressing congressional criticism of his Lebanese intervention.⁵³⁵ Because Congress enacted the Middle East Resolution and modified the term “authorized,” the Eisenhower administration could claim that legislators relinquished their right to criticize his decisions to use force in the Middle East. It could also claim that Congress confirmed the President’s inherent authority when it removed the term “authorized.” Still, had Congress retained the resolution’s original language, the issue of unrestricted presidential discretion with a blank check resolution would have remained. If legally challenged, the President could rely on the resolution’s congressional enactment, his commander-in-chief power, and any expansive legal interpretation due to the resolution’s textual vagueness.

Conclusions

By 1957, Eisenhower and his advisors understood that seeking favorable AUMFs might cost the administration political capital in Congress, but these resolutions would ultimately cost far less than legislation to increase defense spending. While Truman managed to avoid congressional debate and the lengthy enactment processes that Eisenhower endured in 1955 and 1957, he was subjected to harsh criticism for waging the Korean War without authorization. Eisenhower sought to avoid this

⁵³⁵ See Eisenhower, “Statement by the President following the Landing of United States Marines at Beirut,” July 15, 1958; Dwight Eisenhower, “Statement by the President on the Lebanese Government’s Appeal for United States Forces,” July 15, 1958. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 6 March 2019, <https://www.presidency.ucsb.edu/node/233758>; Dwight Eisenhower, “Special Message to the Congress on the Sending of United States Forces to Lebanon,” July 15, 1958. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 6 March 2019, <https://www.presidency.ucsb.edu/node/233759>.

disparagement at all costs, and he repeatedly stated that he generally opposed using offensive military force without some form of congressional resolution backing him. However, he *was* willing to do what he believed was necessary and suffer any political consequences, including impeachment and removal from office, if Congress claimed that he violated the Constitution.

Congress proceeded much differently in how it considered the 1957 Middle East Resolution compared to how it enacted the executive-drafted 1955 Formosa Resolution. First, House members actively voiced their dissatisfaction with being prevented from making amendments to the original draft Middle East resolution. Second, the Senate made significant changes to the original draft resolution. Congress, while enacting another vague and discretionary resolution, was more aware of the notion of a “blank check” resolution empowering the President with *carte blanche* authority to wage war in the Middle East. Yet, the Middle East Resolution was just as vague as the Formosa Resolution; it did not specify who the U.S. would use force against, where the U.S. would use force, what type of force could be used, how long force could be used, and appropriations limits on the use of force. The major difference was the change of wording from “authorized” to “prepared” to use force, subject to the President’s determination.⁵³⁶ This key clause did not state that Congress would be required to enact a subsequent AUMF if the President indeed determined that force should be used. The President would also define what types of force could be used, the enemy targets, the locations, and the duration for hostilities.

⁵³⁶ I consider AUMFs that fail to explicitly “authorize” the use of force as illegitimate, seeking to circumvent Congress’ power to regulate the commander-in-chief.

Notably, Congress used the word “authorize” in section one to describe the grant of authority to the President for economic assistance. In this respect, Congress upheld its right to appropriate money for economic programs, although the Eisenhower administration never claimed an inherent power to appropriate money and provide economic aid on the basis of national security interests combined with the commander-in-chief power. Congress additionally used the word “authorize” in sections two and three to describe the President’s authority to implement military assistance programs with nations requesting it and to use appropriated funds for economic and military aid. Section six specified one notable exception to full presidential discretion on the resolution's expiration. Unlike the Formosa Resolution, Congress could terminate the Middle East Resolution by a concurrent resolution of both houses. A concurrent resolution is a legislative measure that does not require presidential signature, and it does not become law. This was one option for Congress to repeal the resolution without presidential endorsement.⁵³⁷

The broader concept to consider with both episodes in 1955 and 1957 is that Eisenhower *could* have escalated military action in East Asia and the Middle East, and a different President could interpret each resolution in an entirely different manner to justify large-scale wars. Both resolutions delegated Congress' responsibility to define the law, declare war, and regulate the armed forces to the President. While Congress was fixated on supporting Eisenhower and his global anti-communism efforts, it delegated its own congressional powers, in a categorically negligent manner, and created legislative templates for future vague and discretionary AUMFs. These 1950s authorizations, especially the 1957 Middle East Resolution, were

⁵³⁷ This legislative practice, also known as a legislative veto, was outlawed by the Supreme Court in *INS v. Chadha*, 462 U.S. 919 (1983).

ultimately used as models for later discretionary resolutions authorizing the use of military force during the Cuban Missile Crisis and for the expansive yet undeclared Vietnam War.

Chapter Four

Beyond Deterrence: The 1964 Tonkin Gulf Resolution and the Hazards of Discretion in Southeast Asia

Mr. President: Just to see what it looked like—in case you might consider this as one option—I have drafted a Southeast Asia Resolution of 1968. You may wish to discuss it at lunch—or drop it in the wastebasket.

—Walt W. Rostow⁵³⁸

1968 was a year of crises, and Walt Rostow's 8 March letter to President Lyndon Johnson exemplified the apathy, even within the administration, for additional legal justification for military action in Vietnam. It was apparent by March 1968 that there would be no further resolution concerning continued use of military force with the reported rise in American casualties and increasing anti-Vietnam War sentiment. Presidents have often struggled historically to predict crises, and Johnson was no different. In his final year in office he reeled from one crisis to another in the face of the Tet Offensive beginning at the end of January, to the assassinations of Martin Luther King, Jr. in April and Robert F. Kennedy in June, to the August anti-Vietnam War protests and police riots in Chicago during the Democratic National Convention.⁵³⁹

The U.S. had intervened earlier in Southeast Asia during the Second World War to liberate the region from Imperial Japan and assist the French in retaining their post-war colonial empire. But, it was Johnson who critically decided to escalate U.S.

⁵³⁸ "Rostow Memo to the President," March 8, 1968, PLBJ, NSF, Country File: Vietnam, Box 77, Folder: Vietnam 3A (2) 1964-1968 Gulf of Tonkin (2 of 3), LBJPL. Walt Rostow was Johnson's National Security Advisor from 1966 to 1969.

⁵³⁹ For a closer examination of LBJ and the challenges he faced in 1968, see Kyle Longley, *LBJ's 1968: Power, Politics, and the Presidency in America's Year of Upheaval* (Cambridge, Cambridge University Press, 2018).

military involvement in Vietnam after the Tonkin Gulf incidents on 2 and 4 August 1964 and congressional enactment of the Tonkin Resolution on 10 August.⁵⁴⁰ This resolution provided Johnson with vast discretionary power to use military force, without any explicit limits or regulations. As scholar Donald Westerfield highlights, the congressional acceptance of the Tonkin Resolution's broad and discretionary language represented the view that the President, not Congress, could decide any Southeast Asian military intervention or attempts at diplomacy.⁵⁴¹ Congress later asserted during the war that the President should not have the prerogative to take military action abroad to implement U.S. foreign policy.⁵⁴² But, as authorized by the Tonkin Resolution, Presidents Johnson and Richard Nixon had plenary discretion to determine: the conflict's scope as limited or expansive, the enemy targets, what type of force would be used, where force would be used, and the duration of hostilities. The resolution was repealed in 1971, although Nixon continued unauthorized military actions in Southeast Asia.

The Johnson administration pre-planned any congressional Southeast Asia AUMF before the Tonkin Gulf incidents, yet this fact has not been thoroughly analyzed regarding the study of AUMFs and their impact on presidential versus congressional war powers. The Johnson administration initially raised the issue of an AUMF in late 1963, discussed the possibility more seriously in February 1964, drafted its own

⁵⁴⁰ For further reading on the Tonkin Gulf incidents and resolution, see Eugene Windchey, *Tonkin Gulf* (New York: Doubleday, 1971); Anthony Austin, *The President's War: The Story of the Tonkin Gulf Resolution and How the Nation Was Trapped in Vietnam* (Philadelphia: J.B. Lippincott, 1971); John Galloway, *The Gulf of Tonkin Resolution* (Rutherford: Fairleigh Dickinson University Press, 1970).

⁵⁴¹ Donald Westerfield, *War Powers: The President, the Congress, and the Question of War* (Westport: Praeger Publishers, 1996), 84.

⁵⁴² Gary Hess, *Vietnam and the United States: Origins and Legacy of War* (Boston: Twayne Publishers, 1990), 31. Also see Section IV, "The Theoretical Bases for Unilateral Presidential Action," in U.S. Senate, *Documents Relating to the War Power of Congress, the President's Authority as Commander-in-Chief and the War in Indochina*, Committee on Foreign Relations, 91st Congress, 2nd Session (Washington, D.C.: U.S. GPO, 1970): 78-82.

AUMFs in May and June 1964, and was well prepared to facilitate congressional enactment to empower Johnson with broad authority after the Tonkin Gulf incidents.⁵⁴³ These executive AUMF drafts illustrate the significance of preemptive executive action over Congress, and a highly strategic presidential administration, in obtaining favorable, vague, and discretionary AUMFs. The enactment of these resolutions reveals an acquiescent Congress, severely uninformed as to the implications of discretionary language.

This chapter will examine the Johnson administration's AUMF drafts and the enactment of the 1964 Tonkin Resolution. I contend that the Tonkin Resolution was the continuation of the established practice of enacting preemptive, vague, and discretionary AUMFs, which began in 1955 under Eisenhower. The Johnson administration understood the notion of a "blank check" AUMF well before any incident occurred in August 1964, inserting broad discretionary language into its earliest draft resolutions. It never doubted whether Johnson would obtain authorization; it was only a question of when and under what circumstances Congress would enact it. The resolution's vague terms and discretionary provisions enabled Johnson to interpret it as authorizing unrestricted use of military force in Vietnam, including massive deployments of U.S. ground forces and the waging of a large-scale *general* war.

⁵⁴³ Andrew Johns, "Opening Pandora's Box: The Genesis and Evolution of the 1964 Congressional Resolution on Vietnam," *The Journal of American East-Asian Relations*, Vol. 6, No. 2/3 (Summer-Fall 1997): 178. Johns mentions scholarly neglect for in-depth studies of the draft war authorizations in 1964 and discusses the significance of the Johnson administration's strategic planning for all potential scenarios in Southeast Asia and within Congress. However, Johns failed to recognize the presidential pattern of broad interpretation and usage of executive created and defined war authorizations that began in the 1950s during the Eisenhower administration and continued to the present war authorizations. For more on the early resolution drafts and discussions within the Johnson administration, see William Gibbons, *The U.S. Government and the Vietnam War: Executive and Legislative Roles and Relationships*, Part II: 1961-1964 (Princeton: Princeton University Press, 1986), 231 and Edwin Moise, *Tonkin Gulf and the Escalation of the Vietnam War* (Chapel Hill: University of North Carolina Press, 1996), 26-30.

Part I: Southeast Asia Conflict

Vietnam's history has involved many struggles against foreign invasion and colonization, notably against the Chinese, Mongols, and Western European powers (Britain, France, and the Netherlands).⁵⁴⁴ By 1897, France secured control over Indochina, the region in Southeast Asia encompassing Laos, Cambodia, and three French-divided regions forming Vietnam (northern Tonkin, central Annam, and southern Cochin China).⁵⁴⁵ Vietnamese leaders campaigned for national independence throughout the 20th century, after the First World War in 1919, the Second World War in 1945, and during the 1954 Geneva Conference. Vietnam was excluded from the 1919 Paris Peace Conference negotiations by the world powers, and the country was partitioned in 1954 at the 17th parallel, establishing North and South Vietnam.⁵⁴⁶

The U.S. first intervened in Vietnam during the Second World War, supporting the Viet Minh against the Japanese occupation, which began in March 1945. The Office of Strategic Services collaborated with Ho Chi Minh and provided the Viet Minh with radios, weapons, and ammunition to collect intelligence, sabotage Japanese facilities, and rescue stranded American pilots.⁵⁴⁷ Following Japanese surrender, Ho Chi Minh declared independence on 2 September 1945, but the State Department did not recognize the Democratic Republic of Vietnam.⁵⁴⁸ Still, a liberated Vietnam

⁵⁴⁴ George Herring, *America's Longest War: The United States and Vietnam, 1950-1975*, 2nd Edition (New York: Alfred A. Knopf, 1986), 5. For a more detailed review of Vietnam's early history of resistance against foreign intervention, see Gary Hess, *Vietnam and the United States: Origins and Legacy of War* (Boston: Twayne Publishers, 1990), 1-20 and David G. Marr, *Vietnamese Anticolonialism, 1885-1925* (Berkeley, University of California Press, 1995).

⁵⁴⁵ Hess, *Vietnam and the United States*, 7; Herring, *America's Longest War*, 6-7.

⁵⁴⁶ For further reading on the 1919 Paris Peace Conference, see Margaret MacMillan's *Peacemakers: the Paris Conference of 1919 and its Attempt to End War* (London: John Murray, 2001) and *Paris 1919: Six Months that Changed the World* (New York: Random House Trade Paperback, 2002).

⁵⁴⁷ Hess, *Vietnam and the United States*, 30.

⁵⁴⁸ *Ibid*, 31.

continued to seek U.S. recognition of and support for its independence until 1947.⁵⁴⁹ The U.S. instead supported French reassertions of control during the First Indochina War, lasting from December 1946 to July 1954. During this period, the U.S. assisted the French military campaign with funding, equipment, and further acknowledged the French-run regime in Vietnam as the rightful government.⁵⁵⁰

Despite this, Vietnamese nationalists waged a successful insurgency and routed French forces at Dien Bien Phu in May 1954. What followed were summer Geneva negotiations between France, the United Kingdom, the Soviet Union, the PRC, and Vietnamese insurgency leaders. The Geneva Accords ultimately resulted in the independence of Laos and Cambodia. Vietnam, however, was split at the 17th parallel with reunification elections scheduled for 1956.⁵⁵¹ In the north was the communist Democratic Republic of Vietnam, and in the south was the still-nominally colonial Republic of Vietnam (or South Vietnam).

While the U.S. did not endorse the final Geneva settlement, it backed the non-communist South Vietnamese regime. Its support was based on several public agreements, including the 1949 Mutual Defense Assistance Act (MDAA) and the 23 December 1950 Agreement for Mutual Defense Assistance in Indochina. Under the MDAA, the U.S. sent so-called “military advisers” to Vietnam to aid French Union

⁵⁴⁹ Charles Hirschman, Samuel Preston, and Vu Manh Loi, “Vietnamese Casualties During the American War: A New Estimate,” *Population and Development Review*, Volume 21, Issue 4 (December 1995): 789. For more on the relationship between Vietnam and the U.S. prior to American intervention and military hostilities in Vietnam, see Mark Bradley, “An Improbable Opportunity: America and the Democratic Republic of Vietnam,” in *The Vietnam War: Vietnamese and American Perspectives*, eds. Jayne S. Werner and Luu Doan Huynh (Armonk: M.E. Sharpe, 1993), 3-23.

⁵⁵⁰ Gary Hess, *Presidential Decisions for War: Korea, Vietnam, the Persian Gulf, and Iraq*, Second Edition (Baltimore: The Johns Hopkins University Press, 2009), 76.

⁵⁵¹ *Ibid*, 77.

forces.⁵⁵² The U.S. provided various means of assistance to South Vietnam under the 1950 agreement, including military equipment, hardware, and services.⁵⁵³ In 1954, the Southeast Asia Treaty Organization (SEATO) was established to provide mutual defense against communist aggression. SEATO was, however, effectively useless upon its inception as the organization failed to collectively intervene in any conflict.

The U.S. further justified assistance to South Vietnam under the 1961 Foreign Assistance Act (FAA), which authorized economic aid, investments, and military aid abroad to advance U.S. interests and promote security.⁵⁵⁴ The FAA was enacted during an acute Cold War era; its intention was to counter communist expansion globally. The U.S. also entered the International Agreement on the Neutrality of Laos on 23 July 1962, which prohibited external interference for purposes of achieving non-Laotian interests.⁵⁵⁵ According to U.S. claims, North Vietnam violated the Laotian neutrality agreement, which justified any American military intervention to aid South Vietnam.

The U.S. could have been militarily involved in Vietnam much earlier, however. President Eisenhower's administration considered obtaining congressional authorization in early 1954 to support the besieged French during the battle of Dien Bien Phu. Eisenhower was concerned about many of the same issues that later troubled Johnson, including: congressional appropriations, favorable public opinion supporting military action, and the possible need to progressively commit larger

⁵⁵² George S. Prugh, *Law at War: Vietnam, 1964-1973* (Washington, D.C.: Department of the Army, 1975), 87.

⁵⁵³ "Legal Questions and Answers on the Gulf of Tonkin," August 5, 1964, PLBJ, NSF, Country File: Vietnam, Box 76, Folder: Vietnam 3A (1) 1964 & 1967 Gulf of Tonkin (1 of 2), LBJPL, 4.

⁵⁵⁴ Dianne Rennack and Susan Chessier, *Foreign Assistance Act of 1961: Authorizations and Corresponding Appropriations*, Congressional Research Service, R40089 (2011).

⁵⁵⁵ This agreement is also referred to as the 1962 Geneva Accords.

numbers of American ground forces to the conflict.⁵⁵⁶ Additionally, administration officials were concerned about the consequences of unauthorized military actions, so Secretary of State John Foster Dulles drafted an AUMF, which was discussed on 2 April.

The Dulles draft authorized Eisenhower to use naval and air forces to “assist the forces which are resisting aggression in Southeast Asia, to prevent the extension and expansion of that aggression, and to protect and defend the safety and security of the United States.”⁵⁵⁷ It omitted provisions to use army and marine ground forces. This draft also included a termination date of 30 June 1955, or sooner, if Congress enacted a concurrent resolution repealing it. The authorization would have permitted the use of military force throughout Southeast Asia, but this area's regional boundaries and the nations comprising it were not further defined.⁵⁵⁸ Eisenhower considered the draft as sufficient but added that it was tactically important to mold congressional leadership thinking to support using force before presenting it to them.⁵⁵⁹ It appears evident from the discussions and from the language in the administration-drafted AUMF that Dulles and other officials had not labored to strategize or contemplate a broad resolution, one without specific restrictions on duration or the types of force authorized. The administration acted cautiously, and the draft language exemplified this in its limited nature. If enacted, this AUMF would have limited the President much more than succeeding authorizations, and it may have set Congress on a different path of enacting time-limited and type of force-limited authorizations.

⁵⁵⁶ William Gibbons, *The U.S. Government and the Vietnam War: Executive and Legislative Roles and Relationships*, Part I: 1945-1960 (Princeton: Princeton University Press, 1986), 151.

⁵⁵⁷ Ibid, 185.

⁵⁵⁸ Ibid, 185.

⁵⁵⁹ Ibid, 184.

Nevertheless, Eisenhower approved Dulles' draft AUMF. He emphasized that it was tactically vital for Dulles not to mention that it was "drafted by ourselves" (executive branch officials) and to make it appear like a congressionally-prepared resolution.⁵⁶⁰ Dulles and other administration officials met with congressional leaders on 3 April to discuss the possibility of congressional approval for U.S. military intervention with the navy and air force.⁵⁶¹ After this meeting Dulles understood that Congress would not enact an AUMF without prior support from U.S. allies, especially the British.⁵⁶² He mentioned his discussion with congressional leaders at the 6 April NSC meeting, explaining that three conditions needed to be achieved for the administration to obtain congressional authorization. First, the U.S. needed to build a coalition including free Southeast Asian nations, the Philippines, and British Commonwealth nations. Second, the French needed to accelerate the independence of regional colonial states—this would allow the U.S. to counter claims that it was supporting French imperialism. Third, the French needed to commit to keeping military forces in Southeast Asia, if the U.S. intervened.⁵⁶³ Dulles was resolute that the only way to defeat any congressional opposition to U.S. military involvement was to fulfill these requirements.⁵⁶⁴ However, American allies sought an explicit commitment from the U.S. government before an agreement to intervene as a coalition, presenting an impasse for Dulles in his effort to meet congressional prerequisites for an authorization.

⁵⁶⁰ "Memo of Conversation with the President," April 2, 1954, *FRUS*, 1952-1954, *Indochina*, XIII, 1:1210-1211; John Foster Dulles, "Memorandum of Conference with Eisenhower," April 2, 1954, White House Memoranda Series, "Meetings with the President 1954 (4)," JFDP.

⁵⁶¹ Frederik Logevall, *Embers of War: The Fall of an Empire and the Making of America's Vietnam* (New York: Random House Trade Paperbacks, 2013), 468. Eisenhower was at Camp David and did not attend the 3 April meeting.

⁵⁶² *Ibid.*

⁵⁶³ "Memorandum of Discussion at the 192nd Meeting of the National Security Council," Tuesday, April 6, 1954, EPPUS, AWF, DDEPL, <https://history.state.gov/historicaldocuments/frus1952-54v13p1/d705>, 1254.

⁵⁶⁴ *Ibid.*

As the French situation deteriorated at Dien Bien Phu throughout April and May, the administration again sought to gain congressional support. Dulles drafted a second AUMF and presented it to Senate Majority Leader William Knowland (R-CA) on 17 May. This draft stated that the President could use naval and air forces to assist Asian governments against communist revolutionaries and subversives.⁵⁶⁵ Again, ground forces were not authorized, and the second draft maintained the 30 June 1955 termination date. Knowland read the draft but strongly opposed it; he believed that it would provide “blank check” power to the President.⁵⁶⁶ This draft was slightly modified from the first in that it required nations to request military assistance before the U.S. could intervene, and it focused on internal conflict instead of communist aggression in general.

During a 19 May meeting, Eisenhower and Secretary Dulles discussed congressional unwillingness to support an authorization providing discretionary power equaling that of a declaration of war.⁵⁶⁷ The second draft notably became more limited than the first regarding who force could be used against—subversives and revolutionaries. Yet, in the second draft, force could be used within *any* Asian nation requesting assistance, not just Southeast Asian nations. Defense Department General Counsel Wilbur M. Brucker recommended that any desired resolution should not use language restricting the President. For example, both 1954 drafts used the word “authorize” to provide congressional approval for the use of force. Brucker claimed, however, that this language implied that the President could not send the military abroad unilaterally and

⁵⁶⁵ Gibbons, *The U.S. Government and the Vietnam War*, 235.

⁵⁶⁶ *Ibid.*, 236.

⁵⁶⁷ *Ibid.*, 235-236.

would thus set a precedent limiting executive power.⁵⁶⁸ However, he overlooked previous war resolutions that included the word “authorize,” beginning with the 1798 Quasi-War statutes, the first declared war in 1812, and numerous other military conflicts.⁵⁶⁹

Top Eisenhower administration officials differed about what an AUMF would mean versus how they would use it. On 2 April JCS Chairman Arthur Radford wanted to use an AUMF for immediate airstrikes to aid the French, but Secretary Dulles and Defense Secretary Charles Wilson wanted to use it as a deterrent and as a negotiation tool in Southeast Asia.⁵⁷⁰ Eisenhower and most administration officials favored the latter view, which would keep the U.S. from directly intervening in Vietnam and spare American ground forces from undertaking most of the fighting, thereby avoiding a repeat Korean War experience. This lack of consensus on a foreign policy strategy certainly cost the administration during its meeting with congressional leaders.

The administration had also failed to conduct groundwork to build a coalition amongst U.S. allies (especially the British) and increase domestic public support for defending Southeast Asia against a full communist takeover. By the time the Eisenhower administration drafted its own authorization and began to think about

⁵⁶⁸ Ibid, 235.

⁵⁶⁹ See “An Act further to protect the commerce of the United States” 5th Congress, Session II, Ch. 68, 1 Stat. 578, 9 July 1798; “An Act Declaring War between the United Kingdom of Great Britain and Ireland and the Dependencies Thereof and the United States of America and Their Territories,” In *Statutes at Large*, 12th Congress, Session I, Ch. 102, 18 June 1812.

⁵⁷⁰ Gibbons, *The U.S. Government and the Vietnam War*, 184. From 31 March to 2 April, Radford polled the other JCS members whether they supported airstrikes at Dien Bien Phu, but they voted against in all three votes. Radford changed his view during the 2 April meeting about the effectiveness of an airstrike, because he believed a French collapse would occur within hours; thus, U.S. airstrikes were not warranted.

enactment, it was too late to assist French forces. On 8 June, Secretary Dulles publicly stated that the administration did not seek a war authorization for Southeast Asia.⁵⁷¹ Eisenhower echoed these thoughts during a 10 June press conference explaining that he would not seek an authorization then but that should it “become necessary, it would come up on the crest of some crisis, and you would have to go and lay the problem before Congress and ask them.”⁵⁷² These remarks by Dulles and Eisenhower ended the administration’s pursuit of a 1954 Vietnam AUMF.

While the Eisenhower administration seriously considered pursuing an AUMF to intervene in Indochina, it selected other foreign policy options to avoid escalating U.S. military involvement.⁵⁷³ Although the 1954 AUMF drafts are conceptually relevant, this chapter will focus on the Johnson administration and its strategic planning to obtain a discretionary AUMF. What follows is a summary and analysis of the most important executive meetings and draft authorizations prior to the Tonkin Gulf incidents and ensuing Tonkin Resolution enactment.

Part II: 1964 Draft Authorizations and Key Executive Meetings

Although the Johnson administration mentioned an authorization in December 1963, it first began to seriously consider a possible AUMF in February 1964.⁵⁷⁴ Johnson had reportedly been highly critical of President Truman for conducting major

⁵⁷¹ Ibid, 236.

⁵⁷² Dwight Eisenhower, “The President’s News Conference,” June 10, 1954. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 9 June 2020, <http://www.presidency.ucsb.edu/ws/?pid=9917>.

⁵⁷³ For further reading on the Eisenhower administration’s foreign policy in Vietnam and Southeast Asia, see David L. Anderson, *Trapped By Success: The Eisenhower Administration and Vietnam, 1953-1961* (New York: Columbia University Press, 1991); William J. Duiker, *U.S. Containment Policy and the Conflict in Indochina* (Stanford: Stanford University Press, 1994); James R. Arnold, *The First Domino: Eisenhower, the Military, and America’s Intervention in Vietnam* (New York: William Morrow, 1991).

⁵⁷⁴ Johns, “Opening Pandora’s Box,” 178.

unauthorized military actions in Korea. His experience serving as Senate Majority Leader from 1955 to 1961 also guided his judgments.⁵⁷⁵ Additionally, his 1964 presidential election campaign made him more inclined to include Congress in decisions concerning a Southeast Asian military intervention.

Johnson was highly involved in the 1955 Formosa Resolution debate, which authorized Eisenhower to use military force against Communist China to defend Taiwan and smaller neighboring islands.⁵⁷⁶ As Vice-President under John F. Kennedy, Johnson had also visited Saigon in May 1961, and he asserted rather hawkishly that if the U.S. would not protect Indochina from communist aggression, it might as well withdraw all its forces.⁵⁷⁷ In 1964, with upcoming elections and a deteriorating situation in Vietnam, Johnson seemed agitated that preceding administrations had not secured a similarly broad and discretionary AUMF. He would lose valuable campaign time in any pursuit to obtain an authorization, if he intended to widen U.S. military involvement in Southeast Asia. On the advice of Walt Rostow, head of the State Department Policy Planning Council at the time, the administration had been contingency planning for wide-ranging potential scenarios so that it would have an immediate strategy to escalate the U.S. role in Vietnam, if Johnson so desired. This planning included how the administration would most effectively obtain an AUMF.⁵⁷⁸

⁵⁷⁵ There are inconsistencies with Johnson's story of criticizing Truman's unauthorized unilateralism. Senator Johnson expressed support for Truman's congressionally unauthorized actions in a 28 June 1950 letter, the day after Truman sent U.S. ground forces to Korea. See, Lyndon Johnson, *The Vantage Point: Perspectives of the Presidency 1963-1969* (London: Weidenfeld and Nicholson, 1972), 573.

⁵⁷⁶ Ibid.

⁵⁷⁷ John Dumbrell, *Vietnam: American Involvement at Home and Abroad* (Halifax: Ryburn Publishing Services, 1992), 14.

⁵⁷⁸ Johns, "Opening Pandora's Box," 180.

Rostow wrote a memo to Secretary of State Dean Rusk on 12 February 1964 explaining that it was the right moment for Johnson to consult with bipartisan legislative leaders, and, if he received positive reactions, publicly address Congress and request an authorization.⁵⁷⁹ He authored another memo on 13 February that included a draft resolution outline to be sent to Congress. Rostow was confident the administration could secure an authorization if it emphasized the U.S. regional commitment under the SEATO treaty, North Vietnamese violations of the 1954 and 1962 Geneva agreements, and the longstanding U.S. commitment to defending South Vietnamese independence.⁵⁸⁰ The administration also sought to continue the practice, started under Eisenhower during the 1954-1955 Taiwan Strait Crisis, of securing a preemptive discretionary AUMF, one that would function as a deterrent to U.S. adversaries, show congressional approval of previous presidential actions, and empower the President with broad authority to conduct or escalate military action.⁵⁸¹

On 24 May the Executive Committee (EXCOM), without Johnson in attendance, convened to review contingency planning and a draft authorization. The group discussed the Laotian predicament and the intrusion of communist Pathet Lao forces. They also discussed South Vietnam, where General Nguyen Khanh's repressive government retained a weak hold on power with declining legitimacy. The key issue was how much U.S. military aid should be provided and when it should begin. Defense Secretary Robert McNamara, posing as if he were President, asked the group: "Do I want to use military force in Southeast Asia in the next two or three

⁵⁷⁹ Ibid, 180. Also see "Rostow to Rusk," 12 February 1964, "Southeast Asia," PWWR, Box 13, LBJPL.

⁵⁸⁰ "Rostow to Rusk," 13 February 1964, "Southeast Asia," PWWR, Box 13, LBJPL.

⁵⁸¹ Johns, "Opening Pandora's Box," 181; Stanley Karnow, *Vietnam: A History* (Harmondsworth: Penguin Books, 1984), 359.

months?”⁵⁸² Timing for the use of force was critical, and this would dictate the administration’s military strategies towards Vietnam. JCS Chairman General Maxwell Taylor believed that a swift military response to Viet Cong aggression in South Vietnam would give General Khanh much needed support.⁵⁸³ However, the EXCOM members found it difficult to justify U.S. military action to support an oppressive regime, and this concern prevented executive consensus regarding which foreign policy should be implemented to counter communist aggression.

Secretary Rusk mentioned the draft resolution early in the meeting, and he emphasized the importance of not jeopardizing Johnson's position with risky appearances of support for an oppressive Khanh regime in South Vietnam.⁵⁸⁴ Rusk and other officials thought the optimal strategy was to find a way to motivate the South Vietnamese to fight for themselves, with as little overt U.S. military assistance as possible. As Rusk saw it, the administration only had two options: either find a way to strengthen the South Vietnamese government and military or use U.S. military force to expel the communist militants.⁵⁸⁵ The draft authorization reflected these views on the situation in Southeast Asia. The three substantial pages of preamble sections claimed that North Vietnam violated the 1954 Geneva Accords with its aggression towards Laos and South Vietnam. It further stated that Communist China supported aggression by “furnishing direction, training, personnel, and arms for the conduct of guerrilla warfare within South Viet Nam.”⁵⁸⁶

⁵⁸² "Summary Record of Meeting on Southeast Asia," May 24, 1964, PLBJ, FMB, Box 18, Folder: Meetings on Southeast Asia Vol. 1, LBJPL, 4.

⁵⁸³ Ibid, 6.

⁵⁸⁴ Ibid, 1.

⁵⁸⁵ Ibid, 5.

⁵⁸⁶ "Draft Resolution on Southeast Asia," 24 May, 1964, PLBJ, CFOA, Box 176, Folder: C.F. Oversize Attachments: 14/67 Packet #2 (Southeast Asia-Executive Committee Meeting 5/24/64), LBJPL, 1.

The preamble additionally stated that North Vietnam violated the 1962 Geneva Agreement's requirement to respect Laotian neutrality by using it as a base to infiltrate communist forces into South Vietnam. The section two language resembled that of the 1957 Middle East Resolution, stating that the U.S. was "prepared," if the President deemed it necessary, to commit armed forces to "assist" the Laotian and South Vietnamese governments, but only at the request of those governments.⁵⁸⁷ The resolution apparently sanctioned, without explicit use of the word "authorized," the President to "assist" Laotian and South Vietnamese defense against communist aggression or subversion.

This section also did not specify if force could only be used *within* Laos and South Vietnam, but it was vague enough to be interpreted as allowing the use of force *outside* these two nations, globally, to "assist" them with their security. Additionally, it did not define what constituted "armed forces," but one can assume that this meant full presidential discretion to use all military branches. Section three set appropriations limits for the fiscal years of 1964 and 1965, although the exact amount was undetermined.⁵⁸⁸ These limits were specific to spending provisions and exceptions under the 1961 FAA. But, draft subsection (c) authorized the President to use an unspecified amount of money in 1964 and 1965 under the 1961 FAA "when the President determines it to be important to the security of the United States and in furtherance of the purposes of this joint resolution."⁵⁸⁹ The President also had discretion not to specify the nature for the use of these appropriations.

⁵⁸⁷ Ibid, 4.

⁵⁸⁸ Ibid, 4.

⁵⁸⁹ Ibid, 4.

This provision effectively prescribed certain spending limits according to the 1961 FAA, but more could be spent if the President determined that national security was at risk and if he felt it was unwise to state the reason why he needed additional appropriations. While this draft resolution did not set an expiration date for the use of force, it still set spending limits, which would have limited the scope of any U.S. military escalation in Southeast Asia. This draft reflected the administration's concerns about the unstable and unpopular regimes in Laos and South Vietnam and how it would justify a military intervention to Congress and the general public. The long explanatory preamble sections rationalizing the use of force reflected these concerns, and the inclusion of spending limits would also supposedly present the resolution as only sanctioning limited military action.

Weeks later, U.S. and South Vietnamese officials gathered at a foreign policy conference from 1-3 June 1964 in Honolulu, Hawaii. They discussed the military and diplomatic situations in Vietnam and Laos and how U.S. public opinion might be improved to support a broader regional war.⁵⁹⁰ On 2 June Defense Secretary McNamara explained that a desired war resolution would allow them to “make major deployments, make guarantees, anticipate escalation, and call up some reserves.”⁵⁹¹ CIA Director John McCone claimed that the resolution would serve as a deterrent, like the 1957 Middle East Resolution, which was obtained before it was purportedly needed.⁵⁹² The Eisenhower administration asserted that preemptive war authorizations, like the possession of nuclear weapons, were effective deterrents that could thwart conflicts, since the enemy would be aware of the U.S. political

⁵⁹⁰ Gibbons, *The U.S. Government and the Vietnam War*, 261.

⁵⁹¹ “Summary Record of Meetings,” 2 June 1964, www.history.state.gov/historicaldocuments/frus1964-68v01/d189, 432.

⁵⁹² Ibid.

commitment to using military force of any means. U.S. Ambassador to South Vietnam Henry Cabot Lodge, Jr. believed that an authorization was not required if the U.S. only responded to attacks with limited strikes. But Rusk, McNamara, and McCone argued that a congressional authorization would permit Johnson to call up army reserves and embody greatly needed congressional support for the administration's Southeast Asia policies.⁵⁹³ They also asserted that an authorization would ensure South Vietnam's defense, should North Vietnam or Communist China escalate hostilities. This Southeast Asia policy conference did not escape congressional criticism, however. Senator Wayne Morse (D-OR), a longtime critic of U.S. foreign policies in Southeast Asia, publicly claimed that the Johnson administration was using these meetings to prepare for a wider regional war.⁵⁹⁴ Despite such objections, the Hawaii conference signified increasing consensus within the Johnson administration to seek congressional authorization.

The next draft resolution, dated 5 June, included some significant revisions.⁵⁹⁵ The preamble sections were abridged to two pages but essentially reaffirmed the grievances cited in the 24 May draft. Section two stated that the U.S. was "prepared," if the President determined, to use the armed forces to assist *any* Southeast Asian nation, not just Laos and South Vietnam. However, it still required a formal request for U.S. assistance prior to intervention, akin to the previous draft. Once again, this draft did not define Southeast Asian nations, leaving the President to determine geographical boundaries. It also added a statement referencing the use of force in compliance with the U.N. Charter, but it did not specify whether UNSC authorization

⁵⁹³ Gibbons, *The U.S. Government and the Vietnam War*, 262-263.

⁵⁹⁴ Johns, "Opening Pandora's Box," 194.

⁵⁹⁵ "Draft Resolution," 5 June 1964, PLBJ, FMB, Box 18, Folder: Meetings on Southeast Asia Vol. 1, LBJPL.

was required. Section three included use-of-force appropriations limits, according to the 1961 FAA, for the years 1964 and 1965 but did not determine specific dollar amounts. The most important change from the 24 May draft was section four on the resolution's expiration, which was subject to presidential discretion.⁵⁹⁶ The President would determine when peace and security had been restored to Southeast Asia and report this finding to Congress. This section was likely added as another measure to increase congressional support. Adding an expiration date, although undetermined and discretionary, would help present the resolution as a deterrent or limited AUMF, as opposed to a war declaration.

Key officials, including Rusk, McNamara, and McCone—again without Johnson—convened on 10 June for another EXCOM meeting. After a dialogue concerning U.S. reconnaissance missions over Laos and continuing issues with General Khanh's regime, the attendees discussed the 5 June draft authorization—summarized by Assistant Secretary of State William Bundy—and considered how to legally frame it and obtain congressional enactment. They revealed how certain draft sections, such as the preamble, were modeled from the 1957 Middle East Resolution, instead of the 1955 Formosa Resolution or 1962 Cuba Resolution.⁵⁹⁷ Administration lawyers claimed that section three dealing with appropriations limits was “very important but it could be dropped as not being absolutely necessary.”⁵⁹⁸ But why did executive branch attorneys see spending restrictions as not absolutely necessary for a theoretically limited war authorization? The 1957 authorization, used as a template for these 1964 drafts, even included appropriations limits. The answer is that neither

⁵⁹⁶ Ibid.

⁵⁹⁷ "Summary Record of the Meeting on Southeast Asia," June 10, 1964, PLBJ, FMB, Box 18, Folder: Meetings on Southeast Asia Vol. 1, LBJPL, 8.

⁵⁹⁸ Ibid, 8.

the administration lawyers nor the other executive officials were really concerned with spending limits. Their focus was on securing the support of as many legislators as possible to enact an authorization of the administration's choosing.

Rusk concurrently explained that an ideal authorization would be concise, administration-drafted, and congressionally enacted unanimously. He thought it would be a catastrophe if the authorization was weakened through extended congressional debates or if Congress refused to approve the administration's draft.⁵⁹⁹ Accordingly, he counseled, "We should ask for a resolution only when the circumstances are such as to require action, and, thereby, force Congressional action. There will be a rallying around the President the moment it is clear to reasonable people that U.S. action is necessary."⁶⁰⁰ National Security Advisor McGeorge Bundy argued in a policy options paper circulated during the meeting that an authorization request should await congressional enactment of the civil rights bill, likely to occur in the next ten days to two weeks. Additionally, McGeorge Bundy and Attorney General Robert F. Kennedy agreed that the administration would have to be fully committed to obtaining an authorization to begin building congressional support. McNamara expressed doubts that the administration could convene with Congress before 1 July, and Rusk added that the current U.S. situation in Southeast Asia provided no foundation for a resolution. McNamara could not envision an authorization being enacted before September, unless there was a sudden Southeast Asian incident, in which the administration would promptly seek congressional authorization.⁶⁰¹

⁵⁹⁹ Ibid.

⁶⁰⁰ Ibid, 8.

⁶⁰¹ Ibid.

One of Bundy's policy options paper questions inquired whether the resolution would be a "blank check for the President to go to war" in Southeast Asia.⁶⁰² His answer stated that it "will indeed permit selective use of force, but hostilities on a larger scale are not envisaged, and in any case any large escalation would require a call-up of Reserves and thus a further appeal to Congress."⁶⁰³ He added, "More broadly, there is no intent to usurp the powers of the Congress, but rather a need for confirmation of the powers of the President as Commander in Chief in an election year."⁶⁰⁴ His statement is telling, since the purpose of federal law is to set policy, not confirm, reject, or clarify each government branch's constitutional powers. Additionally, Bundy sought to depict the administration's efforts as appreciative of congressional war powers, yet he did not outline what restrictions Congress maintained over the President with its powers to declare war and regulate the armed forces. He erred in stating that the authorization would "permit" the use of force. If he sincerely believed that the President possessed the power as commander-in-chief to send the military abroad, why state that the authorization "permits" the use of force? This demonstrates that the President must obtain prior authorization before using military force abroad.

Bundy's policy options paper also questioned what kinds of force would be possible under the authorization. His answer asserted that the President would not use force if avoidable and that, if aggression continued, there would be a "limited response" targeted at "installations and activities which directly support covert aggression."⁶⁰⁵

This was far from a comprehensive response. Would force be limited to simply

⁶⁰² "Draft Memo for Discussion, Alternative public positions for U.S. on Southeast Asia for the period July 1-November 15," June 10, 1964, PLBJ, NSF, MP, McGeorge Bundy, Vol. 5-8, Box 2, Folder: McGeorge Bundy 6/1-30/64 Vol. 5, LBJPL, 1.

⁶⁰³ Ibid, 1.

⁶⁰⁴ Ibid, 1.

⁶⁰⁵ Ibid, 2.

airstrikes? What types of installations or activities would be targeted? Would this permit a large-scale ground war? There is a major difference between what type of conflict is *envisaged* and what type of conflict is *authorized*, and Bundy failed to indicate what restrictions existed, if any, in the authorization. Without explicit limits, authorizations function as “blank check” authority for the President to conduct *general*, not *limited*, warfare. Yet, in a separate memo to Johnson, Bundy characterized the 10 June meeting as determining that the pursuit of an “early resolution” was too risky unless the administration was clearly committed to taking “more drastic action” than what was presently planned for.⁶⁰⁶ This seems to indicate that Bundy believed a resolution would authorize military actions beyond just limited responses, but he never suggested that the administration would seek a war declaration in that instance. McCone notably stated at the end of the 10 June meeting that a congressional authorization was required before U.S. ground forces could be used in Southeast Asia, and Rusk requested an updated draft authorization.⁶⁰⁷ The administration learned from previous preemptive AUMF debates—especially the 1955 Formosa Resolution and Senator Morse’s challenge to it—the importance of addressing claims that a discretionary AUMF would empower the President to wage a full-scale general war.

Administration officials revised the draft resolution and circulated it after the 11 June cabinet meeting. This updated version included two alternatives for section two concerning military force but still substituted “prepared” for “authorized.” The first option was based on the 1957 Middle East Resolution; it required Southeast Asian

⁶⁰⁶ “Memo to President,” June 10, 1964, PLBJ, NSF, MP, McGeorge Bundy, Vol. 5-8, Box 2, Folder: McGeorge Bundy 6/1-30/64 Vol. 5, LBJPL, 2.

⁶⁰⁷ “Summary Record of the Meeting on Southeast Asia,” June 10, 1964, PLBJ, FMB, Box 18, Folder: Meetings on Southeast Asia Vol. 1, LBJPL, 10.

nations to request assistance before a U.S. military intervention. But, “all measures including the use of armed forces” were included, leaving it to the President to define the meaning and extent of this clause.⁶⁰⁸ The second option, based on the 1962 Cuba Resolution, was just as vague and discretionary. It asserted that the U.S. was “determined” to prevent North Vietnamese aggression against *any* Southeast Asian nation and stated that the President could use “whatever means may be necessary, including the use of arms...”⁶⁰⁹ This second alternative did not require specific requests for U.S. military intervention.

The third section crucially detailed a potential expiration date or “sunset” clause for the resolution. Like section two, the draft listed two resolution expiration choices. The first option afforded the President with discretion; he would declare when peace and security were established in the region by U.N. actions “or otherwise” and report this to Congress, thereby terminating the authorization.⁶¹⁰ The second option set an explicit expiration date of 8 January 1965, when Congress would next convene. The notion here was presumably to allow the legislature to reauthorize the use of military force—thus providing further congressional consent of presidential actions and relieving Johnson of accountability—but this would have forced the administration to engage in congressional enactment politics *again*, taking valuable time away from military strategizing. This was the only draft to include a “sunset” expiration provision. The 11 June draft also removed the appropriations limits previously included in the 5 June draft. The 24 May and 5 June drafts included assistance

⁶⁰⁸ “Draft Southeast Asia Resolution,” June 11, 1964, PLBJ, CFOA, Box 176, Folder: C.F. Oversize Attachments: 14/67 Packet #1 (Southeast Asia-6/13/64), LBJPL.

⁶⁰⁹ Ibid.

⁶¹⁰ Ibid.

spending limits, which likely would have forced a congressional review of the effectiveness of U.S. involvement in Southeast Asia by 1965.

At a 15 June executive meeting, the administration made a critical decision regarding the push for a preemptive war authorization. With the exceptions of William Bundy and Walt Rostow, the group agreed to suspend the authorization pursuit, and they discussed the options available without congressional authorization.⁶¹¹ The goal was to maintain flexibility in potential foreign policy responses and exert the greatest possible pressure on North Vietnam without worsening the conflict, while also averting domestic political difficulties in Congress. Although Johnson reconsidered the strategy to seek congressional authorization without any impending military situation, he understood that a war resolution was still a viable option, and he began to court legislators for support.⁶¹² At the 26 July White House dinner, Johnson told Senate Foreign Relations Committee Chairman William Fulbright (D-AR) that he would request a congressional war resolution shortly, which probably meant after the November elections.⁶¹³ Yet, Johnson and administration officials had decisively envisaged what provisions their preferred war authorization would include by the end of July.

Part III: Tonkin Gulf Incidents and Tonkin Resolution Enactment

During the first week of August 1964, two highly questionable incidents occurred in the Tonkin Gulf involving U.S. destroyers and North Vietnamese torpedo boats. On 2 August, the *Maddox* was patrolling the waters near North Vietnam after South

⁶¹¹ Johns, "Opening Pandora's Box," 201.

⁶¹² Ibid.

⁶¹³ Ibid.

Vietnamese attack boats raided North Vietnamese ports. According to congressional records, North Vietnamese torpedo boats attacked the *Maddox*, which responded by sinking at least one North Vietnamese vessel.⁶¹⁴ On 4 August, the U.S. Navy reported further North Vietnamese attacks against the *Maddox* and *Turner Joy*, although significant doubt exists that any attacks truly occurred.⁶¹⁵ Nonetheless, the incidents illustrated the administration's preparedness and contingency planning, as it ordered retaliatory airstrikes against pre-selected North Vietnamese targets within six hours notice.⁶¹⁶

Johnson, administration officials, and congressional leaders met on 4 August to discuss how the U.S. would retaliate, and they settled on destroying four North Vietnamese torpedo boat bases.⁶¹⁷ Senators Leverett Saltonstall (R-MA) and Bourke Hickenlooper (R-IA) advised Johnson not to set long-term limitations for the use of military force against North Vietnam. Senator Everett Dirksen (R-IL) agreed that the U.S. "should make it clear we would meet every enemy threat."⁶¹⁸ Representative Charles Halleck (R-IN) added, "The President knows there is no partisanship among us."⁶¹⁹ These were astonishing statements from opposition party legislators in an election year, but Halleck clearly stated during the meeting that he would support the proposed war authorization and any future authorization.

⁶¹⁴ "The U.S. Government and the Vietnam War: Executive and Legislative Roles and Relationships, Part II: 1961-1964," Congressional Research Service, Library of Congress (Washington: U.S. GPO, 1984), 285-301.

⁶¹⁵ Ibid.

⁶¹⁶ Richard Cherwitz, "Lyndon Johnson and the 'Crisis' of Tonkin Gulf: A President's Justification for War," *Western Journal of Communication*, Volume 42, Number 2 (Spring 1978): 95.

⁶¹⁷ "Notes Taken at Leadership Meeting," August 4, 1964, PLBJ, NSF, Country File: Vietnam, Box 77, Folder: Vietnam 3A (2) 1964-1968 Gulf of Tonkin (2 of 3), LBJPL.

⁶¹⁸ Ibid, 4.

⁶¹⁹ Ibid, 5.

The fact that the draft authorization originated from the executive branch cannot be discounted. Johnson stated at the meeting, “We can pretty well work out a good resolution with a minimum of doctoring.”⁶²⁰ Senator George Aiken (R-VT) added at the end of the meeting, “By the time you send it up there won’t be anything for us to do but support you.”⁶²¹ These remarks revealed a serious degree of legislative collusion with executive branch lawmaking, partisan affiliation aside. They also indicate the “rally-around-the-president” effect, confirming Secretary Rusk’s prediction from the 10 June EXCOM meeting. These legislators believed that it was not only the responsibility of the executive to conduct military operations; it was the duty of the President and his administration to draft and present a war authorization to Congress. For them, the only remaining legislative action was to swiftly and overwhelmingly enact it, without substantial scrutiny on its discretionary provisions. This interpretation of a reduced congressional role strays from the fundamental purpose of a separate legislative branch, which functions as the *sole* lawmaking body. Congress only acts as a final endorsement body when it overrides presidential vetoes. In this respect, the roles were reversed. The President and his administration acted as lawmakers by drafting and deliberating the authorization within the executive branch, unbeknownst to most legislators, while Congress performed negligent final approval.

During this Cold War period, executive branch lawyers opposed using the word “authorized” in draft war resolutions, because it would supposedly promote claims that the President needed to obtain congressional authorization prior to using military force abroad. Johnson’s legal team applied the strategy of their predecessor, the aforementioned Wilbur Brucker, who argued in 1954 that war authorizations should

⁶²⁰ Ibid, 5.

⁶²¹ Ibid.

not use the word “authorized” to sanction the use of military force. In a confidential document written on 5 August, administration officials made several significant claims regarding the legal authority for presidential unilateralism in Southeast Asia. For example, they asserted that the President held authority as commander-in-chief to use U.S. combat forces in actions responding to the Tonkin Gulf incidents.⁶²² They additionally claimed that the President already had legal authority to use combat forces within Vietnam, again based on the commander-in-chief power and the power to conduct foreign affairs.

Neither of these claims further defined what constituted “combat forces” or whether this included massive ground force deployments. However, the document later responded to these issues by questioning the limits of the Tonkin Resolution under congressional consideration. It asked, “Does this Joint Resolution constitute an anticipatory declaration of war; that is, does it constitute a delegation of Congress’ constitutional authority to declare war?”⁶²³ It answered: “No. The Joint Resolution in no way affects the constitutional prerogative of the Congress to declare war. A declaration of war, however, has always been thought of as implying a massive commitment of U.S. forces. That is not the case here.”⁶²⁴ The administration clearly comprehended, within its own statements asserting legal authority, that “massive” commitments of military force would constitute *general* war, one requiring a congressional declaration. They provided reassurance that Johnson would not be taking actions akin to a declared war, involving large-scale U.S. force commitments.

⁶²² “Legal Questions and Answers on the Gulf of Tonkin,” August 5, 1964, PLBJ, NSF, Country File: Vietnam, Box 76, Folder: Vietnam 3A (1) 1964 & 1967 Gulf of Tonkin (1 of 2), LBJPL.

⁶²³ Ibid, 5.

⁶²⁴ Ibid, 5.

In a brief 5 August congressional message, Johnson requested a resolution to respond to the alleged regional communist aggression. He framed it as “expressing the unity and determination of the United States in supporting freedom and in protecting peace in Southeast Asia.”⁶²⁵ But he also wanted to make clear that the U.S. “intends no rashness, and seeks no wider war.”⁶²⁶ More importantly, he referenced previous AUMFs:

The Resolution could well be based upon similar resolutions enacted by the Congress in the past—to meet the threat to Formosa in 1955, to meet the threat to the Middle East in 1957, and to meet the threat in Cuba in 1962. It could state in the simplest terms the resolve and support of the Congress for action to deal appropriately with attacks against our armed forces and to defend freedom and preserve peace in southeast Asia in accordance with the obligations of the United States under the southeast Asia Treaty. I urge the Congress to enact such a Resolution promptly and thus to give convincing evidence to the aggressive Communist nations, and to the world as a whole, that our policy in southeast Asia will be carried forward—and that the peace and security of the area will be preserved.⁶²⁷

This was very disingenuous mixed-message. While specifically acknowledging previous AUMFs, Johnson concealed that his administration had *already* drafted its own resolution, not Congress. He also claimed “no wider war” in his message and requested a resolution to “defend freedom” and “protect peace,” yet sought a resolution in the “simplest terms” possible—meaning the greatest feasible vagueness and discretion. As discussed in Chapter Three, the 1950s AUMFs endowed Eisenhower with vast discretionary war power, enough for him to wage a large-scale *offensive* ground war on mainland China. Although he refrained from doing so, the 1955 AUMF’s provisions still exceeded what could reasonably be called limited, explicit, or regulated use of force. Johnson’s message was executive doublespeak

⁶²⁵ Lyndon Johnson, “Special Message to the Congress on U.S. Policy in Southeast Asia,” August 5, 1964. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 9 June 2020, <https://www.presidency.ucsb.edu/node/238756>.

⁶²⁶ Ibid.

⁶²⁷ Ibid.

intended to obtain an AUMF in the broadest terms; ultimately, the resolution unconstitutionally equated to a war declaration.

Senator Morse, in a publicly released response that same day, chastised the Johnson administration for its effort to wage war in Vietnam. He opposed the proposed Tonkin Resolution much like he opposed the Formosa and Middle East resolutions. He viewed it as “naught but a resolution which embodies a predated declaration of war. Article I, section 8 of our Constitution does not permit the President to make war at his discretion.”⁶²⁸ He also claimed that the U.S. was just as much a provocateur as the North Vietnamese, that the U.S. violated the 1954 Geneva Accords by providing extensive military aid and troops—inappropriately termed “military advisers”—to South Vietnam, and that the U.S. imposed a government upon the South Vietnamese, which could only sustain itself through U.S. military support and an escalation of the war.⁶²⁹ Morse argued, “A nation does not have to commit the first violation in order to be in violation of the Geneva Accords. And it does not have to commit aggression in order to be in violation of the United Nations Charter.”⁶³⁰ He claimed that the U.S. violated the U.N. Charter by prioritizing war against North Vietnam over negotiating for peace through international bodies. He also criticized the Tonkin Gulf incidents, questioning why U.S. destroyers were reportedly within North Vietnamese waters while South Vietnamese ships shelled two North Vietnamese islands. It appeared to him that the U.S. destroyers were “standing guard,” actively supporting the South Vietnamese mission, and provoking hostile North Vietnamese responses.⁶³¹

⁶²⁸ U.S. Senate: August 5, 1964, *Congressional Record* (Bound), Volume 110, Part 14, August 4, 1964 to August 12, 1964 (Washington, D.C.: U.S. GPO, 1964), 18133.

⁶²⁹ "Remarks of Senator Morse in Opposition to War in Asia," August 5, 1964, PLBJ, NSF, Country File: Vietnam, Box 76, Folder: Vietnam 3A (1) 1964 & 1967 Gulf of Tonkin (1 of 2), LBJPL.

⁶³⁰ Ibid, 13.

⁶³¹ Ibid, 3.

The Armed Services and Foreign Relations Committees met for a joint hearing the following morning, and the House Foreign Affairs Committee also convened (without a hearing). Senator Dirksen, who previously affirmed his commitment to support U.S. retaliation during the 4 August executive meeting, even recommended skipping committee consideration entirely to expedite congressional enactment.⁶³² His suggestion was rejected, and the committees proceeded with Tonkin Resolution hearings. Rusk and McNamara testified in support of the resolution, and new JCS Chairman General Earle Wheeler also attended to answer questions.

After explaining how the administration interpreted the operative clauses of the resolution, Rusk commented on several other fundamental issues. First, he claimed that the President already possessed inherent authority as commander-in-chief to repel attacks against U.S. forces and prevent further aggression. Second, he noted that the resolution would be limited to only assisting in the defense of SEATO members requesting military support, adding that both Laos and Cambodia publicly rejected assistance. No nation could be assisted that refused military aid, and the resolution did not cover military actions against non-communist aggression.⁶³³ Third, Rusk compared the Tonkin Resolution to the Formosa, Middle East, and Cuba resolutions, and he stated that the authority granted to the President in the Tonkin Resolution was similar to that of the prior resolutions. He did not believe it worthy “to review the constitutional aspect of resolutions of this character,” and he claimed that the prior

⁶³² "Viet Nam Resolution." In *CQ Almanac*, 1964, 20th ed., 33132.

Washington, DC: Congressional Quarterly, 1965. <http://library.cqpress.com/cqalmanac/cqal641304516>.

⁶³³ U.S. Congress: Senate, "Joint Hearing before the Committee on Foreign Relations and the Committee on Armed Services, 88th Congress, 1st Session, on A Joint Resolution to Promote the Maintenance of International Peace and Security in Southeast Asia," August 6, 1964 (U.S. GPO: Washington, D.C., 1966), 2.

resolutions formed “a solid legal precedent for the action now proposed.”⁶³⁴ While providing examples of limited military actions conducted under the aforementioned resolutions, Rusk would not say what types of military actions would be necessary for Southeast Asia under the resolution being considered. He never mentioned the vague and discretionary language within the Tonkin Resolution or the previous resolutions. Moreover, he never discussed whether the Tonkin Resolution would authorize large-scale hostilities equivalent to those under a declared war and whether the resolution would delegate Congress’ powers to declare war and regulate the armed forces to the President.

McNamara recapped both purported Tonkin Gulf incidents against U.S. naval forces and then joined Rusk and Wheeler to answer panel questions. Senator John Sparkman (D-AL) expressed satisfaction that the resolution represented what he believed was a “confirmation or a ratification” of the President’s inherent power to use military force.⁶³⁵ Rusk wholeheartedly agreed, claiming that presidents since Jefferson had “taken the view that the President of the United States has the authority to use the Armed Forces.”⁶³⁶ Yet, it was Jefferson who ordered the navy to the Mediterranean to protect U.S. shipping, without prior congressional approval, at the onset of the First Barbary War. Jefferson quickly acknowledged that he could not order offensive actions because he, as commander-in-chief, was “unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense.”⁶³⁷ Many presidents since Jefferson requested congressional authorization prior to using military force, which undermines Rusk’s argument. If the founders intended for the

⁶³⁴ Ibid, 3.

⁶³⁵ Ibid, 10.

⁶³⁶ Ibid, 11.

⁶³⁷ Thomas Jefferson, "First Annual Message," December 8, 1801. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 10 June 2020, <http://www.presidency.ucsb.edu/ws/?pid=29443>.

President to hold inherent constitutional authority to use force abroad, why then did presidents *ever* bother to request explicit congressional authorization prior to using military force? Rusk's one-dimensional argument failed to account for these numerous examples; he demonstrated a prepossessed singling-out of historical episodes of presidential unilateralism to support his viewpoint. The administration's prior drafting of congressional war authorizations, and Rusk's very presence before Congress *to secure a congressional war authorization*, were both as antithetical to claims of inherent presidential power as they were ironic.

As each committee member voiced his support of the resolution, Morse spoke out to oppose what he considered "an aggressive course of action."⁶³⁸ He then argued with Rusk and McNamara about the lack of evidence to demonstrate that North Vietnam had committed blatant military aggression against South Vietnam, subversive activities aside. However, many Senators on the panel supported the resolution because they viewed it as facilitating immediate military responses to enemy aggression against American forces.

Senator Clifford Case (R-NJ) inquired about the consistency of discretionary language used in the Tonkin Resolution in comparison to the previous resolutions. He asked whether the prior resolutions used "As the President determines" or whether this was the first instance.⁶³⁹ Fulbright replied that the three previous resolutions included comparable language, either: "As he determines" or "As he deems

⁶³⁸ U.S. Congress: Senate, "Joint Hearing before the Committee on Foreign Relations and the Committee on Armed Services," 13.

⁶³⁹ Ibid, 19.

necessary.”⁶⁴⁰ Morse interjected to highlight that there had been substantial conversations about the 1962 resolution during its enactment. He noted that the 1962 resolution provided no authority to the President “by direct language,” which differentiated it from the Formosa and Middle East resolutions.⁶⁴¹ This remark was the last mention of the Tonkin Resolution’s language. At the conclusion of the hearing, both Senate committees voted 31-1 to advance the resolution, with only Morse opposing. The House Foreign Affairs Committee, using the same information provided during the Senate hearing, voted 29-0 to advance an identical measure the same day.⁶⁴²

Congressional debates then proceeded on 6 and 7 August.⁶⁴³ Fulbright endorsed the resolution as a deterrent strategy to respond to future North Vietnamese aggression, comparing hypothetical Tonkin Resolution use favorably to Eisenhower’s use of the Formosa and Middle East resolutions, and Kennedy’s use of the Cuba Resolution.

Section one of the resolution stated:

That the Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.⁶⁴⁴

Section two specified:

The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in southeast

⁶⁴⁰ Ibid, 19.

⁶⁴¹ Ibid, 20.

⁶⁴² “Viet Nam Resolution.” In *CQ Almanac*, 1964, 20th ed., 33132.

Washington, DC: Congressional Quarterly, 1965. <http://library.cqpress.com/cqalmanac/cqal641304516>.

⁶⁴³ Senators Fulbright, Richard Russell (D-GA), Bourke Hickenlooper (R-IA), and Leverett Saltonstall (R-MA) introduced the resolution in the Senate on 5 August after Johnson’s message. Representatives Thomas Morgan (D-PA), Clement Zablocki (D-WI), and Francis Bolton (R-OH) introduced an identical version in the House. This section will only analyze the Senate debates, due to negligible House criticism.

⁶⁴⁴ “Joint Resolution to promote the maintenance of international peace and security in Southeast Asia,” Public Law 88-408, 78 Statute 384, 10 August 1964.

Asia. Consonant with the Constitution of the United States and the Charter of the United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.⁶⁴⁵

Section three provided two options for resolution termination: 1) presidential discretion or 2) a legislative concurrent resolution. The final draft included no appropriations limits, no use of force restrictions, and no set expiration date. This contrasts with earlier drafts, which reflected the political situations at those respective times. The administration exercised greater caution in the preceding drafts, attempting to carefully rationalize any military actions outside of North Vietnamese confrontations.

Senator Richard Russell (D-GA) commented that the Tonkin Resolution's language was “almost identical” to that of those previous resolutions, acknowledging that the grant of power to the President was broad.⁶⁴⁶ He added that the previous resolutions, and their broad grants of authority, were still active under Johnson as they had been under Eisenhower and Kennedy. He hoped that enactment “of the resolution, and the action that may be taken pursuant to it, will achieve the same purpose and avoid any broadening of war, or any escalation of danger.”⁶⁴⁷ Russell failed to comprehend the dangerous implications of his statement. While Eisenhower refrained from waging large-scale hostilities against Communist China or throughout the Middle East, a different President could interpret those same resolutions to undertake general wars. That was the arbitrary nature of these virtually limitless resolutions.

⁶⁴⁵ Ibid.

⁶⁴⁶ U.S. Senate: August 6, 1964, *Congressional Record* (Bound), Volume 110, Part 14, August 4, 1964 to August 12, 1964 (Washington, D.C.: U.S. GPO, 1964), 18410.

⁶⁴⁷ Ibid, 18411.

Only Senators Morse and Ernest Gruening (D-AK) opposed the Tonkin Resolution's discretionary language and its purpose. Morse viewed the South Vietnamese situation as a civil war, one the U.S. should help settle through diplomacy and the U.N., not military intervention. He also restated the reasoning behind his opposition to the Formosa and Middle East resolutions during their enactments and why the same concerning issues were present in the Tonkin Resolution. These resolutions were, as he described, "predated declarations of war," constitutional amendments "by way of joint resolution," and acts vesting "in the President of the United States the power to carry on a so-called preventive war."⁶⁴⁸ The vague and discretionary language of the resolution was particularly concerning, as Morse noted:

First, the unlimited language of the resolution would authorize acts of war without specifying countries, places, or times. That language cannot be reconciled with article I, section 8 of the Constitution. It amounts, in fact as well as in law, to a predated declaration of war...Senators can bemoan and warn against a land war in Asia, but the resolution would put the United States in the middle of the Vietnam civil war, which is basically a land war. Under the resolution Congress would give to the President of the United States great authority, without coming to the Congress and obtaining approval by way of a declaration of war, to carry on a land war in South Vietnam. The choice is left up to him.⁶⁴⁹

He then warned:

There is great danger now that Congress will give to the President of the United States power to carry on whatever type of war he wishes to wage in southeast Asia...the broad, sweeping, sanction of power—note my language, because it cannot be done legally—the broad, arbitrary, sweeping power Congress is sanctioning for the President would in no way stop him from sending as many American boys as he wants to send into South Vietnam to make war.⁶⁵⁰

⁶⁴⁸ U.S. Senate: August 7, 1964, *Congressional Record* (Bound), Volume 110, Part 14, August 4, 1964 to August 12, 1964 (Washington, D.C.: U.S. GPO, 1964), 18445, 18447.

⁶⁴⁹ Ibid, 18448.

⁶⁵⁰ Ibid, 18448.

Morse claimed that this conflict required a war declaration, and this is partly true. However, he did not fully comprehend the history of congressionally enacted AUMFs for limited hostilities beginning with the 1798 Quasi-War. Congress is not required to declare war for small-scale or highly regulated conflicts; it must for general wars. In this situation, where the President sought authority to respond to purported North Vietnamese attacks against American vessels, Congress could enact a resolution authorizing *limited* responses, against *specific* enemies, in *specific* locations, for a *limited* time period. Doing so would have clearly distinguished this limited use of force from that sanctioned under a war declaration.

Gruening echoed Morse's concerns about the broad language:

We are now about to authorize the President if he sees fit to move our Armed Forces—that is, the Army, Air Force, Navy, and Marine Corps—not only into South Vietnam, but also into North Vietnam, Laos, Cambodia, Thailand, and of course the authorization includes all the rest of the SEATO nations. That means sending our American boys into combat in a war in which we have no business, which is not our war, into which we have been misguidedly drawn, which is steadily being escalated. This resolution is a further authorization for escalation unlimited.⁶⁵¹

This criticism was appropriate, as the resolution included no limits on the kinds of force authorized. It also set no territorial prohibitions against the use of force beyond the demilitarized border into North Vietnam or elsewhere. The lack of time limitations further placed the authorization on par with a war declaration. No specific enemies were designated in the resolution; yet, every historical war declaration named the U.S. adversary.

Morse concluded the debate with a final reprimand of Congress:

⁶⁵¹ Ibid, 18469.

Our constitutional rights are no better than our preservation of our procedural guarantees under the Constitution. We are seeking by indirection to circumvent article I, section 8 of the Constitution. Senators know as well as I do that we cannot obtain a test before the U.S. Supreme Court of that attempt to grant warmaking powers to a President by a resolution because under this set of facts we cannot hail the President of the United States before the Supreme Court for a determination of such a question as to the unconstitutionality of the pending resolution. I am sorry, but I believe that Congress is not protecting the procedural, constitutional rights of the American people, under article I, section 8 of the Constitution.⁶⁵²

There are indeed proper constitutional procedures for Congress to follow when it enacts war authorizations. The legislature has two options: declare a general war or authorize limited use of force with explicit regulations and guidelines. These two options cannot be merged into one subject to presidential discretion. Doing so violates the Constitution, eradicating Congress' power to declare general war and regulate the armed forces. Morse's final statement also highlighted the barriers to challenging not only presidential use of force, but also the constitutionality of vague resolutions that delegate congressional war powers to the President.

Despite pleas from Morse and Gruening, the Senate approved the Tonkin Resolution, voting 88-2; the House approved it unanimously (416-0).⁶⁵³ Johnson repeatedly promised prior to the 1964 presidential election not "to send American boys 9 or 10,000 miles away from home to do what Asian boys ought to be doing for themselves."⁶⁵⁴ By the end of the year, however, he had approved a plan to progressively escalate the military intervention in Vietnam.⁶⁵⁵

⁶⁵² Ibid, 18470.

⁶⁵³ Johnson signed the resolution on 10 August.

⁶⁵⁴ Lyndon Johnson, "Remarks in Memorial Hall, Akron University," October 21, 1964. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 17 June 2020, <https://www.presidency.ucsb.edu/node/242136>.

⁶⁵⁵ Mark Lawrence, *The Vietnam War: A Concise International History* (Oxford: Oxford University Press, 2008), 85.

On 7 February 1965, Johnson authorized the bombing of North Vietnamese bases after Viet Cong attacks on U.S. forces at Pleiku. The U.S. began a large-scale bombing campaign of North Vietnam (Operation Rolling Thunder) just weeks later on 2 March. Two battalions of U.S. Marines arrived to defend Da Nang airfield on 8 March, and ground force numbers reached 184,300 by the end of 1965. These numbers increased to 385,300 in 1966 and 485,600 in 1967.⁶⁵⁶ President Nixon continued expansive and discretionary use of the Tonkin Resolution in Vietnam upon taking office, with ground forces reaching a maximum of 543,400 in 1969. He even ordered secret bombings and offensive ground operations in Cambodia.⁶⁵⁷

The progressive military escalation and shift to large-scale offensive warfare under Johnson and Nixon did not go unchallenged in the federal courts. Decisions regarding conscription and other issues related to the war were also contested through lawsuits.⁶⁵⁸ However, the federal courts dismissed countless cases challenging the constitutionality of the Vietnam War, considering the issues as political questions to be resolved between Congress and the President.⁶⁵⁹ The dismissal of these cases exemplified the consequences of what Morse warned about during Tonkin Resolution debate. Discretionary war authorizations, and many of the issues resulting from them, are practically immune from constitutional challenge in federal courts.

⁶⁵⁶ Ibid, 89, 90, 102.

⁶⁵⁷ Ibid, 102, 140, 146.

⁶⁵⁸ See *Massachusetts v. Laird*, 400 U.S. 886 (1970); *U.S. v. Sisson*, 399 U.S. 267 (1970). In *Massachusetts*, the Commonwealth of Massachusetts enacted a statute declaring that residents were not required to serve unless Congress declared war. The Supreme Court refused to hear the case based on lack of jurisdiction. In *Sisson*, the Supreme Court ruled that the government could not appeal a lower court judge's directed acquittal of a conscientious objector due to lack of jurisdiction.

⁶⁵⁹ For example, see *Luftig v. McNamara*, 252 F. Supp. 819 (1966); *Mora v. McNamara*, 389 U.S. 934 (1967); *Commonwealth of Massachusetts v. Laird*, 400 U.S. 886 (1970); *Berk v. Laird*, 317 F. Supp. 715 (1970); *Mitchell v. Laird*, 488 F.2d 611 (1973). In *Mitchell*, Representative Parren Mitchell (D-MD) along with 12 other House members filed a lawsuit to halt the war in Southeast Asia.

As the Vietnam War escalated with no foreseeable resolution, Johnson's once reliable congressional support eroded. Even William Fulbright, a trusting ally who was instrumental in securing Senate support for the Tonkin Resolution, lamented the measure's approval and Johnson's plenary use of it. Fulbright explained that the legislators "who accepted the Gulf of Tonkin resolution without question might well not have done so had they foreseen that it would subsequently be interpreted as a sweeping Congressional endorsement for the conduct of a large-scale war in Asia."⁶⁶⁰ Both Fulbright and the Senate failed to uphold their constitutional duties to adequately scrutinize the vaguely worded and discretionary AUMF proposed by the administration. Had Congress done so, according to Fulbright, it "might have put limits and qualifications on our endorsement of future uses of force in South-East Asia, if not in the resolution itself then in the legislative history preceding its adoption."⁶⁶¹ This remark is especially significant, because Fulbright had just outlined the features required for the enactment of limited war AUMFs: explicit limitations, regulations, guidelines, and qualifications on presidential use of force.

Under Nixon, Congress increased its activism to regulate presidential use of force. In his first term alone there were 80 congressional roll call votes concerning presidential use of force in Southeast Asia, compared with just 14 from 1966 to 1968.⁶⁶² Many legislative proposals featured restricting war appropriations, prohibiting the use of ground forces outside of Vietnam, and attempting to set a withdrawal deadline.⁶⁶³ The Nixon administration resisted these proposals, claiming they would intrude upon the President's commander-in-chief power. Yet, Nixon's aggrandizement of executive

⁶⁶⁰ J. William Fulbright, *The Arrogance of Power* (New York: Random House: 1967), 57-59.

⁶⁶¹ Ibid, 57-59.

⁶⁶² Julian Zelizer, "How Congress Helped End the Vietnam War," *The American Prospect*, 6 February 2007, Accessed: 18 June 2020, <https://prospect.org/article/congress-helped-end-vietnam-war/>.

⁶⁶³ Ibid.

power had no legal basis, while Congress has broad constitutional authority to regulate the armed forces, including the commander-in-chief.

Congress also repealed the Tonkin Resolution in 1971 within a law amending the Foreign Military Sales Act.⁶⁶⁴ This did not, however, end U.S. military involvement in Southeast Asia. Further measures were needed to curb presidential unilateralism and reassert congressional oversight on foreign policy. In November 1973, Congress enacted the War Powers Resolution (WPR) over Nixon's veto to restrain unauthorized presidential war making. The resolution consists of nine substantive sections. Section two directs that the "collective judgment of both Congress and the President" is required for the use of force in hostile situations.⁶⁶⁵ It defines the President's commander-in-chief power as limited to the defense of U.S. territory and protection of armed forces against attack, with some form of congressional authorization being required for all other instances. Section three details consultation requirements with Congress prior to and during the use of force. Section four sets reporting requirements after military forces are introduced without a war declaration. The President is required, within 48 hours after hostilities commence, to send reports to the House and Senate explaining the situation requiring force, the legal justifications for its use, and the anticipated scope and timeframe for hostilities. Congress must continue to receive updates at least once every six months.⁶⁶⁶

Sections five, six, and seven specify congressional action requirements in response to executive reporting and set legislative procedures to prioritize joint and concurrent

⁶⁶⁴ See §12 of "An Act To amend the Foreign Military Sales Act, and for other purposes," P.L. 91-672, 12 January 1971.

⁶⁶⁵ "War Powers Resolution," P.L. 93-148, November 7, 1973, §2(a).

⁶⁶⁶ Ibid.

resolutions. Section five is significant for setting a 60-day deadline for the President to terminate the use of force unless Congress declares war, enacts an AUMF, extends the deadline by law, or if Congress cannot convene due to attack. It allows the President to extend the 60-day deadline by 30 additional days if he “determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.”⁶⁶⁷ It also allows Congress to force the withdrawal of U.S. forces if both the House and Senate approve concurrent resolutions (which do not require presidential signature). Section eight provides a detailed interpretation of the resolution’s wording. Section nine states that, should certain sections be invalidated through litigation, the other sections of the resolution still apply.⁶⁶⁸ Since WPR enactment, many presidents have claimed that it unconstitutionally seeks to restrict executive authority to command and use the military. Yet, those seeking to curb executive transgressions argue the WPR unconstitutionally permits unauthorized presidential wars.

There are numerous WPR issues concerning its constitutionality and effectiveness. First, Congress sought to restrain presidential power, yet allocated to the President 60-90 days to conduct unauthorized military operations.⁶⁶⁹ Congress altered constitutional powers through enactment of a federal law rather than amendment of the Constitution. There is nothing in the Constitution that allows the executive to conduct unauthorized military actions abroad. Granting the President any period of time to undertake unauthorized actions empowers him with just as much discretionary

⁶⁶⁷ Ibid, §5(b).

⁶⁶⁸ Ibid.

⁶⁶⁹ Louis Fisher and David Gray Adler, “The War Powers Resolution: Time to Say Goodbye,” *Presidential Studies Quarterly*, Volume 113, Number 1 (Spring 1998): 1-20.

authority as a vague AUMF. It sets no regulations or guidance concerning enemy targets, approved locations, types of force authorized, numbers of force authorized, and appropriations. The President can conduct limited or general warfare as he chooses over 60-90 days, without a war declaration or conflict-specific AUMF.

Second, the enacted WPR included no provisions to restrict the use of force pursuant to the U.N. Charter. While the U.S. is authorized under the U.N. Charter to conduct unilateral military actions for “individual or collective” self-defense, the Charter also states that all members “shall refrain” from threatening or using military force against other states.⁶⁷⁰ The UNSC is empowered to enact AUMFs should situations arise requiring the use of force.⁶⁷¹ The President is principally bound to follow the Constitution, but international law plays a role in setting multilateral conditions prior to the use of military force abroad. When the Senate ratified the U.N. Charter in 1945, its provision against the use of force became a part of U.S. law. This international treaty supplemented established constitutional principles that permit legal regulations of the armed forces and commander-in-chief. The President is required to obtain *both* UNSC sanction and congressional authorization (in either order) before military force can be used outside of national self-defense. Yet, the WPR neglected to include any statements about international law restrictions on presidential war powers.

Third, the WPR did not resolve the issue of permitting the enactment of vague and discretionary AUMFs. It did not acknowledge that congressional scrutiny of the Tonkin Resolution’s vague and discretionary language, and its constitutional implications, had been neglected during its enactment. It also did not acknowledge

⁶⁷⁰ U.N. Charter, Article 51; Article 2(4).

⁶⁷¹ Ibid, Article 42.

that the Johnson administration sought to obtain as broad a resolution as possible and drafted its own AUMF. There were no prohibitions against Congress accepting executive-drafted war authorizations. Additionally, it did not even recognize that the resolution's textual vagueness and discretionary provisions enabled Johnson and Nixon to legally justify the military escalation and prolonged continuation of the Vietnam War. The WPR effectually functions as a 60-90 day discretionary AUMF, delegating to the President plenary power to use force within this timeframe. There is nothing within the text that prevents the President from continuing unauthorized use of force beyond 60-90 days by claiming that a “new” conflict has begun and reporting it to Congress (within 48 hours).

Fourth, the WPR has failed to prevent unauthorized presidential war making and reassert Congress as the essential war-authorizing branch.⁶⁷² There have been several instances of presidential use of force beyond the resolution's time limits, without procedures being implemented to congressionally authorize the respective hostilities.⁶⁷³ Presidents have also refused to acknowledge the resolution's constitutionality. For example, Nixon asserted that the WPR clearly defined presidential power “in ways which would strictly limit his constitutional authority.”⁶⁷⁴ Just as the Supreme Court has refused to review the constitutionality of vague AUMFs that provide presidents with discretionary power to define the limits of the

⁶⁷² Presidents from Ford to Trump have filed 105 total reports, yet Congress has not enacted or rejected 105 distinct AUMF resolutions (Nixon filed no reports). See “Reports,” Reiss Center on Law and Security, NYU School of Law, Accessed: 24 June 2020, <https://warpowers.lawandsecurity.org/reports/>.

⁶⁷³ For example, President Bill Clinton used military force beyond the 60-day limit during the 1999 bombing of Kosovo, but he withdrew U.S. forces prior to the 90-day limit. In 2011, President Barack Obama used force beyond the 60-day limit during bombing operations in Libya. The administration argued that no congressional authorization was required, claiming that the effort was NATO-led with limited U.S. involvement.

⁶⁷⁴ Richard Nixon, “Veto of the War Powers Resolution,” October 24, 1973. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 2 July 2020, <https://www.presidency.ucsb.edu/node/255456>.

law, it has also rejected WPR review on its constitutional merits. However, in *INS v. Chadha* (1983) Justice Byron White noted that the provision requiring the withdrawal of military forces by concurrent congressional resolution would classify as an unconstitutional legislative veto. While the case and majority opinion did not directly concern the WPR, the Court would likely invalidate this provision upon judicial review.⁶⁷⁵

Conclusions

The Vietnam War enveloped Southeast Asia as a wider conflict, causing a staggering amount of suffering and casualties to all actors involved. This included U.S. and pro-North Vietnamese military and insurgency forces but also an incalculable number of civilians. According to U.S. government statistics, 58,220 American soldiers died during the conflict.⁶⁷⁶ Vietnamese combatants and civilians suffered far greater losses, variously estimated at between one million to three million in total.⁶⁷⁷ The U.S. fully withdrew from Vietnam on 30 April 1975 during the Fall of Saigon, when North Vietnamese forces captured the South Vietnamese capital finally ending the war. The conflict also came at a great economic cost to the U.S. The *New York Times* reported in May 1975 that the American government spent \$141 billion dollars for the Vietnam

⁶⁷⁵ See *INS v. Chadha*, 462 U.S. 971; “War Powers Resolution,” §5(c).

⁶⁷⁶ “Vietnam War U.S. Military Fatal Casualty Statistics,” U.S. National Archives, Last modified January 11, 2018, <https://www.archives.gov/research/military/vietnam-war/casualty-statistics>. This record, current as of 29 April 2008, covers the period of conflict from 1956 to 2006.

⁶⁷⁷ Charles Hirschman, Samuel Preston, and Vu Manh Loi, “Vietnamese Casualties During the American War: A New Estimate,” *Population and Development Review*, Volume 21, Issue 4 (December 1995): 789. Hirschman, Preston, and Loi estimate one million Vietnamese combatant deaths from 1965 to 1975. The Vietnamese Government reported 3.1 million deaths in 1995 (1.1 million combatant and two million civilian deaths). See, Associated Press, “Vietnam unveils war casualties,” 3 April 1995; Philip Shenon, “20 Years After Victory, Vietnamese Communists Ponder How to Celebrate,” *The New York Times*, 23 April 1995, <https://www.nytimes.com/1995/04/23/world/20-years-after-victory-vietnamese-communists-ponder-how-to-celebrate.html>.

War.⁶⁷⁸ A lower U.S. government estimate of the war cost puts it at \$111 billion dollars from 1965 to 1975.⁶⁷⁹ The conflict consumed 2.3 percent of U.S. GDP in 1968, the peak year of war spending.⁶⁸⁰

Questions will always remain regarding whether the Johnson administration could have solved the difficulties within Southeast Asia through diplomacy and mediation, instead of through military intervention and escalation. However, Johnson desired to maintain the greatest flexibility in policy, unequivocally sought a broad AUMF, and was mindful of the Tonkin Resolution's lack of restrictions for supposedly "limited" responses to attacks on U.S. forces. The 1971 *New York Times* publication of the *Pentagon Papers* further revealed the administration's intentions for a discretionary war authorization equivalent to a war declaration in the months preceding the 1964 Tonkin Gulf incidents.⁶⁸¹ These leaked documents exposed the gap between what the Johnson administration was publicly stating versus its private planning before and after escalation of the conflict.

Although Johnson and executive officials, notably McGeorge Bundy, claimed that they did not foresee a full-scale general war, the congressionally enacted Tonkin Resolution sanctioned exactly that. The President had the discretion to escalate the conflict and wage a general war in Southeast Asia. The Tonkin Resolution contained no time, location, enemy, appropriations, or type of force limits. Again, there is a critical difference between what type of conflict a presidential administration *envisages* and what type of conflict Congress *authorizes*.

⁶⁷⁸ "U.S. Spent \$141-Billion In Vietnam in 14 Years," *The New York Times*, 1 May 1975, <https://www.nytimes.com/1975/05/01/archives/us-spent-141billion-in-vietnam-in-14-years.html>.

⁶⁷⁹ Stephen Daggett, *Costs of Major U.S. Wars*, Congressional Research Service, RS22926 (2010), 2.

⁶⁸⁰ Ibid.

⁶⁸¹ Neil Sheehan, *The Pentagon Papers* (New York: The New York Times, 1971), 234.

Furthermore, the Tonkin Gulf incidents were used as pretexts for U.S. intervention, but there were numerous other potential incidents that could have also served to justify a military response. For example, the administration could have tried to obtain a war authorization based on U.S. reconnaissance aircraft being shot down over Laos. In fact, had it been committed to getting an authorization much earlier, this pretext would have served just as well to obtain a congressional authorization. The administration understood throughout 1964 that any congressional resolution would mean an escalation, in some fashion, of U.S. military force in Southeast Asia. The exact extent of this escalation was intentionally left unclear to empower the President with wide latitude to take whatever actions he felt necessary. It is symbolic, perhaps ironic, that the administration wanted to clear the legislative table of the domestic Civil Rights Act, while continuing to deprive the Vietnamese of their own civil rights to national sovereignty by refusing to hold reunification elections.

If there had been no elections in 1964, the administration would have likely pressed Congress to enact a war authorization much earlier. Johnson's number one priority was getting re-elected in the fall. He did not want to be perceived as a warmonger or a supporter of oppressive South Vietnamese regimes, so he and his officials had to be cautious about how they presented the conflict in Southeast Asia. Although it is possible that Johnson could have obtained an earlier authorization, many administration officials advised waiting until an incident occurred with North Vietnam to then force a war authorization through Congress with little debate and opposition.

Although Johnson mentioned that he did not believe a war authorization was required for him to intervene, it is also clear that the administration did not wish to take major military actions without one. Clear distinctions can be drawn between the meetings held at the outbreak of the Korean War in 1950, during the battle at Dien Bien Phu in 1954, and prior to the Tonkin Gulf incidents in 1964. The Truman administration sought to suppress any dialogue about a congressional war authorization, claiming that the UNSC resolutions justified any presidential unilateralism. The Eisenhower administration, on the other hand, began its planning for a possible war authorization and groundwork with Congress far too late as the situation rapidly declined for the besieged French. Johnson and his administration, however, had determined long before any attack or incident that they would try to obtain a highly favorable authorization and how they would get congressional support to most effectively facilitate its enactment. This demonstrates that executive strategizing, the manner in which it portrays incidents, and the level of executive groundwork with legislators prior to sending an *executive*-drafted authorization to Congress is most significant. The executive branch can exert extraordinary supremacy over Congress when it carefully strategizes how to control the legislative process; this includes the drafting and enactment process of highly discretionary and largely undefined war authorizations.

Lastly, Congress attempted to reassert legislative oversight concerning the use of military force amid an expanding Vietnam War. Although the WPR was enacted over Nixon's veto to restrain unauthorized presidential war making, the measure has failed to achieve its intended objectives of reasserting constitutional checks and balances in the initiation and conduct of hostilities. It did not address the U.N. Charter,

overlooked the issue of vague and discretionary AUMFs, and delegated 60-90 days to the President to use unfettered military force. By setting this period to use force, the WPR further provided the President with unconstitutional discretionary authority to conduct both limited and large-scale *unauthorized* military operations. Congress' failure to observe the warnings of Senators Morse and Gruening regarding the language of the Tonkin Resolution had a lasting effect. The legislature's insufficient and unconstitutional WPR not only instilled a false sense of confidence in the congressional ability to restrain unauthorized presidential war making, it also set the stage for the most vague and discretionary AUMFs to follow.

Chapter Five

“More complicated, more volatile, and less predictable”: Presidential Unilateralism and the 1991 Persian Gulf AUMF⁶⁸²

We do not want to unleash a War Powers debate [over the use of force], nor do most of the senators, so we're going to keep working the problem...My gut wonder is, how long will they be with us? How long will the Senate stay supportive, or the House? As long as the people are with us, I've got a good chance. But once there starts to be erosion, they're going to do what Lyndon Johnson said: they painted their asses white and ran with the antelopes.

—George H.W. Bush
Diary, 13 September 1990⁶⁸³

From the end of the tumultuous Vietnam War era to the collapse of the Soviet Union, the U.S. endured a so-called “Vietnam syndrome,” a public aversion to sustained large-scale military interventions overseas.⁶⁸⁴ President George H.W. Bush understood this American antipathy toward intervention during the 1990-1991 Persian Gulf conflict. He even proclaimed in his January 1991 national radio address, prior to offensive military action against Iraq, “there will be no more Vietnams.”⁶⁸⁵ Bush and his predecessors learned from Lyndon Johnson’s nightmare of deteriorating congressional support for an authorized, but highly discretionary, presidential conflict in Southeast Asia. Yet, Bush also comprehended that he needed sustained American media support, which had formerly stunned viewers with highly negative depictions

⁶⁸² This chapter’s title was inspired by a phrase from the National Security Strategy of the United States, The White House, Washington, D.C., 1 August 1991, 2.

⁶⁸³ George Bush and Brent Scowcroft, *A World Transformed* (New York: Vintage Books, 1998), 371-372.

⁶⁸⁴ For more on the notion of a “Vietnam Syndrome,” its relation to the 1990-1991 Persian Gulf War, and the post-Cold War era, see Geoff Simons, *Vietnam Syndrome: Impact on U.S. Foreign Policy* (London: Macmillan Press, 1998).

⁶⁸⁵ “Radio Address to the Nation on the Persian Gulf Crisis,” January 5, 1991, Public Papers of George Bush, George H.W. Bush Presidential Library and Museum, Accessed: 20 November 2018, <https://bush41library.tamu.edu/archives/public-papers/2596>.

of U.S. involvement in Vietnam.⁶⁸⁶ Consequently, in 1991 the media was employed to transform brutal Persian Gulf warfare into American home entertainment, televised 24-hours a day for public consumption, contrasting greatly from the torturous spectacle presented during the Vietnam War. U.S. military success and the televised glorification of violence against an Arab army would, for many Americans, compensate for America's loss to Asian militants in the Vietnam War.⁶⁸⁷

Although the U.S. had avoided major overseas interventions employing substantial ground forces since the end of the Vietnam War in 1975, the 1990s brought new foreign policy dilemmas requiring consideration of a large-scale military deployment. Changing international conditions impacted these crises, especially with the dissolution of the Soviet Union. Bush would not only have to respond to international aggression, he would also have to attempt to define a unipolar world without a clear challenger to nascent U.S. hegemony.⁶⁸⁸ His vision, a New World Order, would seemingly involve greater involvement from multilateral institutions and increased international cooperation through coalitions to establish "order, peace, democracy and

⁶⁸⁶ John Dumbrell, *Vietnam: American Involvement at Home and Abroad* (Halifax: Ryburn Publishing Services, 1992), 18.

⁶⁸⁷ Simons, *Vietnam Syndrome*, 335.

⁶⁸⁸ For more on the Bush administration's foreign policy, see Steven Hurst, *The Foreign Policy of the Bush Administration: In Search of a New World Order* (London: Cassell, 1999); George Bush and Brent Scowcroft, *A World Transformed* (New York: Vintage Books, 1998); George Bush, *All the Best, George Bush: My Life in Letters and other Writings* (New York: Scribner, 2013); Hal Brands, *From Berlin to Baghdad: America's Search for Purpose in the Post-Cold War World* (Lexington: University Press of Kentucky, 2008) and *Making the Unipolar Moment: U.S. Foreign Policy and the Rise of the Post-Cold War Order* (Ithaca: Cornell University Press, 2016); Roman Popadiuk, *The Leadership of George Bush: An Insider's View of the Forty-First President* (College Station: Texas A&M University Press, 2009). For further reading on post-Cold War international relations, see Charles Krauthammer, "The Unipolar Moment," *Foreign Affairs*, Volume 70, Number 1 (1990/1991): 23-33; Robert Tucker and David Hendrickson, *The Imperial Temptation: The New World Order and America's Purpose* (New York: Council on Foreign Relations Press, 1992); John Ruggie, *Winning the Peace: America and World Order in the New Era* (New York: Columbia University Press, 1996); Andrew Bacevich, "'Splendid Little War': America's Persian Gulf Adventure Ten Years On," in *The Gulf War of 1991 Reconsidered*, eds. Andrew Bacevich and Efraim Inbar (London: Frank Cass Publishers, 2003), 149-164.

free trade.”⁶⁸⁹ Bush and National Security Advisor Brent Scowcroft produced the New World Order phrase to provide a domestic rational for a U.S. foreign policy, based on justice and morality, of increased global activism.⁶⁹⁰

But would this paradigm also entail greater congressional involvement regarding presidential decisions to take or escalate military action abroad? And would Congress attempt to restrict discretionary presidential power in its AUMFs? This chapter will answer these questions by providing context to the Persian Gulf War, highlighting the Bush administration’s unilateral military actions in the Gulf after the Iraqi invasion of Kuwait, providing detail on executive branch efforts for an AUMF, and analyzing *Dellums v. Bush*, the legal challenge to Bush’s unilateral executive actions.

While Bush and administration officials initially proceeded unilaterally in the Persian Gulf with the *defensive* Operation Desert Shield, certain legislators demanded that Bush not act *offensively* without an AUMF. Representative Dante Fascell (D-FL), chairman of the House Foreign Affairs Committee, drafted and presented a more restrictive AUMF (relative to the 1964 Tonkin Resolution), which largely inhibited executive branch strategizing for a broad and executive-favoring AUMF. The UNSC also approved several significant resolutions in the early days of the crisis, initially calling for a non-military solution to Saddam Hussein’s invasion and occupation of Kuwait. I contend, accordingly, that the Bush administration failed to preempt Congress prior to Iraq’s invasion to secure a preferred AUMF; it was reactionary and suffered serious political and legal consequences. This resulted in an AUMF largely consistent with the UNSC resolutions that excluded provisions sanctioning regime

⁶⁸⁹ Hurst, *Foreign Policy of the Bush Administration*, 129.

⁶⁹⁰ Brands, *From Berlin to Baghdad*, 80-85.

change in Iraq. The Persian Gulf War was thus more restricted in comparison to the Vietnam War. Bush exercised restraint and did not act to oust Saddam from power, which would have exceeded UNSC mandates.

However, Congress committed errors in the process, most notably in its failure to distinguish between whether it needed to declare a general war or authorize limited use of military force against Iraq. With the troop buildup in Saudi Arabia, the looming hostilities would undoubtedly be large-scale in nature, if *offensive* force was needed. Congress failed to enact a war declaration against Iraq; it instead enacted a discretionary AUMF—albeit concurrent to UNSC resolutions—allowing the President to decide all matters regarding the use of military force.

The U.S. victory in the Gulf War is often accompanied by a discussion of its renewed willingness to undertake large-scale military interventions globally since the Vietnam War—thus, rationalizing usage of the proverbial “kicking of the Vietnam syndrome” and “new world order” of greater American military involvement.⁶⁹¹ Yet, the U.S. did not “kick the Vietnam syndrome” post-Gulf War, it only rejected the recklessness of presidential unilateralism, demonstrated during the Korean War, for large-scale military interventions *without* congressional authorization—what we should call kicking the “Korean War syndrome.” The “Vietnam syndrome,” as this thesis defines it, was Lyndon Johnson's failure to win an ill-defined and unpopular war overseas. It

⁶⁹¹ See Joseph Nye, Jr., “What New World Order?” *Foreign Affairs*, Vol. 71, No. 2 (Spring 1992): 83-96; Charles Krauthammer, “Bless Our Pax Americana,” *The Washington Post*, 22 March 1991, Accessed: 5 July 2020, <https://www.washingtonpost.com/archive/opinions/1991/03/22/bless-our-pax-americana/9986eb79-4f4b-4f0a-847d-f36db98fb755/>; Stephen Biddle, “Victory Misunderstood: What the Gulf War Tells Us about the Future of Conflict,” *International Security*, Vol. 21, No. 2 (1996): 139-179; H.R. McMaster, “Kicking the Vietnam Syndrome,” *National Review*, Vol. 55, No. 19 (2003): 9; Spencer Bakich, *Success and Failure in Limited War: Information and Strategy in the Korean, Vietnam, Persian Gulf, and Iraq Wars* (Chicago: University of Chicago Press, 2014).

also embodied the congressional acquiescence to enact a vague war authorization that empowered Johnson with vast discretionary power—equal to that of a declared war, if Johnson so desired—in the Tonkin Resolution. This redefined “Vietnam syndrome” has never been vanquished; it continued beyond the Gulf War into the 21st century, in the War on Terror and the Iraq War. The Gulf War reinforced the tradition of enacting authorizations similar to the Tonkin Resolution in being largely dependent on presidential discretion and lacking explicit AUMF limitations and guidelines.

Part I: Background to the Persian Gulf Crisis

The 1991 AUMF and subsequent U.S.-led military intervention to expel Iraqi forces from Kuwait cannot be fully understood unless we examine the preceding 1980s conflict: the Iran-Iraq War. The 1979 Iranian Revolution, with its anti-monarchy and anti-Western capitalist doctrines rapidly produced Gulf instability. The new Islamic Republic of Iran vilified the Gulf state monarchies, such as Saudi Arabia and Kuwait, as being corrupt, immoral, un-Islamic, and complicit in satisfying an oil-hungry West to the detriment of their own national interests and sovereignty.⁶⁹²

Iraq, controlled by authoritarian dictator Saddam Hussein, invaded Iran on 22 September 1980 to establish itself as the dominant regional economic and military power and extinguish the revolutionary regime of its longtime rival. Iran claimed that Saudi Arabia and Kuwait signed a secret deal on 12 September 1980 to increase their oil production and use the additional capital to finance Iraq’s war. Saddam indeed accepted considerable loans from the Gulf states to finance its war. Saudi Arabia loaned Iraq \$10 billion dollars by the end of the first year of the war in 1981. The

⁶⁹² Dilip Hiro, *The Longest War* (New York: Routledge, 1991), 75.

Saudis clearly sought to provide enough initial financial support for Iraq to swiftly defeat Iran. Kuwait, lacking a substantial military, would have to rely on Iraq's regional military power to provide for its defense. It also allowed Iraq to use its ports, airfields, and highways. Iran launched airstrikes on Kuwaiti border installations in November 1980 due to this Iraqi support. In response to these attacks and Iraq's failed invasion of Iran, Kuwait provided several \$2 billion dollar interest-free loans to Iraq in fall 1980, April 1981, and December 1981. Saudi Arabia and Kuwait continued to financially support Iraq, providing funds totaling \$4 billion dollars in 1984.⁶⁹³

American economic interests in the Middle East, especially access to oil, meant that Iran's apparent religious extremism and anti-West doctrine posed a threat equal to that of Soviet communism. The U.S., like the Saudis and Kuwaitis, thus supported Iraq during the war. U.S. trade with Iraq totaled \$1 billion dollars from 1983 to 1984, three times that between Iraq and the Soviet Union.⁶⁹⁴ It provided military equipment and weapons to Iraq, utilizing third-country Arab allies for arms sales and retransfers.⁶⁹⁵ It also provided commercial loans to Iraq of \$5 billion dollars to be spent on American agricultural products and permitted Iraqi acquisitions of trucks, cargo planes, and helicopters that would be used in the war, and President Ronald Reagan's administration removed Iraq from the list of nations supporting terrorism in February 1982.⁶⁹⁶ This effort to arm Iraq demonstrated an unequivocal U.S. attempt to

⁶⁹³ Ibid, 76-77, 156.

⁶⁹⁴ Ibid, 159.

⁶⁹⁵ Michael Klare, "Arms Transfers to Iran and Iraq during the Iran-Iraq War of 1980-88 and the Origins of the Gulf War," in *The Gulf War of 1991 Reconsidered*, eds. Andrew Bacevich and Efraim Inbar (London: Frank Cass Publishers, 2003), 3-24.

⁶⁹⁶ Ibid.

court a Middle East dictator to defeat Iran and further American interests in the region.⁶⁹⁷

The war concluded in August 1988 and produced several significant outcomes. Despite receiving massive financial and military support, Iraq was unable to decisively defeat Iran economically or militarily. Iraq was also well armed with advanced weapons and aircraft, fielding a formidable regional military, but its economy and infrastructure were destroyed as a consequence of the war. It faced an enormous debt of \$60 billion dollars, and it had to resolve whether the loans taken during the conflict would be forgiven or need to be repaid to its foreign creditors, principally the Saudi and Kuwaiti governments.⁶⁹⁸ Iraq faced a serious economic crisis with no apparent solution. Its economy lacked diversification, being highly dependent on exporting oil, and these types of economies are highly unstable and tied to international market oil prices.⁶⁹⁹ Iraq's 1980 production fell dramatically from 3.4 million barrels per day in August to 140 thousand barrels per day by October.⁷⁰⁰ The price of oil also dropped considerably due to increased production by the other Gulf states.⁷⁰¹ Iraq's oil income thus declined greatly during the early war years, from \$26 billion dollars in 1980 to \$9 billion dollars by 1982.⁷⁰² Post-war capital amassed from oil exports had to be spent on maintaining the massive military, which could not be reduced, because Iraqi soldiers could not be reintegrated into the economy for lack of jobs.⁷⁰³

⁶⁹⁷ Hurst, *Foreign Policy of the Bush Administration*, 87.

⁶⁹⁸ Klare, "Arms Transfers."

⁶⁹⁹ Atif Kubursi, "Oil and the Iraqi Economy," *Arab Studies Quarterly*, Volume 10, Number 3 (Summer 1988): 283-298.

⁷⁰⁰ Ibid.

⁷⁰¹ Klare, "Arms Transfers."

⁷⁰² Charles Tripp, *A History of Iraq* (Cambridge: Cambridge University Press, 2007), 227.

⁷⁰³ Klare, "Arms Transfers." Mass unemployment would have caused widespread unrest.

By 1990, Iraq's relationship with the Gulf states had deteriorated because of what Saddam asserted were abuses against Iraq. In May, he claimed Kuwait breached their OPEC production quotas, which drove down the price of oil and prevented Iraq from raising money for economic recovery. He also claimed that Kuwait stole oil from Iraqi fields and unjustly asked for loan repayments when, under Saddam's interpretation, Iraq provided for Kuwait's defense during the war—meaning the Kuwaitis should have forgiven the loans and viewed them as defense payments.⁷⁰⁴ In his 17 July Revolution Day speech, Saddam openly criticized Kuwait and the United Arab Emirates for pushing oil prices down, which he considered a treacherous act, and shortly after this speech he began to mobilize Iraqi military forces on the Kuwaiti border.⁷⁰⁵ Invading the oil-rich Kuwait would allow Saddam to appropriate its wealth into the struggling Iraqi economy and begin an economic recovery program.⁷⁰⁶ Consequently, when Saddam finally invaded Kuwait on 2 August 1990, he had specific economic motivations and his own political survival at stake by occupying the nation and refusing to withdraw.

Part II: U.S. Executive Action During the Gulf Crisis

Upon notification of the Iraqi invasion in the early morning of 2 August, Bush took immediate unilateral actions without congressional approval. He had few options, since Kuwait had not formally requested military assistance, so he ordered naval vessels in the Indian Ocean and a group of F-15 fighter jets to move towards the

⁷⁰⁴ Ibid.

⁷⁰⁵ Hurst, *Foreign Policy of the Bush Administration*, 88.

⁷⁰⁶ Efraim Karsh, "The Middle East and the Gulf War: A Decade Later," in *The Gulf War of 1991 Reconsidered*, eds. Andrew Bacevich and Efraim Inbar (London: Frank Cass Publishers, 2003), 167-179.

Persian Gulf.⁷⁰⁷ This was the beginning of what would be called Operation Desert Shield, the mission to prevent Iraq from invading Saudi Arabia and seizing its oil assets. Bush also signed an Executive Order, freezing Iraqi and Kuwaiti financial assets within the U.S. and prohibiting trade with Iraq.⁷⁰⁸ With so little time to respond to Iraq's rapid seizure of Kuwait, the administration decided to protect U.S. oil interests in Saudi Arabia and elsewhere in the Gulf.

Later in the morning, the UNSC approved Resolution 660 by a unanimous 14-0 vote (Yemen abstained). It condemned the invasion and called for immediate withdrawal of Iraqi military forces. Bush answered questions from reporters in the Cabinet Room but refused to publicly announce whether the U.S. would intervene with the military. He later wrote, "The truth is, at that moment I had no idea what our options were... What I hoped to convey was an open mind about how we might handle the situation until I learned all the facts."⁷⁰⁹ This early indecisiveness illustrates how the administration had not considered what its response would be, or how it might obtain an AUMF, well before Iraq invaded Kuwait.

Stephen Rademaker, Associate Counsel to the President, drafted a memo on 3 August for Counsel to the President C. Boyden Gray to present to Bush. He outlined the advantages and disadvantages of a war declaration against Iraq, where they fit constitutionally, and the consequences of enactment.⁷¹⁰ He recommended that Bush first consider the risks of U.S. involvement in hostilities and estimate the conflict's

⁷⁰⁷ Bush and Scowcroft, *A World Transformed*, 314.

⁷⁰⁸ See George Bush, "Executive Order 12722—Blocking Iraqi Government Property and Prohibiting Transactions with Iraq," August 2, 1990. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 8 December 2018, <https://www.presidency.ucsb.edu/node/269016>.

⁷⁰⁹ Bush and Scowcroft, *A World Transformed*, 315.

⁷¹⁰ "Memo from Rademaker to Gray," August 3, 1990, RPGC, CBGF, MF, Folder: War Powers (Iraq-Kuwait) (2), GHWBPL.

duration before deciding to seek any congressional resolution. Rademaker explained that a war declaration entitles a nation to certain privileges under international law, including: the right to intern enemy combatants, the right to confiscate enemy property within a nation's own territory, blockade ports, and seize enemy ships. They also serve to notify neutral powers of a conflict, prepare the government and public for an extended conflict, and provide the administration's rationale for going to war.⁷¹¹ A war declaration would be advantageous for the Bush administration because it would dispel further debate concerning the President's war powers or his ability to wage a prolonged war. A declaration would fulfill all constitutional and WPR requirements, and it would signal a focused national effort towards conducting the war.⁷¹² The President would also gain wartime powers, meaning greater authority to control domestic affairs.

However, Rademaker recommended that Bush not seek a war declaration unless he believed it was absolutely necessary to mobilize the American people and economy to wage an extended war against Iraq. Immediately seeking a war declaration could be detrimental to the President because the executive branch would essentially be admitting that it needed the most severe type of congressional resolution to wage even small-scale conflicts elsewhere. Rademaker claimed that the President could order the military into combat without a war declaration, and he cited Grenada and Panama as two instances when it had been reasonable to pass a war declaration or other authorization, yet Congress did not act. With the presupposed small scale of this conflict, he recommended that Bush "proceed either without any congressional

⁷¹¹ Ibid.

⁷¹² Ibid.

approval at all, or seek a joint resolution of Congress.”⁷¹³ Therefore, quite early in the crisis the Bush administration was willing to proceed without any congressional approval. It did not believe that any legal authorization was needed to deploy U.S. forces to the Persian Gulf. Although the UNSC approved Resolution 661 on 6 August to impose economic sanctions against Iraq, this directive did not authorize the use of force against Iraq.

On 8 August, Bush unilaterally escalated the scale of the U.S. military intervention by deploying two squadrons of F-15 fighter planes, one 82nd Airborne Division brigade, and other armed forces to Saudi Arabia to defend the border against further Iraqi aggression.⁷¹⁴ Bush sent letters to House Speaker Tom Foley (D-WA) and President pro tempore of the Senate Robert Byrd (D-WV) the day following his deployment. He detailed Iraq’s invasion, his decision to deploy U.S. armed forces to counter the growing threat to Saudi Arabia, and how his letter should satisfy the WPR by informing Congress of presidential actions. He added that, although he did not foresee imminent involvement in hostilities, additional U.S. forces would be deployed with a *defensive* mission. He believed his deployment of substantial military forces would deter further Iraqi aggression and help resolve the conflict peacefully. Bush also justified his deployment based on the commander-in-chief power and his authority to conduct U.S. foreign relations, but he could not predict the duration of the military’s defensive mission.⁷¹⁵

⁷¹³ Ibid, 2.

⁷¹⁴ "Bush Letter to Robert Byrd," August 9, 1990, RPGC, CBGF, MF, Folder: War Powers (Iraq-Kuwait) (6), GHWBPL.

⁷¹⁵ Ibid.

While Bush claimed an inherent power to act unilaterally, he also closed his letters with the possibility of congressional cooperation to resolve the conflict. During the first week of the crisis, Bush thus made two critical decisions impacting his own presidential power: 1) deploying the armed forces to Saudi Arabia without congressional authorization and 2) assigning the military with a *defensive* mission and notifying Congress of his actions. He significantly decided not to take *offensive* actions against Iraq without authorization, deviating from Truman's precedent during the Korean War.

By late August, Iraq still occupied Kuwait, and U.S. forces continued to provide Saudi border defense. Senate Chairman of the Foreign Relations Committee Claiborne Pell (D-RI) sent a letter to Bush on 23 August about the possibility of congressional action in November to deal with the Gulf situation.⁷¹⁶ Pell thought one possible action would be an AUMF approving "extended use" of military force.⁷¹⁷ However, he did not elaborate on what extended use of military force meant. Would the resolution authorize another open-ended conflict and provide the President with blank check power to wage war, similar to the Tonkin Resolution? Pell never provided specifics in his letter, but he did mention a legislative precedent regarding the drafting of war authorizations. His example was the 1983 resolution concerning Lebanese peacekeeping operations, and he explained how the executive and legislative branches negotiated that authorization's language.⁷¹⁸

⁷¹⁶ "Claiborne Pell to Bush," August 23, 1990, RPGC, CBGF, MF, Folder: War Powers (Iraq-Kuwait) (2), GHWBPL.

⁷¹⁷ Ibid.

⁷¹⁸ Ibid.

It is evident that both the administration and legislators had considered some sort of AUMF in August, yet no progress occurred. One of the issues during that period was the debate over whether to use economic sanctions or military force to compel Saddam to withdraw from Kuwait. Bush asked Boyden Gray before his 11 September congressional address to find out how Lyndon Johnson dealt with Congress to obtain Tonkin Resolution support.⁷¹⁹ However, the Bush administration was not just late in beginning to strategize to influence Congress, it was so far behind that a war powers debate had already begun as a result of his deployment for Operation Desert Shield. The Johnson administration, in marked contrast, conducted extensive groundwork with Congress many months before the Tonkin Gulf incidents.

On 11 September Assistant Secretary of State for Legislative Affairs Steve Berry sent a fax message to Assistant to the President for Legislative Affairs Nicholas Calio containing what appeared to be an executive-drafted congressional resolution (dated 10 September). The resolution's preamble highlighted Bush's unilateral actions to sanction Iraq and freeze its assets in the U.S, and it mentioned five separate UNSC resolutions condemning Iraq's invasion and implementing economic sanctions. The resolution also included congressional statements supporting Bush's unilateral military deployment.⁷²⁰ The preamble further added congressional support for diplomacy and for alternatives to the use of military force to resolve the conflict. Although the resolution included congressional approval for Bush's military deployment, it strangely contained no AUMF. The draft resolution was also pursuant to several unanimously approved UNSC resolutions, thus already framing a

⁷¹⁹ Bush and Scowcroft, *A World Transformed*, 371.

⁷²⁰ "Fax Transmission to Nicholas Calio," September 11, 1990, GWP, NCF, Folder: Iraq: Joint Resolution, GHWBPL.

congressional resolution within a broader multilateral framework. This resolution contained no WPR references, but Congress advised “continued action by the President, including support of the decisions of the United Nations Security Council, to deal with Iraqi aggression and to protect American lives and vital interests in the region.”⁷²¹ This clause could be critical if the resolution was enacted, since the UNSC had not yet approved an AUMF to expel Iraq from Kuwait at the time this draft was written. Would this resolution then have approved of any future presidential decision, assuming it was concurrent with a previously enacted or forthcoming UNSC resolution?

For example, if the UNSC approved an AUMF shortly after this congressional act, which itself provided support for UNSC resolutions concerning the Gulf conflict, would that have legally authorized Bush to use force, even without explicit congressional authorization? Can Congress enact a law allowing the President to take military action subject to future UNSC resolutions? Congress would thus be delegating its war power to a multilateral body, and American use of force would potentially be subject to UNSC resolutions and presidential discretion. Bush certainly could have tried to interpret this act in that manner. It might have enabled him to conduct offensive military actions much earlier and without an explicit congressional authorization, which can be difficult to obtain from an opposition-party Congress. This type of resolution could have been an advantageous alternative for the Bush administration to secure what it could argue was congressional approval for military force, assuming he could link his actions to UNSC resolutions.

⁷²¹ Ibid, 3.

Bush also addressed Congress regarding the Gulf situation on 11 September. He explained that, in response to the Iraqi invasion, he decided “to check that aggression” by deploying military forces to Saudi Arabia.⁷²² His decision to send U.S. military forces abroad was unauthorized, of course, but Bush did not acknowledge this fact. Instead, he framed his actions as countering aggression and defending “civilized values,” citing ample bipartisan and public support.⁷²³ He also demanded the immediate and unconditional withdrawal of Iraqi forces from Kuwait to restore peace and stability to the region, the restoration of Kuwaiti sovereignty, and the release of hostages.

Notably, Bush omitted key words such as “military,” “force,” “war,” and “unilateral” in his address. The speech focused on multilateralism and the efforts of the UNSC to support U.S. objectives through its approved resolutions. For example, Bush referenced the UNSC resolution that authorized “all means necessary” to enforce economic sanctions, but he did not limit U.S. enforcement measures to defensive actions.⁷²⁴ Bush sought a “new world order,” his vision for greater integration and multilateral cooperation to establish a more peaceful world, and he cited a meeting with Mikhail Gorbachev to illustrate the foundation of a new relationship with the Soviets.⁷²⁵ While Bush stated that he would give economic sanctions time to impact Iraq, he was actively evaluating every option with U.S. allies. He neither requested the congressional enactment of the 10 September executive-drafted resolution—that supported the deployment and continued presidential action—nor did he request an

⁷²² George Bush, “Address Before a Joint Session of the Congress on the Persian Gulf Crisis and the Federal Budget Deficit,” September 11, 1990. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 20 May 2020, <https://www.presidency.ucsb.edu/node/264415>.

⁷²³ *Ibid.* There was indeed substantial bipartisan congressional agreement for Bush’s military deployment and defensive mission in Saudi Arabia.

⁷²⁴ *Ibid.*

⁷²⁵ *Ibid.*

AUMF from Congress to use *offensive* military force against Iraq. Bush clearly sought to generate support for his deployment and frame any U.S. response to the crisis in the Gulf as part of a multilateral response.

The administration immediately began development of a Persian Gulf policy plan and evaluated what levels of congressional support existed on bills concerning the Persian Gulf situation. Calio received a message the following day from Frances Norris, the Special Assistant to the President for Legislative Affairs; it listed all the proposed bills concerning Iraq, including: the Sanctions Against Iraq Act of 1990, a bill calling for other nations to provide financial contributions for the U.S. military stationed in the Gulf, and the Resolution concerning the Removal of U.S. Armed Forces from the Middle East (to end Operation Desert Shield).⁷²⁶ The House approved the sanctions bill on 2 August unanimously (416-0), but the Senate failed to enact it. Representative Henry González (D-TX) introduced the removal bill on 5 September that called for the withdrawal of all U.S. military forces by 1 October.⁷²⁷ The removal bill also failed to receive congressional support.

Calio authored a 13 September memo that included a congressionally drafted resolution for Boyden Gray to review. This draft, written by the House Foreign Affairs Committee's majority staff on 12 September, was more detailed than the version circulated within the executive on 11 September. While the House Foreign Affairs Committee draft repeated verbatim the preamble sections from the executive-

⁷²⁶ "Iraq: Proposed Legislation from Frances Norris to Nicholas Calio," September 12, 1990, GWP, NCF, Folder: Iraq: Proposed Legislation, GHWBPL.

⁷²⁷ Ibid. Representative González was concerned about presidential use of force against Iraq without a declaration of war, and he supported impeaching Bush based on this concern and previous financial transactions between U.S. banks and Saddam Hussein.

circulated version, it *did* include an AUMF.⁷²⁸ It authorized military force to: implement the UNSC resolutions (none of which called for regime change in Iraq), obtain the release of U.S. hostages, achieve the withdrawal of all Iraqi forces from Kuwait, and defend Saudi Arabia from further Iraqi aggression.⁷²⁹ Any use of force would be in accordance with the WPR; however, the Bush administration highly opposed the inclusion of WPR clauses in any AUMF. The final section also contained congressional authority to terminate the authorization, but this was not a sunset clause, as it did not define any prescribed end date for hostilities. The following day, Iraqi soldiers seized the U.S. consul and other international diplomats in Kuwait City. Bush could have used this event as a pretext to press for congressional enactment of this AUMF draft, but it made no apparent progress.

Bush convened with congressional leaders on 21 September, seeking to determine how much congressional support he had for *offensive* military actions. Speaker Foley explained that both Democratic and Republican legislators supported what Bush had done but that sanctions against Iraq should be allowed more time to work. He also recommended that Bush postpone all discussions for *offensive* military actions, unless Iraq directly provoked U.S. forces in Saudi Arabia.⁷³⁰ Under these circumstances, a U.S. military response, potentially a unilateral response, would be required; a lingering war powers dilemma would remain, however.

Senate Majority Leader George Mitchell (D-ME) and House Majority Leader Dick Gephardt (D-MO) supported Bush because they considered the military deployment

⁷²⁸ "Memo for C. Boyden Gray from Nicholas Calio," September 13, 1990, GWP, NCF, Folder: Iraq: Joint Resolution, GHWBPL.

⁷²⁹ Ibid.

⁷³⁰ Bush and Scowcroft, *A World Transformed*, 372.

necessary, and they believed that the U.S. should maintain its current policy of protecting the Saudi border.⁷³¹ Senator Pell opposed any unilateral offensive response, while Senate Minority Leader Bob Dole (R-KS) and House Minority Leader Robert Michel (R-IL) along with Representative John Murtha (D-PA) supported the administration's strategy. However, Murtha thought that a conflict with Iraq was probably inevitable. Senator Sam Nunn (D-GA) and Representative Les Aspin (D-WI) argued that the U.S. should avoid the use of ground forces in the event of a military confrontation with Iraq.⁷³² Bush could have pushed for a limited AUMF at this meeting (possibly only airstrikes), especially with U.S. diplomats being held hostage by Iraqi forces, but he neglected to do so.

On 27 September, Assistant Secretary Steve Berry faxed a message containing an updated draft resolution to Virginia Lampley, the Senior Director of Legislative Affairs within the NSC. Foreign Affairs Committee Chairman Dante Fascell authored the resolution, repeating much of the same language from the previous 12 September congressional draft.⁷³³ This version again supported Bush's deployment, the UNSC resolutions, and a peaceful resolution of the conflict through diplomatic measures. However, this draft did not include an AUMF and added a substantial section discussing WPR findings, referencing Bush's 9 August congressional report that notified of his military deployment to Saudi Arabia and how he stated that it was "consistent with the War Powers Resolution (WPR)."⁷³⁴ This section restated key WPR provisions to demonstrate that Bush was following its requirements, even though the administration contested the WPR's constitutionality. In Berry's cover

⁷³¹ Ibid.

⁷³² Ibid.

⁷³³ "Fax Transmission from Berry to Lampley," September 27, 1990, RPGC, CBGF, MF, Folder: War Powers (Iraq-Kuwait) (4), GHWBPL.

⁷³⁴ Ibid, 10.

sheet note he explained that more resources would have to be devoted to obtaining a congressional resolution, if Bush still desired one.

Berry additionally remarked that the administration could not accept the WPR provisions within the rewrite.⁷³⁵ He included a significant statement noting that Chairman Farnsworth “said he would not move on resolution where there is no agreement from Administration.”⁷³⁶ The administration delayed action on previous drafts and ended up with a later version without the needed AUMF. Had the administration clearly communicated with Farnsworth and the Democrats regarding the 12 September draft, it might have been able to obtain an AUMF, albeit with WPR provisions. It did not fully grasp the significance of simply obtaining an AUMF within a resolution. Even if WPR provisions were included, it would not have hindered Bush in using military force under the AUMF. The war would have been congressionally authorized with Bush empowered to direct military operations without further congressional interference.

The House and Senate each approved resolutions supporting Bush’s defensive deployment on 1 and 2 October.⁷³⁷ Yet, Bush became increasingly worried about declining congressional support for his military deployment by mid-October, as sanctions had still not compelled Saddam to withdraw. Both Bush and National Security Advisor Brent Scowcroft wrote in their diaries on 17 October that an Iraqi provocation could be used to justify *offensive* U.S. military action. The U.S. embassy remained under siege during this time, with eight diplomatic officials and forty non-

⁷³⁵ Ibid.

⁷³⁶ Ibid, 1.

⁷³⁷ H.R.J. Res. 658, 101st Cong., 2d Sess., 136 Congressional Record H8441-42 (Daily Ed. Oct. 1, 1990); S. Con. Res. 147, 101st Cong., 2d Sess., 136 Congressional Record S14, 338 (Daily Ed. Oct. 2, 1990). Neither resolution included an AUMF.

diplomats still inside. Bush stated, “The news is saying some members of Congress feel I might use a minor incident to go to war, and they may be right.”⁷³⁸ He could have requested an AUMF from Congress during the U.S. embassy siege, and he likely would have received greater support. As with the Iraqi seizure of the U.S. consul in September, a wavering Bush did not pressure Congress for an AUMF.

The Bush administration instead appeared to shift its military strategy from a defensive position to an offensive one in October. Assistant to the President for Legislative Affairs Fred McClure responded to two letters from Representative Bill Goodling (R-PA) and Senator Joe Biden (D-DE). Writing on 26 October, Goodling referenced Representative Ted Weiss’ (D-NY) statement of concern, signed by 81 Democrats.⁷³⁹ Weiss and the Democrats were concerned about possible war in the Middle East and the upcoming congressional recess on 28 October. With Congress adjourning for the upcoming November mid-term elections—potentially being in recess until January 1991—Bush would have no recourse to legislative AUMF enactment and might conduct unauthorized offensive actions. These Democratic legislators claimed that there would not be any sort of “low intensity conflict” based on the numbers of U.S. forces in the region.⁷⁴⁰ In short, any military operations using the deployed military forces should be defined as a war, thus requiring a congressional war declaration or AUMF. The statement also indicated congressional unease that executive-held consultative meetings with select legislative leaders were being used to replace comprehensive congressional deliberations. These legislators

⁷³⁸ Bush and Scowcroft, *A World Transformed*, 382.

⁷³⁹ "Enclosed Statement by Members of Congress," November 2, 1990, RPGC, CBGF, MF, Folder: War Powers (Iraq-Kuwait) (4), GHWBPL. House Speaker Thomas Foley submitted the statement enclosed within a 30 October letter to Bush.

⁷⁴⁰ Ibid, 4.

called for other members outside of exclusive congressional leadership to be included in these discussions.⁷⁴¹

Goodling, as a Republican, did not sign the statement because of its critical nature and because it was authored by a Democrat. However, he advised Bush “not to move without the support of the majority of Congress.”⁷⁴² This was a prudent statement by a member of the President’s own party. Goodling did not want to publicly denounce Bush and ostracize himself from his own party by signing a partisan statement. Yet, he cautioned against Bush taking any unilateral offensive actions without some procedural motion of support from a congressional majority. McClure responded to Goodling on 2 November with a provocative statement that Bush would continue to consult with Congress should *offensive* actions be necessary to “force Saddam out of Iraq.”⁷⁴³ This is startling, since the publicly stated objective was Iraqi withdrawal from Kuwait; the UNSC resolutions never mentioned regime change. McClure may have inadvertently stated how the administration was at least considering the overthrow of Saddam’s regime.

McClure’s peculiar line about removing Saddam from Iraq, instead of Kuwait, may have simply been an error, yet it was also included in his first response letter to Biden on 30 October. Biden’s detailed 27 October letter to Bush criticized him for allowing Congress to adjourn without authorizing the military deployment or its use in the Middle East.⁷⁴⁴ He believed that Bush would have received a congressional

⁷⁴¹ Ibid.

⁷⁴² "Goodling Correspondence with McClure," October 29, 1990, RPGC, CBGF, MF, Folder: War Powers (Iraq-Kuwait) (4), GHWBPL, 3.

⁷⁴³ Ibid, 2.

⁷⁴⁴ "Correspondence between McClure and Biden," October 29, 1990, RPGC, CBGF, MF, Folder: War Powers (Iraq-Kuwait) (4), GHWBPL.

authorization had he requested one, even though “Congress is wary of writing blank checks.”⁷⁴⁵ Biden actually wanted to provide Bush with advanced authorization to defend Saudi Arabia and Israel, to respond to attacks on Americans, and to take offensive action against Iraq pursuant to UNSC resolutions.⁷⁴⁶ It can be gathered from Biden’s letter that some Democrats supported a military response, albeit a multilateral one.

Additionally, Biden used the Soviet Union to make an ironic point about Bush’s unsanctioned unilateralism. He claimed that even the Soviet parliament, now more independent and assertive relative to Kremlin leadership, was required to authorize military force; these officials no longer held sole war powers authority.⁷⁴⁷ His point was that Bush, by initiating hostilities without legislative consent, would be presenting the Soviet system as less autocratic and more democratic than the U.S. system founded upon James Madison’s principle to divide war powers between the President and Congress. Biden concluded his letter by strongly advising Bush to request either a war declaration or other statutory war authorization.

Biden further mentioned that Democratic congressional leadership had previously drafted a strongly worded AUMF; however, this resolution was “then shelved in the expectation that you would oppose it.”⁷⁴⁸ Biden was likely referring to the 12 September House-drafted AUMF. Executive documents confirm that this draft was circulated within the Bush administration the day after the House committee discussed it—Nicholas Calio and Boyden Gray both reviewed this draft. Thus, it is

⁷⁴⁵ Ibid, 3.

⁷⁴⁶ Ibid.

⁷⁴⁷ Ibid.

⁷⁴⁸ Ibid, 3.

particularly baffling that the Bush administration did not push this type of resolution forward within Congress. It undoubtedly opposed the inclusion of WPR provisions, but the AUMF clause should have been a significant counter-argument to any executive opposition, as it would seemingly satisfy WPR requirements and end further congressional war powers debates. Furthermore, the House draft authorized Bush to use military force to obtain “the prompt withdrawal of Iraqi occupation forces from Kuwait.”⁷⁴⁹ This clause was *not* subject to any UNSC resolution; Bush would have discretion to use force unilaterally.

On 30 October, Bush met with congressional leaders, including Speaker Foley and Senate Majority Leader Mitchell. Some legislators were extremely alarmed about the possibility of military action while Congress was in recess. The President explained that Saddam had almost doubled his forces in Kuwait, and the U.S. was at a critical moment when it needed to increase its own force numbers in the region to match Iraq in case offensive actions were necessary. Bush stressed that this decision did not mean he would take offensive measures but that this would just be an option if these forces needed to be used. Foley countered that this represented a dramatic policy shift, which could cost Bush congressional and public support.⁷⁵⁰ Timing for these actions was critical, since the executive-legislative budget dispute had overtaken the Gulf crisis as the predominant national concern. Senator William Cohen (R-ME) argued that American hostages could not be used as justification of offensive military actions. Foley finally appealed to the administration, “I want to plead with you personally before you take the country into war. Unless there is gross provocation, you won’t

⁷⁴⁹ "Memo for C. Boyden Gray from Nicholas Calio," September 13, 1990, GWP, NCF, Folder: Iraq: Joint Resolution, GHWBPL.

⁷⁵⁰ Bush and Scowcroft, *A World Transformed*, 390.

have public support.”⁷⁵¹ The general consensus amongst attending congressional leaders was to delay the use of force and continue sanctions against Iraq.

Key executive officials gathered later that day, and Scowcroft outlined three potential options for the administration. They could continue to use sanctions, prepare for offensive military actions (by a specific date), or try to provoke a military response—for example, using the siege on the U.S. embassy in Kuwait City as justification for offensive action.⁷⁵² Defense Secretary Dick Cheney recommended an immediate increase to the amount of troops stationed in Saudi Arabia. However, Secretary of State James Baker advised that Bush should not use offensive force before February, if there was no provocative incident before. Ultimately, Bush decided on sending a second deployment of troops to the region, while refraining from offensive military actions.

Bush publicly announced the troop increase during an 8 November press conference.⁷⁵³ He argued that another troop deployment would both strengthen Desert Shield and “ensure that the coalition has an adequate offensive military option should that be necessary to achieve our common goals.”⁷⁵⁴ He did not state how many troops would be deployed, but to the media, his announcement appeared to signal that the U.S. was moving towards a large-scale offensive war. One member of the press asked Bush if he believed he had the power to send U.S. forces into offensive combat without UNSC authorization. Bush responded that, although his administration

⁷⁵¹ Ibid, 391.

⁷⁵² Ibid.

⁷⁵³ Bush’s political advisers recommended that he announce the second troop deployment after Congress’ mid-term elections on 6 November.

⁷⁵⁴ George Bush, “The President’s News Conference on the Persian Gulf Crisis,” November 8, 1990. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 16 December 2018, <https://www.presidency.ucsb.edu/node/265616>.

supported multilateralism through the U.N., he nevertheless held the authority for unilateral military intervention.⁷⁵⁵

The following day Senator Dole sent a letter to Bush stating his support for his unilateral actions. However, he added that Bush's recent decision to increase military pressure on Iraq had to be matched with congressional and popular support.⁷⁵⁶ Dole did not favor a war declaration, which he felt would strengthen Saddam and confuse the American public. He believed putting the issue of offensive military action before Congress would get majority support for enactment, reinforce Bush's strategy, and end the war powers debate between the executive and legislative branches.⁷⁵⁷ He remarked that the executive branch must be prepared before going to Congress for a resolution and must resolutely campaign for its desired outcome. If not, there would be a long and drawn-out negotiation process over the choice of words to be included in an AUMF.

The Bush administration convened again with a bipartisan group of congressional leaders on 14 November. It needed to ease the congressional tension after Bush's deployment of 200,000 more troops to the Gulf.⁷⁵⁸ Bush tried to assure the attending congressional leaders that the U.S. had not acted beyond a threshold from which it could not reverse its course. Sanctions would continue to be implemented against Iraq, although Bush was more doubtful that they would work politically against Saddam. He claimed that congressional divisions empowered Saddam to continue his

⁷⁵⁵ Ibid.

⁷⁵⁶ "Bob Dole to Bush," November 9, 1990, RPGC, CBGF, MF, Folder: War Powers (Iraq-Kuwait) (3), GHWBPL.

⁷⁵⁷ Ibid.

⁷⁵⁸ Bush and Scowcroft, *A World Transformed*, 400.

occupation of Kuwait.⁷⁵⁹ Speaker Foley countered, “It’s believed that we now have sufficient force to conduct offensive operations, but there’s no consensus to use those forces.”⁷⁶⁰ Foley desired an approved UNSC AUMF to present to Congress, which would provide the necessary impetus to obtain legislative support for a concurrent U.S. AUMF.

It is evident from this meeting that accountability for the creation of policy fell to the executive, even though many legislators desired to participate in the foreign policy process. Certain congressional leaders were unable or unwilling to assert any sort of legislative primacy over the executive branch. These congressional leaders sought a vote prior to offensive military actions, yet they also wanted the Bush administration to take the first step and request legislative action. The administration, however, had little interest in assenting to further congressional measures, especially since some officials claimed that Bush could wage unauthorized offensive war.

On 14 November, too, Representative Jim Bates (D-CA) sent a letter to Bush expressing his concern about the recent deployment of another 200,000 troops.⁷⁶¹ Bates considered this move to be a clear sign that Bush was preparing for offensive military action. He argued that this unilateral deployment placed American prestige at risk, and he urged Bush to recall Congress from its recess to vote on his administration’s policies.⁷⁶² Assistant to the President McClure responded to Bates’ letter on 21 November, stating that the administration valued his views on “the proper

⁷⁵⁹ Ibid.

⁷⁶⁰ Ibid, 400.

⁷⁶¹ "Bates Letter to President Bush," November 14, 1990, RPGC, CBGF, MF, Folder: War Powers (Iraq-Kuwait) (3), GHWBPL.

⁷⁶² Ibid.

Congressional role in any decision to use military force to liberate Kuwait.”⁷⁶³ In contrast to the responses he had previously sent to Goodling and Biden, McClure was very careful to frame any decision concerning the use of force as being for the liberation of Kuwait, not for removing Saddam from power in Iraq.

The UNSC approved the most significant Gulf crisis resolution on 29 November with Resolution 678. It authorized “all necessary means,” including the use of military force, to remove Iraqi forces from Kuwait and restore peace to the region after a deadline of 15 January 1991.⁷⁶⁴ This resolution's enactment date highlights how unhurried the Bush administration was in seeking a UNSC AUMF. Had Bush obtained UNSC authorization shortly after Iraq's invasion, it would have placed more pressure on Congress to enact a resolution providing support for Bush's deployment or even authorizing the use of force. The late UNSC authorization enactment date contrasts with President Truman's efforts to obtain favorable UNSC resolutions in the opening days of the Korean War, illustrating Truman's understanding of political forces and how best to utilize the U.N. for domestic political ends. The Bush administration failed to grasp the domestic political benefits of UNSC resolutions, and multilateral institutions generally, at the onset of the crisis.

The 29 November UNSC AUMF also evoked the 11 September executive-drafted resolution. Bush could have used that earlier draft to potentially claim authority to use military force based on congressional approval for what the UNSC later enacted. He also could have tried to use the UNSC AUMF like Truman in the early days of the

⁷⁶³ "McClure Letter to Bates," November 21, 1990, RPGC, CBGF, MF, Folder: War Powers (Iraq-Kuwait) (3), GHWBPL.

⁷⁶⁴ United Nations Security Council Resolution 678, 29 November 1990, Accessed: 4 June 2020, [https://undocs.org/S/RES/678\(1990\)](https://undocs.org/S/RES/678(1990)).

Korean War, to claim that any use of force was not a unilateral U.S. effort, but a multilateral U.N. "police action." Yet, Bush did not order offensive military operations after the UNSC approved its AUMF, distinguishing himself from Truman, who justified U.S. intervention in Korea based solely on UNSC resolutions and claimed inherent presidential powers.

Despite October House and Senate resolutions supporting Bush's defensive troop deployment to Saudi Arabia, 53 Representatives and one Senator, led by Ronald Dellums (D-CA), filed a lawsuit on 20 November challenging the Bush administration's deployment and apparent move towards congressionally unauthorized offensive military actions. *Dellums v. Bush* (1990) would become an important legal precedent on Congress' power to preemptively challenge unauthorized presidential use of military force abroad.⁷⁶⁵ The case specifically examined whether Congress could file for an injunction to prohibit the President from engaging in offensive military actions without obtaining prior congressional authorization. In his 13 December District Court opinion, Judge Harold Greene reviewed legal arguments raised by both legislators and the Justice Department. The congressional plaintiffs argued that Bush would shortly initiate offensive military force without authorization. Doing so, they claimed, would be unconstitutional, because it would deprive the legislature of its constitutional power to declare war.

The Justice Department countered with its own multifaceted defense. First, it argued that questions regarding whether certain military actions require a war declaration represented a non-justiciable political question, which should be decided by the

⁷⁶⁵ *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990).

political branches. Second, Dellums and the other legislative plaintiffs lacked standing to bring the case before the courts, because they faced no immediate threat of constitutional injury. Third, the lawsuit violated conventional principles of equity jurisprudence; namely, Congress maintained remedial discretion to resolve this issue without judicial involvement.⁷⁶⁶ Fourth, the issue of constitutional war powers apportionment between the executive and legislative branches was not ripe for review.⁷⁶⁷ All of these defenses are measures of “constitutional avoidance” that the courts can cite to deny review of a case.⁷⁶⁸

Judge Greene first responded to the political question claim, dissenting with the Justice Department. He determined:

This claim on behalf of the Executive is far too sweeping to be accepted by the courts. If the Executive had the sole power to determine that any particular offensive military operation, no matter how vast, does not constitute war-making but only an offensive military attack, the congressional power to declare war will be at the mercy of a semantic decision by the Executive. Such an “interpretation” would evade the plain language of the Constitution, and it cannot stand.⁷⁶⁹

His assessment was absolutely correct, and several early 19th century Supreme Court decisions, which distinguished *general* from *limited* warfare, further support his conclusions.⁷⁷⁰ In any case, offensive military force classifies as war making, and it must be congressionally authorized. On the question of congressional standing to challenge the President’s use of military force, Greene granted standing. On the question of remedial discretion, he explained that the legislative plaintiffs were not

⁷⁶⁶ This would involve Congress enacting, repealing, or amending a legal statute.

⁷⁶⁷ *Ibid.*, 1144.

⁷⁶⁸ Judge Duane Benton, U.S. Court of Appeals for the 8th Circuit, Personal Interview Conducted by Morgan Baker, Kansas City, Missouri, 18 June 2018.

⁷⁶⁹ *Dellums v. Bush*, 752 F. Supp. 1145 (D.D.C. 1990).

⁷⁷⁰ *See Bas v. Tingy*, 4 U.S. 37 (1800); *Talbot v. Seeman*, 5 U.S. 1 (1801); *Brown v. U.S.*, 12 U.S. 110 (1814).

challenging the constitutionality of a statute that they could possibly repeal. Congress, according to Greene, could not achieve the desired outcome by simply convincing colleagues to enact, repeal, or amend a law.

Additionally, Greene explained that a congressional resolution advising the President to refrain from using military force without authorization would not likely inhibit unilateral executive action if the President claimed authority from the commander-in-chief power. As such, cutting off military appropriations or impeaching the President would not be a political or practical remedy for Congress.⁷⁷¹ Finally, on the issue of ripeness, Greene ruled that there must be a constitutional impasse between the executive and legislative branches before federal courts can decide the proper allocation of war powers. Accordingly, he dismissed the case. He determined that Congress needed to assert its voice as a collective majority or in its entirety that the executive branch was trespassing upon its constitutional war powers. Congress needed to utilize its available legislative powers to demonstrate what was under threat by the President.

Greene, however, did not outline what congressional actions would suffice to meet this ripeness requirement. Bush would unquestionably veto any congressionally enacted statute to prohibit presidential use of offensive military force. Congress, or even just one legislative chamber, could have alternatively met the ripeness condition by voting “no” on a war declaration or AUMF. It would thereby signal as a collective body that it did not support offensive military actions and utilize its remaining

⁷⁷¹ *Dellums v. Bush*, 752 F. Supp. 1149 (D.D.C. 1990).

legislative powers to reject a war resolution. Legislators could then cite this “no” vote in a new lawsuit against impending presidential use of offensive military force.

Ultimately, Congress never implemented this strategy. It should also be noted that had Bush conducted offensive military action prior to the *Dellums* ruling, a federal judge would have dismissed the case based on another measure of avoidance: mootness. In this case, the issue would be moot because a court ruling would not affect any completed action.⁷⁷² Despite the outcome, *Dellums v. Bush* represents a key departure from previous war powers cases being dismissed as involving a non-justiciable political question.⁷⁷³

Prior to the *Dellums* decision, Associate Counsel to the President Nelson Lund circulated a memo within the administration on 4 December stating its position on the legal case. Lund claimed that legal challenges like the *Dellums* case were nothing new, adding that they occur when a small group of legislators desire to sensationalize their opposition to government defense policies.⁷⁷⁴ He also stated that the courts have always been unwilling to intercede due to the political nature of the legal questions involved, leaving the political branches of government to resolve them. These legislators’ real complaint, according to Lund, was not against a presidential decision

⁷⁷² Judge Duane Benton, U.S. Court of Appeals for the 8th Circuit, Personal Interview Conducted by Morgan Baker, Kansas City, Missouri, 18 June 2018.

⁷⁷³ For example, *see* *Luftig v. McNamara*, 252 F. Supp. 819 (1966); *Mora v. McNamara*, 389 U.S. 934 (1967); *Commonwealth of Massachusetts v. Laird*, 400 U.S. 886 (1970); *Berk v. Laird*, 317 F. Supp. 715 (1970); *Mitchell v. Laird*, 488 F.2d 611 (1973). In *Mitchell*, Representative Parren Mitchell (D-MD) along with 12 other House members filed a lawsuit to halt the war in Southeast Asia. In *Ange v. Bush*, another case decided on the same day as *Dellums*, a federal judge dismissed a lawsuit brought on behalf of a deployed reserve military serviceman claiming that Bush violated congressional war powers and the WPR by ordering the troop deployment to Saudi Arabia. *See* *Ange v. Bush*, 752 F. Supp. 509 (D.D.C. 1990).

⁷⁷⁴ "Memo for Steve Hart from Nelson Lund," December 4, 1990, RPGC, CBGF, MF, Folder: War Powers (Iraq-Kuwait) (2), GHWBPL.

but instead against decisions of their fellow legislators.⁷⁷⁵ He dismissed the *amicus curiae* brief filed by 45 law professors as flawed, asserting that their analysis “is questionable as a matter of constitutional theory and is demonstrably incorrect as a matter of constitutional law and practice.”⁷⁷⁶

During the *Dellums* lawsuit, Bush authored a memo to Boyden Gray on 5 December 1990 asking him to provide WPR legal analysis. He questioned whether it was possible to meet constitutional responsibilities, without acknowledging any constitutional WPR validity, by notifying Congress of an imminent military conflict. Bush supposed that he only needed to notify Congress that the U.S. was about to take military operations; he staunchly believed that the President held constitutional authority to initiate offensive military operations without a congressional war declaration.⁷⁷⁷ He sought some type of resolution “short of ‘declaring’ war that satisfies Congress,” but he did not want any resolution enacted that restricted his conduct of Persian Gulf military operations.⁷⁷⁸ This notion of securing an AUMF to meet constitutional requirements, but only one that provides discretionary presidential power, is contradictory and falls within a gray zone between a declared large-scale war and an undeclared limited war under an AUMF. Bush acknowledged that he wished to conduct a war without restrictions, yet he opposed declaring war, which would have provided him with wartime powers and greater discretion to conduct hostilities. The ideal solution for the administration would be to secure a vague and discretionary AUMF allowing the President to interpret it and use military force, albeit, purportedly in some fashion not equivalent to a declared large-scale war.

⁷⁷⁵ Ibid.

⁷⁷⁶ Ibid, 2. Original quote formatting unaltered.

⁷⁷⁷ Bush, *All the Best*, 491.

⁷⁷⁸ Ibid, 492.

Like its internal WPR discussions, executive officials also referenced previous administrations' theories on presidential power. Assistant Attorney General Michael Luttig excerpted from Dean Acheson's book *Present at the Creation* in a 14 December message to Boyden Gray.⁷⁷⁹ Acheson described Truman's struggles to prevent outside forces from diminishing presidential power. Truman believed that his office was "a sacred and temporary trust," and he refused to set a precedent of acquiescence to the notion that presidents did not hold the power to send the military into hostilities abroad.⁷⁸⁰ Acheson then described a memo claiming 87 instances from the previous century when presidents conducted unauthorized military actions.⁷⁸¹ The timing of Luttig's correspondence is notable, since the legislative battle with Bush regarding the power to both deploy massive ground forces abroad and initiate offensive military actions was at its zenith.

Democratic leaders waited until 4 January 1991, after the start of the 102nd Congress, to formally begin war authorization debate. In an 8 January letter to Speaker Foley, Bush claimed that the Persian Gulf situation threatened vital U.S. interests and the peace. He thought it was best if Congress went on record supporting the 29 November UNSC AUMF.⁷⁸² He used two astute tactics in this letter to gain congressional support for a resolution. First, he framed the enactment of an AUMF as the "last best chance for peace."⁷⁸³ Paradoxically, Congress would promote a course towards peace

⁷⁷⁹ "Mike Luttig Correspondence to C. Boyden Gray," December 14, 1990, RPGC, CBGF, MF, Folder: War Powers (Iraq-Kuwait) (2), GHWBPL. See Dean Acheson, *Present at the Creation: My Years in the State Department* (New York: W.W. Norton & Company, 1969), 415.

⁷⁸⁰ Ibid, 415.

⁷⁸¹ Ibid.

⁷⁸² "Bush to Speaker of the House," January 8, 1991, RPGC, Counsel's Office, White House, CBGF, MF, Folder: War Powers (Iraq-Kuwait) (1), GHWBPL.

⁷⁸³ Ibid, 2.

by authorizing the President to wage war. Bush, however, maintained that a congressional resolution showing support for the President would enhance any effort to compel Saddam to withdraw from Kuwait. Second, he never once used the words “war,” “military,” or “force” in his letter to Foley. Instead, he requested that Congress enact a resolution that supported “the use of all necessary means to implement UN Security Council Resolution 678,” the UNSC AUMF against Iraq after 15 January.⁷⁸⁴ Bush plainly did not want to use specific words or phrases that would present war as the administration’s primary objective from a congressional resolution. He could also easily attempt to construe any congressional resolution that either supported or authorized “the use of all necessary means” pursuant to the UNSC AUMF as a congressional war authorization.

Although Bush sought rapid enactment of a congressional resolution supporting presidential action, Congress refused to be hurried into action. It began several days of extensive debates on assorted draft resolutions. On 10 January, Senate Majority Leader Mitchell entered into the record a congressionally drafted, although incomplete, AUMF to guide the debate over the use of force. This AUMF was limited to the *defensive* military enforcement of U.N. economic sanctions against Iraq, the defense of Saudi Arabia, and the protection of deployed U.S. military forces in the Persian Gulf. It did not authorize *offensive* use of military force against Iraq, and it asserted Congress’ preference to continue sanctions and diplomacy, although it stated that Congress could declare war or authorize the use of force at a later time. It also affirmed Congress’ constitutional power to declare war, and it began an unfinished

⁷⁸⁴ Ibid, 1-2. Source quotation formatting unaltered.

section to be debated on the conditions necessary for congressional consideration of an *offensive* AUMF against Iraq, if Bush again requested it.⁷⁸⁵

Senator Dole noted that he would meet with Republican legislators and with the administration to discuss the congressionally drafted resolution and gather Bush's views of it. Senator Patrick Leahy (D-VT) commented that a congressional vote on war was "absolutely essential" and that a vote against any resolution to authorize military force would settle any question regarding whether the U.S. would wage war against Iraq.⁷⁸⁶ Leahy's statement seemed to allude to the *Dellums* case and the ripeness issue that resulted in the lawsuit being dismissed. If Congress voted to reject an AUMF after substantial debate, then it would be a clear indication that *offensive* military force would not be authorized. The text of any congressionally enacted or rejected resolution regarding the use of force would thus be critical to any potential political or legal conflict with Bush and his claim of inherent constitutional power to wage unauthorized war.

In his speech, Senator Mitchell sharply criticized Bush's recent approach to secure congressional support:

Two days ago, the President requested that Congress authorize him to implement the U.N. resolution authorizing "all necessary means" to expel Iraq from Kuwait. But yesterday the President said that, in his opinion, he needs no such authorization from Congress. I believe the correct approach was the one taken by the President 2 days ago when he requested authorization. His request clearly acknowledged the need for congressional approval. The Constitution of the United States is not and cannot be subordinated to a U.N. resolution.⁷⁸⁷

⁷⁸⁵ U.S. Senate: January 10, 1991, *Congressional Record* (Bound), Volume 137, Part 1, January 3, 1991 to January 14, 1991 (Washington, D.C.: U.S. GPO, 1991), 407. Senators George Mitchell (D-ME), Sam Nunn (D-GA), Robert Byrd (D-WV), Claiborne Pell (D-RI), David Boren (D-OK), and Carl Levin (D-MI) drafted this proposed joint resolution.

⁷⁸⁶ *Ibid.*, 407.

⁷⁸⁷ *Ibid.*, 408.

This bespoke concern that Bush might effectively compel Congress to enact a resolution backing the administration by claiming inherent presidential authority to use force. Yet, much of the debate on 10 January centered on the effectiveness of diplomacy and economic sanctions against Iraq, whether these measures would ever force an Iraqi military withdrawal, and whether the use or threatened use of military force through congressional authorization should replace diplomacy and sanctions. By the end of the day's debate, Dole indicated that Republicans would discuss what their own proposed resolution would be. While many Democratic legislators clearly supported the continuation of sanctions for an unspecified period, Dole indicated that other Republican legislators believed that the U.S. could "send a stronger message to Saddam Hussein by approving the use of force, hoping it will not be needed."⁷⁸⁸ Ultimately, the Dole-sponsored resolution included an AUMF for *offensive* use of military force.

The House debated similar issues regarding the Gulf crisis. Longtime Representative Sam Gibbons (D-FL) read part of a draft resolution proposed by the Bush administration. It stated, "The President is authorized, subject to subsection (b), to use United States Armed Forces pursuant to the United Nations Security Council Resolution No. 678-1990 in order to achieve and implement Security Council resolution..."⁷⁸⁹ Gibbons, a veteran congressman who had voted for the Tonkin Resolution in 1964, held serious reservations about the administration's proposal. He warned:

⁷⁸⁸ Ibid, 473.

⁷⁸⁹ U.S. House: January 10, 1991, *Congressional Record* (Bound), Volume 137, Part 1, January 3, 1991 to January 14, 1991 (Washington, D.C.: U.S. GPO, 1991), 497.

It is a declaration of war. It is thinly disguised, but it is a declaration of war. I say that, because I sat here in this Chamber many, many years ago right back here, in August 1964 when the Gulf of Tonkin resolution was adopted. It was a declaration of war despite the fact that those who stood in the well and who supported it and said it was not. They said specifically in the debate it was not a declaration of war, but all of us know, and history proved, that the Gulf of Tonkin resolution was used as a declaration of war and plunged this country in 8 or 9 years of really disastrous war in Vietnam.⁷⁹⁰

However, neither the 1964 Tonkin Gulf Resolution nor the proposed 1991 AUMF were war declarations. Gibbons was correct to be skeptical about the level of discretion contained within the AUMF resolution, but he and the rest of Congress failed to understand the fundamental operative differences between war declarations and AUMFs.

One significant issue remained regarding whether Bush would wage offensive war anyway, even if Congress only enacted a defensive AUMF—such as that provided in the Democrat-drafted resolution—or rejected his request for an offensive AUMF. Senator Biden commented earlier in the Senate debate about how Bush claimed that he did “not need the will of the people, spoken through Congress as envisioned by our Constitution, to decide whether or not to go to war. I assume that means he would believe he had the constitutional authority even if we vote down a resolution authorizing him to use force.”⁷⁹¹ Biden’s observations may have accurately characterized the administration’s views. For example, Defense Secretary Cheney claimed, “We do not believe that the President requires any additional authorization from the Congress before committing U.S. forces to achieve our objectives in the Gulf... The President has the right as a matter of practice and principle to initiate

⁷⁹⁰ Ibid, 497.

⁷⁹¹ Senate: January 10, 1991, *Congressional Record* (Bound), 427.

military action.”⁷⁹² Cheney’s expansive claims of unilateral presidential power were wholly erroneous and unfounded, and they demonstrate his open adherence to what is known as the Unitary Executive Theory.⁷⁹³

Biden also commented about how Congress needed to authorize *offensive* use of force:

In short, the Congress decides whether to make war. And the President decides how to do so...Before President Bush can launch an offensive action of 400,000 troops—by anybody’s standard a war—he must obtain a congressional authorization or declaration. It need not be a formal declaration of war, according to precedents and all the constitutional scholars, but it must be a clear, unambiguous authorization.⁷⁹⁴

While he was correct that the President must obtain congressional approval prior to using military force, he failed to account for the significant differences between enacting a limited AUMF versus a declaration of general war. Congress has the power, and indeed a duty, to define what limitations on the use of force should be prescribed when it enacts an AUMF. A war declaration grants greater wartime powers to the President, although Congress can still set regulations for the commander-in-chief. Declarations are also appropriate for sustained military action, against a sovereign international state, with substantial numbers of ground forces.

Congressional debates continued for another full day on 11 January, with the House debate centering on three resolutions. The first resolution, introduced by longtime Representative Charles Bennett (D-FL) on 19 October 1990, recognized Congress’

⁷⁹² Ibid, Cheney quoted at 427.

⁷⁹³ For further information and analysis on the Unitary Executive Theory, *see* Chapter Six.

⁷⁹⁴ Ibid, 427.

power to authorize “aggressive offensive war.”⁷⁹⁵ It asserted that the President is empowered to conduct unauthorized military force only for defensive purposes and also called for “no action on the part of the executive government” to wage an offensive war.⁷⁹⁶ The second resolution, introduced by Representative Lee Hamilton (D-IN), would delay the use of force to allow economic sanctions and diplomacy to continue. The third resolution, drafted by the Bush administration and introduced by Representatives Robert Michel (R-IL) and Stephen Solarz (D-NY), authorized the use of military force. Bennett cautioned that the administration’s resolution amounted to a war declaration, that it would classify as congressional approval for presidential use of force, and that further congressional approval would not be needed. Bennett issued this warning to portray the administration’s resolution as an extreme policy option and to persuade House members to support his own resolution.

In the Senate, legislators continued debate of the Mitchell resolution, which only authorized defensive military actions and maintained the use of sanctions and diplomacy. They also debated the Dole-sponsored AUMF resolution for offensive use of military force after the 15 January UNSC deadline. Senator J. Bennett Johnston (D-LA) voiced his support for the use of sanctions, yet he would vote for the AUMF. He also provided some significant commentary on congressional war powers and the AUMF under consideration. He remarked regarding the AUMF resolution:

On January 8, the President of the United States asked for just that authority. What he has asked for has been described by the majority leader, and I think correctly so, as being a blank check, a *carte blanche*. There is no euphemism. It is, unadulterated, a request to go to war. What this request is is the authority to put in the hands of the

⁷⁹⁵ U.S. House: January 11, 1991, *Congressional Record* (Bound), Volume 137, Part 1, January 3, 1991 to January 14, 1991 (Washington, D.C.: U.S. GPO, 1991), 588.

⁷⁹⁶ *Ibid*, 588. Congressional enactment of this resolution could have possibly satisfied ripeness requirements for litigation against a potential offensive war initiated by Bush.

President not only the authority to go to war, but to determine the circumstances under which he would exercise that power, as well as the timing as to when we would go to war.⁷⁹⁷

Johnston failed to recount the enactment history of the 1964 Tonkin Gulf Resolution and Lyndon Johnson's use of it to wage a general war in Southeast Asia. He never recognized that, by enacting a blank check AUMF, Congress would delegate its war power to the President to decide the scope of hostilities. In fact, Johnston's other comments seemed to demonstrate his preference for this type of vague and discretionary war authorization over a more explicit AUMF with clear limitations and guidelines for the commander-in-chief.

Republicans, such as Senator Arlen Specter (R-PA), seemed open to continuing economic sanctions; however, the 15 January UNSC deadline was looming. While Specter opposed the setting of a January deadline, he felt "that it was much too late in the day to try to change U.S. foreign policy and representations and commitments which had been made by the President on behalf of the United States."⁷⁹⁸ He criticized the House Speaker and Senate majority leader, both Democrats, for failing to reconvene Congress after the November elections. He also criticized Bush's more aggressive 8 November posturing of U.S. military forces in the Persian Gulf. Congress could have acted more forcefully when Bush deployed additional forces to the Gulf in November, yet it refrained from doing so. Accordingly, Specter argued that Congress would be second-guessing the President if it enacted the Mitchell resolution for defensive actions and sanctions.

⁷⁹⁷ U.S. Senate: January 11, 1991, *Congressional Record* (Bound), Volume 137, Part 1, January 3, 1991 to January 14, 1991 (Washington, D.C.: U.S. GPO, 1991), 783.

⁷⁹⁸ *Ibid*, 780.

Senator Jeff Bingaman (D-NM), in a discourse with Specter, countered his claims by criticizing Bush's lack of communication with congressional leadership prior to the additional November deployment. Consulting with legislative leaders, according to Bingaman, would have placed Congress on notice about a shift in strategy and may have led leadership to see the need to assert itself.⁷⁹⁹ The Specter-Bingaman debate illustrates contrasting perspectives regarding Congress' foreign policy role and its acquiescence to unilateral presidential decision-making. Although it is true that presidents should notify congressional leadership of foreign policy strategy changes during periods of conflict, Congress can and must be more proactive in the direction of foreign policy strategy. Refusing to authorize the President to use military force, authorizing the use of force for limited *offensive* military actions, or only authorizing the use of force for *defensive* purposes, is not second-guessing the President. It is a demonstration of Congress' constitutional power to regulate the commander-in-chief and actively participate in foreign policy.

In the final congressional debates on 12 January, Senator Pete Domenici (R-NM) began the proceedings by refuting the notion that the resolution was a war declaration against Iraq. He asserted that there would “not be a state of war between the United States and Iraq” upon enactment of the AUMF; however, enacting the AUMF “could lead to something approaching war at some future time,” if diplomacy failed and the international coalition decided that military force was the only viable option.⁸⁰⁰ Domenici's interpretation of the AUMF did not clearly distinguish it from a war declaration. He did not provide any further explanation about how Bush would wage

⁷⁹⁹ Ibid, 781.

⁸⁰⁰ U.S. Senate: January 12, 1991, *Congressional Record* (Bound), Volume 137, Part 1, January 3, 1991 to January 14, 1991 (Washington, D.C.: U.S. GPO, 1991), 938.

war differently if the U.S. was in a state of war with Iraq, whether the President would be limited under the AUMF, and how, or whether the President would be subject to additional congressional restrictions.

For Domenici, the primary debate question was not if Congress would authorize the use of force, but when. He argued, “The disagreement among us centers on whether to authorize the use of force now. Authorizing the use of force now grants to the President the widest range of options. Authorizing the use of force now provides for the greatest possibility that we will avoid war.”⁸⁰¹ His argument for authorizing the use of military force evokes the 1955 Formosa Resolution debate and whether Congress would provide Eisenhower with authority to use force or at least threaten the use of force against the Chinese Communists. During the 1950s, the threat of military force was viewed as a formidable option for the President to use against U.S. adversaries, regardless of whether force was used or not. It was assumed that an enacted AUMF would deter further aggression, potentially lead to a de-escalation of tension, and possibly increase compliance with U.S. interests. Yet, unlike the Formosa Resolution, this proposed 1991 AUMF would likely be concurrent with UNSC resolutions, which would possibly limit U.S. military objectives in the Persian Gulf and restrict Bush’s military options against Iraqi military forces and Saddam Hussein’s regime in Baghdad.

Some Republicans took a more restrained foreign policy view in their remarks. Senator Jim Jeffords (R-VT) cautioned against abandoning diplomacy and expressed his belief that sanctions “could work, or at least further debilitate the Iraqi

⁸⁰¹ Ibid, 938.

infrastructure—military, economic, and perhaps even political.”⁸⁰² Nonetheless, Jeffords thought it imperative for Congress to support Bush and the U.N. as a conflict resolution institution. Division within the U.S. government, in his assessment, would increase the possibility of more aggression abroad. He then provided a noteworthy statement of advice:

If there is war, we must wage it wisely. It would be, in my opinion, foolhardy to launch a ground attack against Saddam’s ground troops, playing to his strengths rather than our own. While “limited war” is rightly thought a contradiction, it may be that we can exert sufficient air and naval pressure to reach our goals. The notion of limiting a war is of course specious, not just from a military standpoint, but from a broader political one as well.⁸⁰³

Here Jeffords indicated, whether knowingly or not, two significant aspects of constitutional war powers. First, Congress has the power to regulate the commander-in-chief during wartime; it can enact specific regulations on how force should be conducted—such as prescriptions for sole use of the air force and navy or explicit limits on the use of ground troops—and the President is bound to follow them.⁸⁰⁴ It would absolutely be within Congress’ power to prohibit ground forces in a war against Iraq, but Jeffords appeared oblivious to this fact. Second, Jeffords’ statement distinguished the critical principle of *imperfect* or limited war. Limited war is not a contradiction in American foreign policy or constitutional law. As Justice Samuel Chase described in *Bas v. Tingy* (1800), an early Quasi-War Supreme Court case:

Congress is empowered to declare a general war, or Congress may wage a limited war, limited in place, in objects, and in time. If a general war is declared, its extent and operations are only restricted and regulated by the *jus belli*, forming a part of the law of nations, but if a partial war is waged, its extent and operation depend on our municipal laws.⁸⁰⁵

⁸⁰² Ibid, 941.

⁸⁰³ Ibid, 941.

⁸⁰⁴ See *Little v. Barrame*, 6 U.S. 170 (1804).

⁸⁰⁵ *Bas v. Tingy*, 4 U.S. 43 (1800).

When Congress decides to enact only an AUMF and not a war declaration, existing laws pertaining to a state of war do not automatically go into effect that increase presidential power and permit a more expansive conflict. The capability to differentiate between limited versus general war is instrumental, yet legislators have consistently failed to demonstrate this awareness during debates to authorize hostilities.

In the House, legislators debated the three resolutions discussed during the previous days. The first, the legally nonbinding Bennett-Durbin resolution, asserted that the President needs congressional approval prior to offensive use of military force. The House approved it overwhelmingly, voting 302-131.⁸⁰⁶ For those who opposed, such as Representative Sid Morrison (R-WA), the Bennett-Durbin resolution represented an intrusion upon inherent presidential war powers. Morrison delivered the often repeated, although fallacious, claims regarding presidential power to use military force:

History shows that the Presidents of the United States have initiated military action on about 260 different occasions, while Congress has declared war five times. As the clock ticks toward the January 15 U.N. deadline, this legislative option reopens a centuries old debate over who has what authority under the Constitution. This resolution simply ties the President's hands on any offensive action against Iraq unless Congress specifically approves, a process that could take months. I would love to be part of an in-depth debate on this constitutional issue, but not under today's circumstances. As history reflects, the Commander in Chief has the authority to react instantly, and Congress has chosen to legally participate less than 2 percent of the time, in every case in support of the President. This resolution, though nonbinding, would totally deny the Executive's emergency authority that currently does not necessarily lead to the start of war. That authority has been used, for instance, to force down the plane carrying the fleeing murderers of the *Achille Lauro* hijacking, and there are numerous other examples of a justified use of force. In the name of separation of powers, this resolution is unduly restrictive and is

⁸⁰⁶ Two members did not vote.

unnecessary in light of the resolution offered in support of the United Nations.⁸⁰⁷

Morrison was severely mistaken in his claims. First, Congress has enacted war declarations more than five times. In total, Congress has declared war eleven times. Although Congress declared war against Nazi Germany in December 1941, Franklin Roosevelt returned to Congress in 1942 to obtain additional war declarations against Romania, Bulgaria, and Hungary. Second, Congress has authorized the use of military force dating back to the Quasi-War (1798-1800); it enacted AUMFs for, but not limited to: the First Barbary War (1802), the Second Barbary War (1815), the Caribbean anti-piracy wars (1819), the AUMF preceding the 1898 Spanish-American War declaration, the 1955 Formosa Resolution, the 1957 Middle East Resolution, the 1962 Cuba Resolution, the 1964 Gulf of Tonkin Resolution, and the 1983 Lebanon authorization.

Third, Bush would not be authorized to use military force under UNSC Resolution 678. UNSC resolutions do not supersede the U.S. Constitution. Truman faced considerable public criticism because he waged war in Korea without obtaining congressional authorization concurrent with UNSC authorization. Debate on the use of force can possibly take weeks, if not months, but it is a critical responsibility for the nation's public representatives. Separation-of-powers principles mandate that Congress debate and authorize presidential use of force, yet Morrison supported abandoning Congress' responsibility.

⁸⁰⁷ U.S. House: January 12, 1991, *Congressional Record* (Bound), Volume 137, Part 1, January 3, 1991 to January 14, 1991 (Washington, D.C.: U.S. GPO, 1991), 1048.

Despite various calls and a resolution for continued use of diplomacy and economic sanctions, Congress voted to reject this strategy. The House instead enacted the AUMF resolution, H.J. Resolution 77, and the Senate enacted S.J. Resolution 2, the matching resolution. The Senate approved the AUMF narrowly, voting 52-47.⁸⁰⁸ The House was less divided, voting 250-183. Legislators understood that enactment of the AUMF meant approval for large-scale *offensive* use of the military, including the use of ground combat forces. This contrasts with the enactment of the 1964 Tonkin Resolution and the minimal congressional debate preceding it, in which legislators did not clearly understand that they would be authorizing extensive use of ground troops and a *general* war defined and conducted at Johnson's discretion.

The 1991 AUMF, as enacted, restated much of what previous administration drafts contained in the preamble section, namely, that Iraq had illegally invaded Kuwait and that the UNSC had approved resolutions demanding Iraq's immediate and unconditional withdrawal.⁸⁰⁹ One difference was the inclusion of a statement about UNSC Resolution 678 authorizing military force against Iraq. The AUMF section was divided into two subsections. The first subsection specified, "The President is authorized, subject to subsection (b), to use United States Armed Forces pursuant to United Nations Security Council Resolution 678 (1990) in order to achieve implementation of Security Council Resolutions 660, 661, 662, 664, 665, 666, 667, 669, 670, 674, and 677."⁸¹⁰ The second subsection required the President to make a determination that military force was necessary. It specified:

⁸⁰⁸ Senator Alan Cranston (D-CA) would have voted against the AUMF, but was absent due to illness.

⁸⁰⁹ "Authorization for Use of Military Force Against Iraq Resolution," Public Law No. 102-1, 105 Stat. 3, 14 January, 1991.

⁸¹⁰ Ibid, 1.

Before exercising the authority granted in subsection (a), the President shall make available to the Speaker of the House of Representatives and the President pro tempore of the Senate his determination that the United States has used all appropriate diplomatic and other peaceful means to obtain compliance by Iraq with the United Nations Security Council resolutions cited in subsection (a); and that those efforts have not been and would not be successful in obtaining such compliance.⁸¹¹

The enacted AUMF was actually stricter than the 12 September 1990 House draft that failed to receive congressional or executive consideration. Although the January AUMF did not restrict the types of force authorized or set a termination date for hostilities, it did require Bush to determine that force was necessary prior to ordering offensive military actions against Iraq, provided that he had taken all measures of diplomacy to resolve the conflict peacefully or determined that future diplomatic efforts were not feasible. The President also had to issue this report to specific legislators before conducting offensive actions. The 12 September draft did not require Bush to make any such determination before initiating offensive military action. Additionally, the final resolution stipulated that the U.S. operation was to implement specifically named UNSC resolutions, which further defined the mission to only forcing Iraq out of Kuwait. It also contained the very WPR language that the Bush administration opposed in the 12 September House draft containing an AUMF.

Bush signed the AUMF on 14 January, one day before the UNSC deadline for Iraq to withdraw from Kuwait. When the deadline passed, Bush notified the nation on 16 January of the imminent offensive military actions in Operation Desert Storm. Bush complied with the AUMF's requirement that he notify Congress that diplomatic efforts had failed before he initiated hostilities by writing to Speaker Foley and Senator Byrd. Bush also telephoned Foley, Byrd, and other ranking legislators of the

⁸¹¹ Ibid, 1-2.

imminent U.S. airstrikes to follow. At the beginning of hostilities, Bush only ordered air strikes and refrained from using ground forces. U.S. and allied air forces conducted over 1,000 air strikes during the first day and flew over 30,000 sorties over the first two weeks of the conflict.⁸¹²

U.S. airstrikes, while great in number, failed to force Saddam to withdraw. On 22 February Bush issued an ultimatum for Saddam to withdraw completely or face a ground war. After Saddam refused, Bush ordered ground forces into hostilities on 24 February. After 100 hours of ground combat, U.S. forces obliterated the Iraqi army in both Kuwait and on the roads leading back to Iraq.⁸¹³ Bush announced a cease-fire on 27 February, stating, “Kuwait is liberated. Iraq’s army is defeated. Our military objectives are met.”⁸¹⁴ There are two important outcomes to note about the U.S. military intervention in the Persian Gulf. First, despite serious domestic concerns that a ground war would result in massive American casualties reminiscent of Vietnam, the military campaign against Iraq was highly successful, with only 89 U.S. forces killed and 38 missing in action.⁸¹⁵ Second, Bush did not order a military assault on Baghdad to overthrow Saddam’s regime. There was no UNSC resolution calling for regime change in Iraq, and Bush did not attempt to interpret the AUMF as legal justification for Saddam’s removal. This demonstrated restraint, yet also illustrates how another President could have interpreted the AUMF differently to go beyond the mere liberation of Kuwait.

⁸¹² “1991 Begins With War in the Mideast.” In *CQ Almanac 1991*, 47th ed., 437-50. Washington, D.C.: Congressional Quarterly, 1992. <http://library.cqpress.com/cqalmanac/cqal91-1111031>.

⁸¹³ Ibid.

⁸¹⁴ George Bush, “Address to the Nation on the Suspension of Allied Offensive Combat Operations in the Persian Gulf,” February 27, 1991. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 15 January 2019, <https://www.presidency.ucsb.edu/node/265182>.

⁸¹⁵ In addition to enemy combat, U.S. forces were also killed by “friendly fire.”

Conclusions

While Presidents Eisenhower and Johnson succeeded in obtaining executive-favored, preemptive, and discretionary AUMFs by strategically influencing Congress, Bush failed to anticipate and suppress the political attacks against his unilateral moves toward *offensive* military action against Saddam's invasion and occupation of Kuwait. Bush's massive deployment of U.S. forces successfully prevented an Iraqi invasion of Saudi Arabia. However, it also substituted for legislative action—such as the enactment of a deterrent AUMF, such as the 1955 Formosa Resolution—and illustrated the administration's reactionary response to growing Iraqi aggression in the years preceding the conflict. The Bush administration did not begin serious groundwork with legislators to further the AUMF enactment process ahead of the *Dellums* lawsuit contesting the U.S. military buildup in the Persian Gulf. Bush dealt with a war-weary Congress and an American public still suffering from an aversion to large-scale U.S. military interventions overseas—the so-called “Vietnam syndrome”—and a significant legal attack that raised awareness for significant constitutional issues regarding presidential deployments of the military and use of force abroad prior to congressional authorization.

When Bush declared, “It’s a proud day for America. And, by God, we’ve kicked the Vietnam syndrome once and for all,” his statement should have been revised to reflect the “Korean War syndrome” of taking large-scale military actions without congressional authorization.⁸¹⁶ Unlike Korea, when Truman used UNSC resolutions as a substitute for congressional authorization, Bush did not attempt to wage an

⁸¹⁶ George Bush, “Remarks to the American Legislative Exchange Council,” March 1, 1991, Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: November 22, 2018, <https://www.presidency.ucsb.edu/node/265226>.

offensive war based on the 29 November UNSC Resolution 678 authorizing force, before its deadline of 15 January. However, the Bush administration's actions during the Persian Gulf conflict illustrate an executive branch that failed to seize multiple opportunities to secure a favorable AUMF much earlier than it ultimately did. The administration's 11 September draft resolution, if enacted, could have possibly bypassed Congress completely and led to a more focused effort on getting a UNSC AUMF. The 12 September House draft, written by Democrats, included an AUMF clause; and, although it also included WPR provisions, it primarily would have given the administration what it needed without further restrictions. Democratic congressional leaders sought to empower Bush with authority to wage war in the draft bill, but Bush and his administration failed to even consider it because of largely meaningless WPR redlines.

Presidents succeeding George H.W. Bush have been unwilling to wage large-scale *offensive* military conflicts without congressional authorization. They have, however, continued to obtain vague and highly discretionary AUMFs from Congress to conduct unrestricted warfare overseas. President George W. Bush did not conduct the War on Terror and the Iraq War without legislative consent; he obtained two congressional authorizations prior to offensive hostilities. This tradition thus appears to have been upheld since the 1991 Persian Gulf War, which demonstrates the period's most lasting impact on presidential unilateralism in war making.

As for Congress, the Persian Gulf crisis and ensuing congressional debates over continuing the use of sanctions and diplomacy versus authorizing the use of military force illustrate several critical legislative branch failures. First, Congress failed to

appropriately determine whether it needed to enact a declaration of general war against Iraq or enact a limited war AUMF. Many legislators preferred airstrikes and use of the navy, while prohibiting the use of ground forces. However, at no point did Congress recognize and seriously consider the enactment of a limited war AUMF for *only* offensive airstrikes and use of the navy. Second, Congress failed to exert itself and use its foreign policy powers, especially its authority to regulate the commander-in-chief and his use of military force through federal law. Congress does not exist to simply react to presidential decision-making, particularly when the President conducts unilateral military actions overseas. It also does not exist to unconditionally support the President during a crisis or his foreign policy strategy. As Senator Nunn aptly stated during the congressional debates on 11 January:

I do not think our main duty here in the Senate is to preserve President Bush's prestige, or any other President's prestige. I think we are sworn to preserve the Constitution of the United States and to represent our constituents and this country and to give them our best judgment. I never want to see a President's prestige in any way diminished. But if we take the position that any time the President commits his prestige we have to salute and line up and go along, then we have basically said that our role under the Constitution is not important; that once the President commits his prestige we are going to go along no matter what.⁸¹⁷

Nunn's comments revealed a high regard for preserving Congress' own prestige.

Whether a resolution is an offensive or defensive-only AUMF, the legislative branch has the sole power to regulate the President as commander-in-chief. Indeed, it has a solemn duty to do so, with explicit limits and guidelines, when enacting AUMFs.

⁸¹⁷ U.S. Senate: January 11, 1991, *Congressional Record* (Bound), Volume 137, Part 1, January 3, 1991 to January 14, 1991 (Washington, D.C.: U.S. GPO, 1991), 791.

Chapter Six

A Beginning with no End: The Unitary Executive, the 2001 AUMF, and the Presidential Prerogatives of Limitless War

I believe that it is also important to note that this authorization for the use of force is limited to the nations, organizations, or persons involved in the terrorist attacks of September 11. It is not a broad authorization for the use of military force against any nation, organization, or person who were not involved in the September 11 terrorist attacks.

—Senator Carl Levin (D-MI), 14 September 2001⁸¹⁸

Our war on terror begins with Al Qaida, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated.

—President George W. Bush, 20 September 2001⁸¹⁹

Finally, the President may deploy military force preemptively against terrorist organizations or the states that harbor or support them, whether or not they can be linked to the specific terrorist incidents of September 11.

—John Yoo, Deputy Assistant Attorney General, 25 September 2001⁸²⁰

In the days following the September 11th, 2001 al-Qaeda attacks on the World Trade Center in New York City and Pentagon in Washington, D.C., the largest terror attack in U.S. history, and in the scramble to thwart further assaults on the nation, Congress enacted a law to begin what has become the longest war in American history. The 2001 AUMF, initially enacted to address the 9/11 perpetrators, was interpreted by the George W. Bush administration and succeeding presidents to sanction an expansive war against not only the terrorist groups directly responsible for 9/11, but also any terrorist group the President deemed as a national security threat.

⁸¹⁸ U.S. Congress, *Congressional Record*, 107th Cong., 1st Sess., Vol. 147, No. 120 (Washington D.C.: U.S. GPO, 2001), 9416. Senator Levin issued this statement on the day Congress enacted the 2001 AUMF. President Bush signed the AUMF into law on 18 September 2001.

⁸¹⁹ George W. Bush, “Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11,” September 20, 2001. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 13 May 2019, <https://www.presidency.ucsb.edu/node/213749>.

⁸²⁰ John Yoo, “The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them,” 25 September 2001, *Opinions of the Office of Legal Counsel in Volume 25*, Office of Legal Counsel, U.S. Department of Justice, 188.

This chapter will answer several critical questions about the 2001 AUMF. What were its legal and theoretical origins? Did its discretionary provisions violate the legal doctrines of non-delegation and void-for-vagueness? And what is its enduring legacy concerning how AUMFs are congressionally enacted? This chapter will demonstrate how the initial AUMF interpretation almost immediately shifted from authorizing the use of force against those principally responsible for the 2001 attacks to authorizing force against *any* terror group or suspected terrorist—as determined by the President and administration officials—and bolstering executive claims of an inherent presidential power to wage new wars without further authorization or limitation.

Part I will examine the origins of the Unitary Executive Theory (UET), the legal doctrine employed by Bush administration officials to draft the AUMF and set the scope for its use. Part II will detail the AUMF's enactment, and Part III will analyze AUMF usage and its inconsistent employment by three distinct presidential administrations. I will demonstrate how the 2001 AUMF enactment represented a vast delegation of discretionary war power from Congress to the President, based on expanded UET principles. Furthermore, its usage firmly established a presidential prerogative to pre-emptively use military force against terrorism globally. The lack of defined limits within the AUMF's text, its expansive presidential use, and the variance in its usage demonstrably represent unconstitutional vagueness and a legislative delegation of Congress' power to declare war and regulate the armed forces during conflicts.

Part I: Origins of The Unitary Executive Theory

In response to the Vietnam War and Watergate scandal, Congress sought in the 1970s to reestablish control over an executive branch that had exceeded constitutional limitations.⁸²¹ It repealed the Tonkin Resolution in 1971, enacted the WPR over Richard Nixon's veto in 1973, began conducting oversight of domestic and foreign intelligence agencies, created the Congressional Budget Office while expanding the Congressional Research Service, and enacted other laws to regulate the executive branch.⁸²² Yet, the *Imperial Presidency* would forever remain an enduring legacy of the centuries-long executive accretion of power.⁸²³ For many former Nixon administration officials, and for those who perceived Jimmy Carter's administration as being woefully incompetent, the presidency appeared greatly weakened by the end of the 1970s.⁸²⁴ Ronald Reagan's 1980 election victory meant, however, that those supporting greater executive power—initially to control and roll-back the administrative state—had an opportunity to remold the presidency to achieve their conservative political revolution.⁸²⁵

⁸²¹ For further discussion of the Nixon administration's usurpation of power and the Watergate scandal, see John Robert Greene, *The Limits of Power: The Nixon and Ford Administrations* (Bloomington: Indiana University Press, 1992); Theodore White, *Breach of Faith: The Fall of Richard Nixon* (New York: Atheneum Publishers, 1975); Fred Emery, *Watergate: The Corruption of American Politics and the Fall of Richard Nixon* (New York: Simon and Schuster, 1994).

⁸²² Benjamin Ginsberg and Martin Shefter, "After the Reagan Revolution: A Postelectoral Politics," in *Looking Back On the Reagan Presidency*, ed. Larry Berman (Baltimore: The Johns Hopkins University Press, 1990), 241-267; Joseph Hogan, "Back in the 1970s: The Context of the Reagan Presidency," in *The Reagan Years: The Record in Presidential Leadership*, ed. Joseph Hogan (Manchester: Manchester University Press, 1990), 3-20. Other notable acts enacted by Congress include: the Budget and Impoundment Act, the Freedom of Information Act, the Arms Export Control Act, the National Emergencies Act, the Case Act, and the Ethics in Government Act.

⁸²³ See Arthur Schlesinger, Jr., *The Imperial Presidency* (Boston: Houghton Mifflin, 1973).

⁸²⁴ Ryan Barrilleaux and Christopher Kelley, "Introduction: What is the Unitary Executive?" in Barrilleaux and Kelley (eds.) *The Unitary Executive and the Modern Presidency* (College Station: Texas A&M University Press, 2010), 1-14.

⁸²⁵ John MacKenzie, *Absolute Power: How the Unitary Executive Theory is Undermining the Constitution* (New York: The Century Foundation Press, 2008), 3. For more information about the Reagan administration's deregulation political strategy, see Meg Jacobs and Julian Zelizer, *Conservatives in Power: The Reagan Years, 1981-1989: A Brief History With Documents* (Boston: Bedford/St. Martin's, 2011), 38-40. For more information regarding Reagan's groundbreaking 1980 election victory, see Craig Shirley, *Reagan's Revolution: The Untold Story of the Campaign that Started It All* (Nashville: Nelson Current, 2005); Doug Rossinow, *The Reagan Era: A History of the*

Accordingly, officials serving within Reagan's Justice Department under the direction of Attorney General Edwin Meese created the UET: a paradigm to consolidate White House control over all executive branch bodies with decentralized authority.⁸²⁶ The theory would be publicized amongst constitutional scholars, cited as legal arguments before the courts, and ultimately become embedded within American legal culture.⁸²⁷ George W. Bush administration officials—namely Deputy Assistant Attorney General John Yoo, Vice President Dick Cheney, and Cheney's legal counsel and Chief of Staff David Addington—further expanded upon the initial theory of White House control to encompass both domestic *and* foreign policy. The Bush administration would proceed to cite this revisionist version of the initial contrived legal theory as legal justification for their vigorous and excessive antiterrorism policies post-9/11.⁸²⁸

The UET principally asserts that the President as chief executive holds not some, but all executive power.⁸²⁹ Its proponents cite the “Commander in Chief” and “Vesting” clauses of Article II in the Constitution as evidence supporting plenary presidential

1980s (New York: Columbia University Press, 2015). For a comparative analysis of Franklin Roosevelt and Reagan, two presidents with "transformative" but highly contrasting political visions, see John Sloane, *FDR and Reagan: Transformative Presidents with Clashing Visions* (Lawrence: University Press of Kansas, 2008).

⁸²⁶ MacKenzie, *Absolute Power*; Steven Calabresi and Christopher Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* (New Haven: Yale University Press, 2008). Congressman Dick Cheney (R-WY) should also be credited with supporting similar principles of the more expansive version of the Unitary Executive Theory during the 1980s; Cheney defended President Reagan during the Iran-Contra Scandal by claiming that the President held an inherent power granting him immunity from any wrongdoing or congressional investigation.

⁸²⁷ Jeremy Bailey, “The New Unitary Executive and Democratic Theory: The Problem of Alexander Hamilton,” *The American Political Science Review*, Vol. 102, No. 4 (November 2008): 453; See also Steven Calabresi and Kevin Rhodes, “The Structural Constitution: Unitary Executive, Plural Judiciary,” *Harvard Law Review*, Vol. 105, No. 6 (April 1992): 1153-1216. Calabresi, formerly a Meese Justice Department assistant, is the most published proponent of the initial version of the Unitary Executive Theory.

⁸²⁸ Jeffrey Crouch, Mark Rozell, and Mitchel Sollenberger, “The Unitary Executive Theory and President Donald J. Trump,” *Presidential Studies Quarterly*, Vol. 47, No. 3 (September 2017): 564.

⁸²⁹ John MacKenzie, *Absolute Power*.

power.⁸³⁰ They claim that the President alone has almost total control over all executive functions, including the power to remove executive officials and wage war abroad, without congressional constraints. The President can also order executive officials to reject subpoenas to testify before Congress or independent commissions.⁸³¹ UET opponents criticize the theory as being “devoid of content, not expressed or even strongly implied in foundational documents such as *The Federalist*, not to mention the Constitution.”⁸³² John Yoo, however, claimed that the Founders “established a system which was designed to encourage presidential initiative in war” and Congress, he claimed, can only exercise checks on presidential power by regulating military appropriations or impeaching the President.⁸³³

To say that Yoo issued *some* fallacious historical statements or promulgated a *few* egregious misconstructions of executive power would be an understatement. He claimed that the U.S. “has declared war only five times: during the War of 1812, the Mexican-American War of 1848, the Spanish-American War of 1898, and World Wars I (1914) and II (1941).”⁸³⁴ He further cited several instances when Congress enacted AUMFs instead of declaring war (e.g. 1798 Quasi-War, 1964 Tonkin Resolution, 1991 AUMF). Yet, Yoo asserted that presidents have ordered the use of military force in countless instances without any AUMF or war declaration.⁸³⁵ This, he believed, substantiates his claims about war declarations or AUMFs being

⁸³⁰ John Yoo, “War Powers in the Bush Administration,” in *Testing the Limits: George W. Bush and the Imperial Presidency*, ed. Mark Rozell and Gleaves Whitney (Lanham: Rowman and Littlefield, 2009), 131-156.

⁸³¹ Bailey, “The New Unitary Executive and Democratic Theory.”

⁸³² MacKenzie, *Absolute Power*, 55.

⁸³³ John Yoo, “The Continuation of Politics by Other Means: The Original Understanding of War Powers,” *California Law Review*, Vol. 84, No. 2 (March 1996): 174.

⁸³⁴ *Ibid*, 177.

⁸³⁵ *Ibid*.

supplementary, although unnecessary, for presidents to use military force at their own discretion.

In actuality, Congress has enacted eleven war declarations.⁸³⁶ Yoo neglected the additional declarations during the First and Second World Wars. In 1917, the U.S. first declared war against Germany and then against Austria-Hungary in a separate declaration. During the Second World War, the U.S. declared war against Japan, Germany, and then Italy in 1941, all in separate declarations. Yet, in 1942, President Roosevelt returned to Congress for further declarations against Bulgaria, Hungary, and Romania, again all in separate resolutions.⁸³⁷ Why would Roosevelt bother with further declarations if he already held authority to wage a large-scale war against Germany and Italy, which controlled and occupied continental Europe? And why would President Wilson seek an additional war declaration in 1917 against Austria-Hungary when Congress had already enacted one against Germany and, according to Yoo, the President held an independent power to wage unauthorized war? He never answers these questions, but the answer is: Presidents Wilson and Roosevelt wanted to be fully and constitutionally authorized to wage full-scale war against all enemy belligerents when the U.S. began hostilities in Europe, even if it might appear as a mere constitutional formality. Presidents preceding Roosevelt clearly thought it prudent to seek a congressional war declaration against the nations the U.S. would be in full-scale conflict with.

⁸³⁶ David Ackerman and Richard Grimmett, *Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications*, Congressional Research Service, RL31133 (January 14, 2003).

⁸³⁷ Ibid.

History notwithstanding, UET proponents have claimed that Supreme Court rulings demonstrate constitutional support for greater executive power, insulated from congressional checks. *Goldwater v. Carter* (1979) and *INS v. Chadha* (1983) were two significant contemporary cases that limited congressional challenges or controls over executive power.⁸³⁸ *Goldwater* concerned Jimmy Carter's actions to establish relations with the PRC. He unilaterally annulled the Sino-American Mutual Defense Treaty with Taiwan, which drew the attention of Republicans opposed to any softening of relations with communist China. Senator Barry Goldwater (R-AZ) led a lawsuit claiming that Carter acted unconstitutionally by annulling the treaty without Senate approval. The Supreme Court ordered the case dismissed, ruling that Carter's actions constituted a non-justiciable political question to be resolved between Congress and President.⁸³⁹ The Court further added that the issue would not be ripe for judicial review "until each branch has taken action asserting its constitutional authority."⁸⁴⁰ The constitutional question regarding whether the President can unilaterally annul a treaty was thus left unanswered, but Carter succeeded in terminating the treaty without congressional approval.

Chadha concerned Congress' power to control executive actions using a so-called "legislative veto" under the 1965 Immigration and Nationality Act (INA). Jagdish Rai Chadha, a native-born Kenyan, was subject to deportation proceedings by the Immigration and Naturalization Service (INS), because his student visa had expired. Chadha became a stateless individual when Kenya, Britain, and India either refused to grant or stripped his nationality and residency rights. However, an INA provision

⁸³⁸ *Goldwater v. Carter*, 444 U.S. 996 (1979); *INS v. Chadha*, 462 U.S. 919 (1983).

⁸³⁹ *Goldwater v. Carter*, 444 U.S. 996 (1979).

⁸⁴⁰ *Ibid.*

provided the Attorney General with discretion to halt the deportation of people at risk of “extreme hardship” by submitting a request to Congress subject to the veto of one house of the legislature.⁸⁴¹ After the House vetoed the request, Chadha, with INS support, appealed by challenging the legislative veto's constitutionality, citing violations of separation-of-powers and rules of legislative bicameralism.

The Supreme Court ruled in a 7-2 decision to strike down the INA's legislative veto. Chief Justice Warren Burger explained that the House veto of the Attorney General's executive decision constituted a legislative act and was required to follow constitutionally explicit lawmaking rules subject to bicameralism, the “Presentment Clauses,” presidential veto, and the legislative veto override power.⁸⁴² Congress also employed judicial powers by prescribing, in a separate unicameral vote, a final ruling over executive decisions and directing an executive official to either act or not.⁸⁴³ Justice Byron White dissented, arguing that the legislative veto was essential to the functioning of modern government. He also claimed that the Court had allowed Congress to delegate lawmaking power to executive agencies, which illustrated that lawmaking did not always require legislative bicameralism and a presentation to the President for signature. He further claimed that the “Necessary and Proper Clause” allowed Congress the most freedom in lawmaking, to which the administrative state owed its existence.⁸⁴⁴ The *Chadha* ruling, while rigidly maintaining separation-of-powers principles, ultimately meant the loss of an efficient and effective congressional check over the executive branch.

⁸⁴¹ See §244(a)(1) of the Immigration and Nationality Act of 1965, 66 Stat. 216.

⁸⁴² *INS v. Chadha*, 462 U.S. 958 (1983). The “Presentment Clauses” are enumerated within Article I, §7, clauses 2 and 3. They state that bills enacted by the House and Senate are to be presented to the President for approval or veto, which Congress can override by two-thirds majorities in both houses.

⁸⁴³ *Ibid.*

⁸⁴⁴ *INS v. Chadha*, 462 U.S. 983 (1983).

Yet, the Supreme Court also repudiated expansive claims issued by supporters of the UET. In *Morrison v. Olson* (1988) the Supreme Court ruled in a 7-1 decision against the Reagan administration's attempt to overturn the independent counsel provisions of the 1978 Ethics in Government Act.⁸⁴⁵ The law was enacted in the aftermath of Nixon's infamous "Saturday Night Massacre," when he ordered the firing of Archibald Cox, the special prosecutor in charge of investigating his administration's improprieties. Under the act, independent executive branch investigators were appointed, logically, outside the President's discretion and could not be subject to removal by the President. Chief Justice William Rehnquist explained in the majority opinion that the President held an independent appointment power for *principle* executive officers only, but the judiciary could appoint other *inferior* officers under the "Excepting Clause" of the Constitution.⁸⁴⁶ The act did not violate separation-of-powers because the Attorney General, an executive official, was authorized to remove the special prosecutor with reasonable cause.

Justice Antonin Scalia, the sole dissenter, claimed that the act unconstitutionally deprived the President of an *exclusively* executive power to conduct prosecutions and that the special prosecutor did not classify as an inferior officer.⁸⁴⁷ He notably repeated the claim of UET proponents that the "Vesting Clause" did not just empower the President with "some of the executive power, but all of the executive power."⁸⁴⁸ However, Scalia failed to grasp that the Constitution specifically provides exceptions

⁸⁴⁵ *Morrison v. Olson*, 487 U.S. 654 (1988).

⁸⁴⁶ *Ibid*, 675. *See* U.S. Constitution, Article II, §2, Clause 2. The "Excepting Clause" states that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

⁸⁴⁷ *Morrison v. Olson*, 462 U.S. 705 (1988).

⁸⁴⁸ *Ibid*, 705.

for inferior executive officers. While the executive power is vested in the President, executive branch functions are still subject to checks and oversight by the other branches. The *Morrison* ruling rejected UET claims that the President holds plenary power, based on the “Vesting Clause,” and is immune from congressional and judicial oversight.⁸⁴⁹

Part II: AUMF Enactment

The political and social shockwaves of 9/11 compelled Bush administration officials to immediately begin work on policies to retaliate. In these early days post-9/11, Bush used intensifying rhetoric that first pledged to bring justice to those responsible but then promised the use of military force to wage war, equal to that of a declared war, against global terrorism generally. For example, Bush issued several significant statements that, upon reflection, demonstrate the expansive direction the administration would take with regards to the War on Terror. He remarked on 11 September, “Make no mistake: The United States will hunt down and punish those responsible for these cowardly acts.”⁸⁵⁰ His language did not mention offspring groups or so-called “associated forces” not directly involved in the attacks; he only referenced those responsible for 9/11. Bush then re-affirmed this objective in his nationally televised address later that day:

The search is underway for those who are behind these evil acts. I've directed the full resources of our intelligence and law enforcement communities to find those responsible and to bring them to justice. We will make no distinction between the terrorists who committed these acts and those who harbor them.⁸⁵¹

⁸⁴⁹ MacKenzie, *Absolute Power*, 55.

⁸⁵⁰ George W. Bush, “Remarks at Barksdale Air Force Base, Louisiana, on the Terrorist Attacks,” September 11, 2001. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 2 September 2019, <https://www.presidency.ucsb.edu/node/216402>.

⁸⁵¹ George W. Bush, “Address to the Nation on the Terrorist Attacks,” September 11, 2001. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 4 September 2019, <https://www.presidency.ucsb.edu/node/216451>.

He stated further that the U.S. and its allies would “stand together to win the war against terrorism.”⁸⁵² Before the day had concluded, and before any AUMF had even been drafted, Bush declared the nation’s mission: to find those responsible and obtain justice for the victims. This rhetoric set the initial mindset for Americans and legislators regarding the necessary actions to combat terrorism.

Bush sought appropriations, a bill to expand executive power over domestic law enforcement, and an AUMF.⁸⁵³ The initial notion for a war authorization originated, unsurprisingly, from Vice President Cheney on 11 September.⁸⁵⁴ David Addington, Cheney’s legal counsel, along with White House Counsel Alberto Gonzales, Deputy White House Counsel Timothy Flanigan, and Deputy Assistant Attorney General John Yoo of the Justice Department’s Office of Legal Counsel (OLC) discussed what type of power Bush needed to respond to the attacks via a secure network video call during 9/11.⁸⁵⁵ The entire AUMF conceptualization, drafting, and enactment process took place from 12 to 14 September. Flanigan and Yoo completed the initial AUMF draft that empowered Bush with plenary authority to use military force to combat not just the groups responsible for 9/11, but also pre-empt *any* threat of terrorism and *all* national threats. This executive-drafted AUMF was sent to Congress the evening of 12 September. The draft text stated:

That the President is authorized to use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, harbored, committed, or aided in the planning or commission of the attacks against the United States that occurred on

⁸⁵² Ibid.

⁸⁵³ Shoon Murray, “Stretching the 2001 AUMF: A History of Two Presidencies,” *Presidential Studies Quarterly*, Vol. 45, No. 1 (March 2015): 176.

⁸⁵⁴ Ibid.

⁸⁵⁵ Barton Gellman and Jo Becker, “A Different Understanding with the President,” *The Washington Post*, June 24, 2007, A01.

September 11, 2001, and to deter and pre-empt any future acts of terrorism or aggression against the United States.⁸⁵⁶

While on one hand claiming that the President did not need any congressional approval, the Bush administration hastily drafted an AUMF to empower the President with the most discretion to wage war against any perceived threat. Within this AUMF the President would decide, at any given time, who was responsible for the 9/11 attacks and who the U.S. would be at war with, not Congress. It included no restraints, guidelines, or rules on how force must be executed. Another noteworthy aspect about this first draft is the administration's apparent lack of prior preparation or even consideration of an AUMF framework prior to 9/11, in the event the U.S. was attacked or faced a crisis abroad requiring the use of military force.

This contrasts greatly with Lyndon Johnson's administration in 1964, when it prepared draft war authorizations months before the Tonkin Gulf incidents. Nevertheless, the Bush administration was able to quickly prepare and send to Congress the broadest of possible AUMFs within 24 hours of the attacks. This demonstrates that vaguely worded administration-drafted AUMFs do not necessarily need to be prepared months in advance to receive strong congressional support. In this case, the impact of 9/11 was more significant in rallying Congress behind the administration's objective for a broad AUMF.

Representatives from the White House's Office of Counsel to the President met with congressional leaders on 13 September to discuss and negotiate the text of the AUMF. The congressional group principally included: House Speaker Dennis Hastert (R-IL),

⁸⁵⁶ "Text of Original Draft of Proposed White House Joint Resolution," September 12, 2001. U.S. Congress, *Congressional Record*, 107th Congress, 1st Session, Senate, 9949-9951.

House Minority Leader Richard Gephardt (D-MO), Senate Majority Leader Tom Daschle (D-SD), and Senate Minority Leader Trent Lott (R-MS).⁸⁵⁷ Peculiarly, congressional leadership negotiated the AUMF's language themselves, bypassing the conventional legislative review process by congressional committees.⁸⁵⁸ The congressional response at the meeting was highly critical to the executive's draft language. Not only would the President have the authority to wage an unrestricted war against all forms of terrorism, however the executive branch defined it, the President could also wage pre-emptive war against *any* hypothetical threat to the nation. This act would have clearly removed the need to consult Congress for additional AUMFs, rendering Congress' power to declare war meaningless. The executive branch proposal to so openly circumvent Congress' constitutional power to authorize future use of military force, both limited and general warfare, should have raised red flags amongst the congressional leaders present at the negotiation.

To their credit, the congressional leaders *did* decisively reject the deterrence and pre-emption language in the final clause of the executive draft, which authorized the use of force against any national threat. Daschle later remarked that the administration's draft was "a blank check to go anywhere, anytime, against anyone the Bush administration or any subsequent administration deemed capable of carrying out an attack."⁸⁵⁹ Senator William Fulbright issued a similar statement in 1957 when he criticized the Eisenhower administration's desire for a so-called "blank check"

⁸⁵⁷ Richard Grimmett, *Authorization For Use of Military Force in Response to the 9/11 Attacks (P.L. 107-40): Legislative History*, Congressional Research Service, RS22357 (January 16, 2007).

⁸⁵⁸ Ibid.

⁸⁵⁹ Tom Daschle and Michael D'Orso, *Like No Other Time: The 107th Congress and the Two Years that Changed America Forever* (New York: Crown Publishers, 2003), 124.

resolution to use unrestricted force in the Middle East.⁸⁶⁰ In that instance, Congress even removed the word “authorize” from the 1957 resolution, as some believed that its inclusion might limit presidential discretion to use force elsewhere.

However, this was not the case in 2001, as the word “authorize” appeared in the resolution. Negotiations over the 2001 AUMF language continued into the night of 13 September, but an understanding emerged between the parties that the AUMF should be limited to the terrorists responsible for 9/11 and those who provided sanctuary for them.⁸⁶¹ Congressional leaders succeeded in adding WPR compliance provisions into the resolution, yet they failed to add further regulatory provisions such as a presidential certification of involvement for any targets (individuals, organizations, or nations). This certification would have required the administration to provide “specific and credible evidence” that the targets for the use of force were involved in 9/11.⁸⁶² A similar certification requirement would have also applied to any nation providing sanctuary to the terrorists responsible. The President, prior to using military force, would have to certify that he had exhausted all diplomatic options to pressure such nations to cease their support for terrorist activities occurring within. Negotiations over these regulating provisions reached an impasse during the meeting, and they were ultimately dropped from the final bill.

⁸⁶⁰ See U.S. Congress, *Congressional Record*, 85th Cong., 1st Sess., Vol. 103, Part 2 (Washington, D.C.: U.S. GPO, 1957), 1856.

⁸⁶¹ David Abramowitz, “The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force against International Terrorism,” *Harvard International Law Journal*, Vol. 43, No. 1 (Winter 2002): 74.

⁸⁶² *Ibid*, 76.

On the morning of 14 September Daschle and Lott co-sponsored the resolution and brought it forward for expedited enactment.⁸⁶³ They used a Senate procedure called the Unanimous Consent Agreement to secure a quick vote without further amendments or debate.⁸⁶⁴ This also meant that the Senate would have no further votes until the following week, which put more pressure on the House to approve the AUMF without further amendments or delays. The House voted on the AUMF later that evening.

The following remarks provided during the House and Senate debates on the AUMF substantiate a narrower congressional interpretation that the authorization was limited to those responsible for 9/11.⁸⁶⁵ Senator John Kerry (D-MA) provided his interpretation of the AUMF, stating:

This resolution allows the President to use all necessary and appropriate force against those nations, organizations, or individuals who are responsible for this attack and against those who helped or harbored them. But it does not give the President a blanket approval to take military action against others under the guise of fighting international terrorism. It is not an open-ended authorization to use force in circumstances beyond those we face today...Like any legislation, this resolution is not perfect. I have some concern that readers may misinterpret the preamble language that the President has authority under the Constitution to take action to deter and prevent acts of international terrorism as a new grant of power; rather it is merely a statement that the President has existing constitutional powers. I am gratified that in the body of this resolution, it does not contain a broad grant of powers, but is appropriately limited to those entities involved in the attacks that occurred on September 11.⁸⁶⁶

Kerry further described his thoughts regarding the scope of the forthcoming conflict, adding:

⁸⁶³ Grimmett, *Authorization For Use of Military Force in Response to the 9/11 Attacks*.

⁸⁶⁴ See "Glossary Term: Unanimous Consent Agreement," U.S. Senate Glossary. Accessed: 11 September 2019, https://www.senate.gov/reference/glossary_term/unanimous_consent_agreement.htm.

⁸⁶⁵ Senate remarks occurred *after* the vote to enact the AUMF, after Senators returned from the 14 September memorial service.

⁸⁶⁶ U.S. Congress, *Congressional Record*, 107th Cong., 1st Sess., Vol. 147, No. 120 (Washington, D.C.: U.S. GPO, 2001), 9417.

If this is indeed to be a war, then the President should seek a declaration of war. We cannot allow our cherished Constitution to become a dead letter. And it should go without saying that to declare a war, he must identify our adversary. If this will be something short of a war in the broadest sense, then it is proper that we will pass a resolution that gives such broad powers to the President that he could thereby conduct a full-scale war across the globe without the consent of Congress. This would, as well, fly in the face of the structure that our Constitution sets up.⁸⁶⁷

These statements are telling, given Kerry sought to distinguish full-scale military actions authorized under a war declaration versus limited military actions permitted under an AUMF.

Senator Joe Biden (D-DE) also interpreted the resolution as authorizing military force only against the groups responsible. He repeated this statement several times in his Senate remarks. He asserted that Congress did not say, “Go do anything, anytime, anyplace, Mr. President.”⁸⁶⁸ Yet, Biden also included statements that seemed to indicate a lack of insight about the limits to the use of military force under the AUMF. He added, “The authority permits the President wide latitude to use force against the broad range of actors who were responsible for the September 11 attacks...It [the AUMF] does not limit the amount of time that the President may prosecute this action against the parties guilty for the September 11 attacks.”⁸⁶⁹ He failed to recognize that AUMFs without explicit time restrictions remove the distinction between authorizing a limited war and declaring a general war. Biden, again reasserting his interpreted limitations of the AUMF, then remarked, “It should go without saying, however, that the resolution is directed only at using force abroad to combat acts of international terrorism. The authority granted is focused on those responsible for the attacks of

⁸⁶⁷ Ibid, 9418.

⁸⁶⁸ Ibid, 9422

⁸⁶⁹ Ibid, 9422

September 11.”⁸⁷⁰ He and many other legislators were seriously mistaken. They assumed that it was unnecessary to include explicit limits and guidelines within an AUMF on the use of force. These statements illustrate Biden’s simplistic interpretation of the AUMF as simply targeting those responsible. Yet, the resolution’s text was so vague that it would allow the President to do exactly what Biden asserted would not be sanctioned: to do anything, anytime, anyplace, and against anyone. Biden asserted who the targets of the AUMF were, yet he failed to comprehend that enemy targets would be determined by presidential discretion and that limits on other factors such as time, location, and the types of force authorized should also hold significance.

Similarly, Senator Carl Levin (D-MI) interpreted the AUMF as authorizing force *only* against those responsible for 9/11.⁸⁷¹ He added:

I believe it is important to note that this joint resolution would authorize the use of force even before the President or the Congress knows with certainty which nations, organizations, or persons were involved in the September 11 terrorist acts. This is a truly noteworthy action and a demonstration of our faith in the ability of our Government to determine the facts and in the President to act upon them.⁸⁷²

Although Levin clearly remarked that the AUMF did not authorize war against those *not* responsible for 9/11, he admitted that Congress enacted a resolution without all the facts on who was responsible for the attacks. This determination would be left to the President; thus, leaving the law as enacted undefined.

⁸⁷⁰ Ibid, 9423.

⁸⁷¹ See Levin quotation at 285.

⁸⁷² U.S. Congress, *Congressional Record*, 107th Cong., 1st Sess., Vol. 147, No. 120 (Washington, D.C.: U.S. GPO, 2001), 9416.

Representative Peter DeFazio (D-OR) echoed Kerry's and Biden's views, stating, "I had strong reservations about earlier drafts of the proposed resolution that authorized the use of force in an unprecedented, open-ended manner, far beyond that necessary to respond to the terrorist acts on our people, even far beyond that ceded to FDR in World War II."⁸⁷³ His statement was significant, since the administration's initial draft AUMF would have clearly removed the lines distinguishing a *limited* AUMF from a declaration of *general* war. The question DeFazio should have proposed to Congress was whether the enacted AUMF also provided the President with power equal or beyond that provided to FDR during the Second World War.

However, many other legislators either expressed a very different AUMF interpretation or desired a broader global mission beyond the terrorists responsible for 9/11. For example, Senator Jon Kyl (R-AZ) was opposed to "putting a lot of strings on" a war authorization.⁸⁷⁴ He also worried about the President having "enough flexibility to act if we put a lot of restrictions in" the AUMF.⁸⁷⁵ Other Republicans agreed with Kyl's view. For example, Senator John McCain (R-AZ) stated:

These were not just crimes of mass murder against the United States; they are acts of war. The American people now know that we are at war...The stakes today are higher than before the Persian Gulf War: this mission is harder, will take longer, and ends not with the capture or death of Osama bin Laden, but with the destruction of the terrorist networks that threaten our way of life, and the defeat of nations supporting and collaborating with this evil.⁸⁷⁶

Representative Brian Kerns (R-IN) added, "I believe that we will have to take additional action to address further threats. This must only be the beginning of a

⁸⁷³ Ibid, 5633.

⁸⁷⁴ "Congress OKs Force After Sept. 11," In *CQ Almanac 2001*, 57th ed., 7-8-7-9. Washington, DC: Congressional Quarterly, 2002. Accessed: 8 August 2019, <http://library.cqpress.com/cqalmanac/cqal01-106-6388-328730>.

⁸⁷⁵ Ibid.

⁸⁷⁶ U.S. Congress, *Congressional Record*, 107th Cong., 1st Sess., Vol. 147, No. 120 (Washington, D.C.: U.S. GPO, 2001), 9417.

comprehensive war on terrorism.”⁸⁷⁷ Kerns did not say whether this meant further congressional authorizations for the use of force or the enactment of further counterterrorism policies, but his use of general terminology such as a “comprehensive war” against terrorism indicated a desire for presidential use of military force against other terror groups not responsible for 9/11. Representative Howard Berman (D-CA) concurred with his Republican colleagues, stating:

We know the hijackers had ties to Osama bin Laden and his Al Qaeda organization...But this is not just about bin Laden. There are other radical groups that engage in terrorism, including Hezbollah, Hamas, Islamic Jihad. To win the war against terrorism, we must eliminate the entire infrastructure that sustains these organizations.⁸⁷⁸

Other representatives voiced their concerns during the 14 September House debate about the need for further congressional AUMF deliberation concerning its undefined approach to combating terrorism. For example, Representative Jesse Jackson, Jr. (D-IL) stated:

Even though I am going to vote for this legislation, I have deep concerns and grave reservations about it. First, it is too narrow. We need a comprehensive anti-terrorist approach. This legislation does not represent such a comprehensive strategy and war against terrorism around the world. It only pertains to the terrorism associated with the events surrounding September 11, 2001. This legislation looks backward, not forward. This legislation fails to develop a strategy to combat and prevent potential or future acts of terrorism. Second, and paradoxically, it is too broad. The literal language of this legislation can be read as broadly as executive interpreters want to read it, which gives the President awesome and undefined power. As written, the resolution could be interpreted, if read literally, to give the President the authority to deploy or use our armed forces domestically.⁸⁷⁹

Representative John Tierney (D-MA) also appeared to desire further congressional AUMF consideration. He cited a seldom-used House rule to propose returning the

⁸⁷⁷ Ibid, 5643.

⁸⁷⁸ U.S. Congress, *Congressional Record*, 107th Cong., 1st Sess., Vol. 147, No. 120 (Washington, D.C.: U.S. GPO, 2001), 5643. Representative Berman also strongly backed the 2003 U.S. military intervention in Iraq, and he helped organize congressional support for the 2002 Iraq AUMF. Berman also voted for a bill to block a scheduled U.S. withdrawal from Iraq.

⁸⁷⁹ U.S. Congress, *Congressional Record*, 107th Cong., 1st Sess., Vol. 147, No. 120 (Washington, D.C.: U.S. GPO, 2001), 5675.

AUMF bill to a House committee for a final amendment. His amendment would have added a requirement compelling the President to report to Congress every sixty days on the administration's AUMF employment. The House rejected his proposal by voice vote.⁸⁸⁰ Yet, both Jackson, Jr. and Tierney ultimately voted to enact the AUMF without further consideration or the addition of other regulatory amendments.

The desire to wage a more expansive war against terrorists beyond simply those responsible for 9/11 transcended partisan boundaries. Various Republicans and Democrats sought to provide Bush full discretion and accountability to use force, and they supported a wider mission of waging war against numerous other terrorist organizations. Yet, other legislators felt uneasy about being effectively compelled to enact such an authorization and voiced their concerns about the need for further deliberation. One fact remains: that were two distinct congressional interpretations of the AUMF, one more limited and the other quite broad.

How was this possible? The AUMF left the question of specific enemy targets up to the President to define through its vague provisions. There was a distinct lack of discussion during the 13 September AUMF negotiations regarding whether the administration was required to obtain further congressional authorization to expand the use of force to other targets. If Congress desired a more expansive war against terrorist organizations beyond those responsible for 9/11, then this notion should have been explicitly stated within the AUMF's text and those organizations specifically named. If Congress desired a full-scale general war against terrorism without time limitations, then it was required to declare war against explicitly named nations and

⁸⁸⁰ Abramowitz, "The President, the Congress, and Use of Force," 77.

terror organizations. This vagueness empowered the President with full discretion to define the enemy and all other aspects of the use of force, therefore permitting the President to determine the law. This resulted in an AUMF that delegated Congress' power to declare war, and its power to legislate generally, to the President. The fact that there were two vastly different congressional AUMF interpretations illustrates the law's extreme lack of clarity.

The Senate approved the AUMF, voting 98-0. Two Senators, Larry Craig (R-ID) and Jesse Helms (R-NC), did not vote on the bill. The House approved the bill, voting 420-1.⁸⁸¹ Representative Barbara Lee (D-CA) was the only legislator to oppose the AUMF. Lee rejected the notion that using military force abroad would prevent further terrorist attacks on the U.S, and she urged restraint.⁸⁸² In her assessment, the AUMF “authorizes an open-ended action and significantly reduces Congress’s authority in this matter.”⁸⁸³ Lee later reinforced her AUMF opposition in a 23 September *San Francisco Chronicle* opinion article, stating:

Some believe this resolution was only symbolic, designed to show national resolve. But I could not ignore that it provided explicit authority, under the War Powers Resolution and the Constitution, to go to war. It was a blank check to the president to attack anyone involved in the Sept. 11 events—anywhere, in any country, without regard to our nation's long-term foreign policy, economic and national security interests, and without time limit. In granting these overly broad powers, the Congress failed its responsibility to understand the dimensions of its declaration.⁸⁸⁴

⁸⁸¹ 10 representatives did not vote.

⁸⁸² Ibid.

⁸⁸³ “Congress OKs Force After Sept. 11,” In *CQ Almanac 2001*, 57th ed., 7-8-7-9. Washington, DC: Congressional Quarterly, 2002. Accessed: 8 August 2019, <http://library.cqpress.com/cqalmanac/cqal01-106-6388-328730>.

⁸⁸⁴ Barbara Lee, “Why I Opposed the Resolution to Authorize Force,” *San Francisco Chronicle*, September 23, 2001, Accessed: 15 September 2019, <https://www.sfchronicle.com/opinion/article/Why-I-opposed-the-resolution-to-authorize-force-2876893.php>.

Her remarks advocating greater scrutiny and debate of an extremely vague and discretionary AUMF would ultimately prove more significant compared to her general opposition to using military force to combat global terrorism.

Unmoved by Lee's opposition, legislators overwhelmingly enacted the AUMF. Its text stated:

That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.⁸⁸⁵

The resolution's preamble was identical to the administration's initial draft, except for the additional "whereas" clause that declared presidential authority "under the Constitution to take action to deter and prevent acts of international terrorism against the United States."⁸⁸⁶ The Supreme Court, however, specifically distinguished the language within a resolution's preamble clauses versus that of the resolving clauses, which have the legal operative effect to authorize or regulate.⁸⁸⁷ The preamble also included WPR requirements, which again, have little impact.

Bush swiftly signaled his forthcoming plans to use military force as he saw fit, for as long as he determined to be necessary. He began issuing statements defining an expansive mission, on par with a full-scale general war, the day following congressional enactment. He stated to reporters, "We're at war. There has been an act

⁸⁸⁵ P.L. 107-40, 115 Stat. 224 (2001).

⁸⁸⁶ *Ibid.*

⁸⁸⁷ *See Yazoo and Mississippi Valley Railroad Company v. Thomas*, 132 U.S. 174, 188 (1889). Chief Justice Melville Fuller stated, "But, as the preamble is no part of the act, and cannot enlarge or confer powers nor control the words of the act unless they are doubtful or ambiguous, the necessity of resorting to it to assist in ascertaining the true intent and meaning of the legislature is in itself fatal to the claim set up."

of war declared upon America, and we will respond accordingly.”⁸⁸⁸ He also remarked in a radio address, “We are planning a broad and sustained campaign to secure our country and eradicate the evil of terrorism.”⁸⁸⁹ On 16 September, Bush admitted to reporters at the White House:

This crusade, this war on terrorism is going to take a while, and the American people must be patient. I'm going to be patient. But I can assure the American people, I am determined. I'm not going to be distracted. I will keep my focus to make sure that not only are these brought to justice, but anybody who's been associated with them will be brought to justice. Those who harbor terrorists will be brought to justice. It is time for us to win the first war of the 21st century decisively, so that our children and our grandchildren can live peacefully into the 21st century.⁸⁹⁰

All of these statements highlight the administration’s resolve to wage more than simply a limited war. Although undeclared, the administration would use military force under an AUMF equivalent to that under a war declaration. Bush also first mentioned so-called “associated forces” and, more generally, nations who harbor terrorists; yet, this was not specifically referenced to only those who aided the perpetrators of 9/11.

Bush endorsed the AUMF into law on 18 September, adding a presidential signing statement to assert the executive interpretation of it:

Senate Joint Resolution 23 recognizes the seriousness of the terrorist threat to our Nation and the authority of the President under the Constitution to take action to deter and prevent acts of terrorism against the United States. In signing this resolution, I maintain the longstanding position of the executive branch regarding the President's

⁸⁸⁸ George W. Bush, “Remarks in a Meeting With the National Security Team and an Exchange With Reporters at Camp David, Maryland,” September 15, 2001. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 4 September 2019, <https://www.presidency.ucsb.edu/node/212475>.

⁸⁸⁹ George W. Bush, “The President's Radio Address,” September 15, 2001. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 4 September 2019, <https://www.presidency.ucsb.edu/node/216351>.

⁸⁹⁰ George W. Bush, “Remarks on Arrival at the White House and an Exchange With Reporters,” September 16, 2001. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 4 September 2019, <https://www.presidency.ucsb.edu/node/213051>.

constitutional authority to use force, including the Armed Forces of the United States and regarding the constitutionality of the War Powers Resolution.⁸⁹¹

While it is true that the President is authorized to prevent invasions and stop threats to the nation, this authority does not extend to the use of force abroad. The AUMF's preamble mentioned deterrence and prevention, yet these provisions were not included in the legally operative resolving clauses. Bush attempted to use the AUMF's preamble as confirmation of an inherent presidential power to use force. He used a signing statement, one of the hallmarks of the UET, to claim more executive power than was seemingly agreed upon prior to the enactment of the 2001 AUMF. Regardless, the AUMF's text was expansive and vague enough, and the administration's signing statement interpretation illustrated that Bush would use force abroad as he deemed necessary, with or without further congressional authorization.

It should be noted that Bush signed two bills on 18 September regarding the attacks. On 12 September, prior to AUMF consideration, Congress enacted a resolution that condemned the attacks, offered sympathy to the victims, commended the actions of first responders, thanked those who expressed solidarity with the U.S., declared that the U.S. was entitled to respond to the attacks under international law, committed to increasing the resources needed to eradicate terrorism, and supported the President's determination to bring justice and punish the perpetrators and their supporters.⁸⁹²

There are several critical points to note regarding this resolution. First, this was not an AUMF or a war declaration. It did not authorize the use of military force to respond to

⁸⁹¹ George W. Bush, "Statement on Signing the Authorization for Use of Military Force," September 18, 2001. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 4 September 2019, <https://www.presidency.ucsb.edu/node/213941>.

⁸⁹² "Joint Resolution Expressing the sense of the Senate and House of Representatives regarding the terrorist attacks launched against the United States on September 11, 2001," September 18, 2001, In *Statutes at Large*, 115 Stat. 222, Pub. Law 107-39.

the attacks nor did it change the state of the nation from peace to war. Second, Congress notably included Bush's rhetoric from the preceding day, the notion that a "war against international terrorism" had been thrust upon the nation.⁸⁹³ Third, Congress included language committing to increase resources (i.e. appropriations) "in the war to eradicate terrorism."⁸⁹⁴ This referenced combating all forms of terrorism; yet, it contrasted greatly with the next clause, which supported the President's mission, "in close consultation with Congress, to bring to justice and punish the perpetrators of these attacks as well as their sponsors."⁸⁹⁵ Again, the focus was on the specific individuals and organizations that committed the attacks, as well as those who provided aid. This resolution never mentioned any so-called "associated forces" who did not participate in the attacks or provide support to the terrorists responsible.

When addressing Congress on 20 September, Bush clearly enunciated the administration's expansive interpretation of the authorization and its broad mission to combat terrorism. He asserted that the War on Terror would begin against the people responsible for 9/11, yet it would not end until *every* terror organization was vanquished.⁸⁹⁶ He added:

This war will not be like the war against Iraq a decade ago, with a decisive liberation of territory and a swift conclusion. It will not look like the air war above Kosovo 2 years ago, where no ground troops were used and not a single American was lost in combat. Our response involves far more than instant retaliation and isolated strikes. Americans should not expect one battle but a lengthy campaign, unlike any other we have ever seen. It may include dramatic strikes, visible on TV, and covert operations, secret even in success. We will starve terrorists of funding, turn them one against another, drive them from

⁸⁹³ Ibid.

⁸⁹⁴ Ibid.

⁸⁹⁵ Ibid.

⁸⁹⁶ Bush, "Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11."

place to place, until there is no refuge or no rest. And we will pursue nations that provide aid or safe haven to terrorism.⁸⁹⁷

This stated mission was without limitations, under complete presidential discretion. Bush provided no indication in his congressional address that he would follow any explicit guidelines or regulations regarding the use of force. In fact, there were questions regarding whether the AUMF had underhandedly overturned bans on assassinations, as it did not mention specific approved methods of force.⁸⁹⁸

Yoo authored a 25 September memo essentially reinstating the expansive language within the administration's initial draft AUMF.⁸⁹⁹ Recall that during the 13 September meeting with congressional leaders, the administration agreed to the removal of language empowering the President with discretion to target any terrorist organization or pre-empt any potential national threat. This language ultimately appeared in the AUMF's preamble, which has no legal effect. However, Yoo cited the preamble as *confirmation* of the President's inherent power to use military force against groups beyond just the terrorist organizations responsible for 9/11.⁹⁰⁰ This argument flies in the face of the rule of law, Supreme Court precedents, and the Constitution. Imagine if John Adams had claimed, after he ordered the seizure of ships during the Quasi-War, that he held broad inherent power to exceed the laws regulating the use of force. Such an assertion would have been even more outrageous in claiming that a law's preamble confirmed this inherent power.

⁸⁹⁷ Ibid.

⁸⁹⁸ Abramowitz, "The President, the Congress, and Use of Force," 78.

⁸⁹⁹ Yoo, "The President's Constitutional Authority to Conduct Military Operations."

⁹⁰⁰ Ibid.

The Supreme Court repudiated any notion that the President can exceed or violate laws regulating the commander-in-chief in *Little v. Barrame* (1804).⁹⁰¹ The President must follow congressional orders; he cannot construct his own war-making rules outside of the law. Besides Supreme Court precedent, even the full title of the 2001 AUMF illustrates that Congress largely intended to authorize force only against those responsible. The full resolution title is: a “Joint Resolution To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.”⁹⁰² This mentions no “associated forces,” and it says nothing about a global war to eradicate every terrorist organization. Most legislators interpreted the AUMF as limited to just those responsible for 9/11, and this holds some relevance concerning congressionally intended AUMF limits. While one might assume that authorizing the use of force against those responsible logically precludes the use of force against anyone *not* responsible, what remains evident is that the AUMF’s limits were not explicit, and the President held the power to define its scope.

Yoo asserted that, even if Congress enacted an AUMF to limit the use of force, the President’s Article II powers would fill in any legal gaps. His interpretation of executive power, while practical for presidential applications, is unsupported by the Constitution. As one of the 2001 AUMF’s architects and an individual responsible for promulgating a far more expansive version of the UET, Yoo even conceded that the 2001 AUMF provided much narrower authority to use force when compared to inherent presidential power. Thus, if the President has no such inherent power to use military force abroad without congressional authorization, then he is certainly subject to congressional regulations within AUMFs. The fact that the Bush administration

⁹⁰¹ See *Little v. Barrame*, 6 U.S. 170 (1804).

⁹⁰² P.L. 107-40, 115 Stat. 224 (2001).

sought an AUMF to wage an expansive war in the first instance further supports the conception that presidents have no inherent power to wage war abroad without prior congressional approval. Yoo's concession about the 2001 AUMF's targeting nexus provides significant meaning regarding how the Obama and Trump administrations have exceeded even the vague provisions of the AUMF to wage war against terror groups *not* responsible for 9/11.

Some legislators attempted to reassert the narrow AUMF interpretation. On 1 October, more than two weeks after its enactment, Senator Robert Byrd questioned the haste at which Congress enacted the resolution. He read the initial and final drafts of the AUMF into the Congressional Record. He then attempted to provide clarification regarding the AUMF's limits, stating:

First, the use of force authority granted to the President extends only to the perpetrators of the September 11 attack. It was not the intent of Congress to give the President unbridled authority—I hope it wasn't—to wage war against terrorism writ large without the advice and consent of Congress. That intent was made clear when Senators modified the text of the resolution proposed by the White House to limit the grant of authority to the September 11 attack...Those persons, organizations or nations that were not involved in the September 11 attack are, by definition, outside the scope of this authorization.⁹⁰³

Legislators failed to discriminate between the negotiations of the AUMF's wording versus the provisions that were included in the law and the administration's immediate interpretation of it upon presidential signature. Congress repeated the same mistake from 1955, 1957, and 1964. They accepted the administration's notion that it would use the AUMF prudently, yet the actual wording of the authorization was so vague as to allow the President plenary power to decide the targets, location, and duration of hostilities. Simply *hoping*, as Byrd and many others did, that the

⁹⁰³ U.S. Congress, *Congressional Record*, 107th Cong., 1st Sess., Vol. 147, No. 129 (Washington, D.C.: U.S. GPO, 2001), 9949.

commander-in-chief will use force in a wise manner does not align with Congress' role to regulate the use of armed force with explicit rules and guidelines.

During the 14 September Senate debate some legislators apprehensively recalled the 1964 Tonkin Resolution, which Johnson and Nixon cited as legal justification to wage and escalate war in Vietnam and elsewhere in Southeast Asia without limitations or further authorization.⁹⁰⁴ However, the congressional leaders present at the 13 September 2001 AUMF negotiations with the Bush administration failed to recognize the significance of the Tonkin Resolution's enactment and its relevance to post-9/11 executive branch aspirations for greater power. They concurrently neglected to include language asserting Congress' constitutional powers to authorize conflicts and regulate the commander-in-chief's use of military force. Congressional leaders may have presumed that this expansive proposal was just following precedents in which the executive branch generally suggests, as an initial negotiating gambit, more broadly worded proposals to Congress to enlarge presidential and executive power. Yet, the executive-drafted AUMF demonstrated total disregard for the Constitution, Congress' rightful authority over the use of force abroad, congressional checks over executive power, and separation of the war power between legislative and executive.

Part III: Executive Usage of the AUMF

Following AUMF enactment, the Bush administration immediately implemented its counterterrorism strategy against al-Qaeda, the group directly responsible for 9/11.

Osama bin Laden, the leader of al-Qaeda, became the world's most wanted and

⁹⁰⁴ Shoon Murray, *The Terror Authorization: The History and Politics of the 2001 AUMF* (New York: Palgrave Macmillan, 2014). These members included Vietnam War veterans John McCain (R-AZ) and John Kerry (D-MA). Longtime Senator Robert Byrd (D-WV) served in Congress at the time of the Vietnam War, and he voted to enact the 1964 Gulf of Tonkin Resolution.

notorious fugitive. The administration also sought new policies to prevent further threats of terrorism.⁹⁰⁵ Beginning on 24 September, Bush notified Congress of his overseas military deployment.⁹⁰⁶ On 7 October, he addressed the nation, stating that he ordered strikes against the Taliban regime in Afghanistan, which aided al-Qaeda and provided sanctuary while they planned the attacks.⁹⁰⁷ And on 9 October, he notified Congress that ground combat operations had commenced in Afghanistan.⁹⁰⁸ However, Bush would undertake far more than simply limited military operations against those responsible for the attacks, citing the AUMF as part of its legal justification for expansive and often extreme actions.⁹⁰⁹

For example, in a 23 October 2001 OLC memo, Yoo and OLC Special Counsel Robert Delahunty claimed that the AUMF allowed military force for counterterrorist and law enforcement operations within the U.S.⁹¹⁰ Additionally, they claimed that

⁹⁰⁵ For example, it established the Department of Homeland Security on 8 October 2001 through Executive Order 13228. Congress also enacted the USA PATRIOT Act on 26 October 2001, which allowed for greater domestic surveillance, border security, and discretion to investigate and thwart terrorist threats.

⁹⁰⁶ George W. Bush, “Letter to Congressional Leaders Reporting on the Deployment of Forces in Response to the Terrorist Attacks of September 11,” September 24, 2001. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 4 September 2019, <https://www.presidency.ucsb.edu/node/211948>.

⁹⁰⁷ George W. Bush, “Address to the Nation Announcing Strikes Against Al Qaida Training Camps and Taliban Military Installations in Afghanistan,” October 7, 2001. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 17 September 2019, <https://www.presidency.ucsb.edu/node/213831>.

⁹⁰⁸ George W. Bush, “Letter to Congressional Leaders Reporting on Combat Action in Afghanistan Against Al Qaida Terrorists and Their Taliban Supporters,” October 9, 2001. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 17 September 2019, <https://www.presidency.ucsb.edu/node/213973>.

⁹⁰⁹ While this chapter will not specifically examine every action taken by the Bush, Obama, and Trump administrations, it will provide a concise overview of some of the broad range of activities to illustrate how the AUMF has been inconsistently interpreted and applied by three different presidential administrations. For further reading on the War on Terror, see Jason Ralph, *America’s War on Terror: The State of the 9/11 Exception from Bush to Obama* (Oxford: Oxford University Press, 2013) and Kurt Eichenwald, *500 Days: Secrets and Lies in the Terror Wars* (New York: Simon and Schuster, 2012). For an insider account of the Bush administration’s attempts to legally justify its policies, see Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (New York: W.W. Norton, 2009).

⁹¹⁰ John Yoo and Robert Delahunty, “Authority for Use of Military Force To Combat Terrorist Activities Within the United States,” 23 October 2001, Office of Legal Counsel, U.S. Department of Justice, <https://nsarchive2.gwu.edu/torturingdemocracy/documents/20011023.pdf>.

First Amendment free speech rights and Fourth Amendment protections against unreasonable searches and seizures would not apply in such circumstances.⁹¹¹ Yoo repeatedly claimed necessity as a justification for this broad authority. Yet, this memo's claims directly oppose a key congressional action to *reject* a last minute change sought by the administration—to authorize the use of force “in the United States”—just prior to the 14 September Senate vote. Tom Daschle, former Senate Majority Leader at the time of 9/11, recognized by winter 2005 that the Bush administration held a distorted AUMF interpretation that Congress rejected during the 2001 enactment.⁹¹² He described how the administration attempted to add language authorizing the use of force within the U.S. just minutes before the Senate voted on the bill.

However, Daschle saw no justification for this expansive power and rejected the White House proposal. He was concerned because the Bush administration claimed that the President was authorized to use force within the U.S. anyways and that this was intrinsically included in the AUMF. But, Daschle rightly highlighted the AUMF enactment process when “the administration clearly felt they weren’t [authorized to use force within the nation] or it wouldn’t have tried to insert the additional language.”⁹¹³ Steven Bradbury, who became acting head of the OLC (2004-2009), revoked Yoo’s claims in 2008 on grounds that they were based on extremely dubious or false logic.⁹¹⁴

⁹¹¹ Ibid.

⁹¹² Tom Daschle, “Power We Didn’t Grant,” *The Washington Post*, December 23, 2005, <http://www.washingtonpost.com/archive/opinions/2005/12/23/power-we-didnt-grant/693ef8f3-4979-41a3-83d0-f336b17a76e1/>.

⁹¹³ Ibid.

⁹¹⁴ Steven Bradbury, “Memo Regarding October 23, 2001 OLC Opinion Addressing the Domestic Use of Force to Combat Terrorist Activities,” 6 October 2008, Office of Legal Counsel, U.S. Department of Justice, <https://nsarchive2.gwu.edu/torturingdemocracy/documents/20081006.pdf>. Bradbury had

One of the administration's broadest policies began on 13 November, when Bush issued a military order for the detention, treatment, and trial for enemy combatants captured during the War on Terrorism.⁹¹⁵ This order set the foundation for the administration's policies of trial by military tribunal and indefinite detention, without trial, for suspected terrorists and combatants held at Guantanamo Bay Prison in Cuba.⁹¹⁶ Bush claimed authority for the order as commander-in-chief, from U.S. Code (sections 821 and 836 of title 10), and from the 2001 AUMF. The administration also claimed that federal courts lacked jurisdiction to accept *habeas corpus* petitions from detainees held outside U.S. sovereign territory, including Guantanamo Bay, Cuba.⁹¹⁷

Along with detention of combatants and suspected terrorists, the Bush administration implemented policies of abduction and extraordinary rendition, the unsanctioned relocation of individuals from one location to another, for trial.⁹¹⁸ It also implemented

authored several earlier memos, including one in 2005 claiming that enhanced interrogation techniques did not constitute torture. See "Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of 'Enhanced Interrogation Techniques' on Suspected Terrorists," 29 July 2009, Department of Justice, https://www.aclu.org/files/pdfs/natsec/opr20100219/20090729_OPR_Final_Report_with_20100719_declassifications.pdf.

⁹¹⁵ George W. Bush, "Military Order - Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," November 13, 2001. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 17 September 2019, <https://www.presidency.ucsb.edu/node/212756>.

⁹¹⁶ For further discussion on the Bush administration's indefinite detention policy at Guantanamo Bay, see Jordan Paust, *Beyond the Law: The Bush Administration's Unlawful Responses in the "War on Terror"* (Cambridge: Cambridge University Press, 2007); Laurel Fletcher and Eric Stover, *The Guantánamo Effect: Exposing the Consequences of U.S. Detention and Interrogation Practices* (Berkeley: University of California Press, 2009).

⁹¹⁷ John Yoo, "Memorandum from Yoo to William J. Haynes regarding Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba," 28 December 2001, Office of Legal Counsel, U.S. Department of Justice, <https://nsarchive2.gwu.edu/torturingdemocracy/documents/20011228.pdf>.

⁹¹⁸ The Bush administration OLC claimed that the President has unlimited power as commander-in-chief to transfer captured enemy combatants. See Jay Bybee, "The President's power as Commander in Chief to transfer captured terrorists to the control and custody of foreign nations," 13 March 2002, Office of Legal Counsel, U.S. Department of Justice, <https://nsarchive2.gwu.edu/torturingdemocracy/documents/20020313.pdf>. For more analysis of the Bush administration's use of kidnappings and rendition, see Louis Fisher, "Extraordinary Rendition: The Price of Secrecy," *American University Law Review*, Vol. 57, No. 5 (June 2008): 1405-1452; Jordan Paust, "Secret Detentions, Secret Renditions, and Forced Disappearances During the Bush

an extensive torture program intended to gather intelligence for counterterrorism operations and obtain confessions from suspects.⁹¹⁹ Yoo and other Justice Department officials wrote secret memos seeking to legally justify the administration's torture practices. He even claimed that international treaties, including the Geneva Conventions, did not apply to suspected terrorists and, as such, "Enhanced Interrogations Techniques" (such as waterboarding, stress positions, and extreme sleep deprivation) did not constitute war crimes.⁹²⁰ Yoo reasoned that, because terror organizations and suspected terrorists are non-state actors and unlawful combatants, they are not subject to these wartime protections.⁹²¹

Additionally, the Bush administration used remote warfare, specifically unmanned aerial vehicles (UAVs or "drones"), for the targeted killing of suspected terrorists abroad.⁹²² The legality and ethics of this policy are problematic, as the U.S. has

Administration's 'War on Terror,'" in *The Theory and Practice of International Criminal Law*, eds. Leila Sadat and Michael Scharf (Leiden: Brill-Nijhoff Publishers, 2008), 253-267.

⁹¹⁹ For further discussion of the Bush administration's use of torture (i.e. Enhanced Interrogation Techniques), and human rights violations, see; M. Cherif Bassiouni, "Reflections on the Torture Policy of the Bush Administration (2001-2008)," in *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman*, ed. Mahnoush Arsanjani et al (Leiden: Brill-Nijhoff, 2010), 395-405; Christopher Joyner, "Terrorizing the Terrorists: An Essay on the Permissibility of Torture," in *The Theory and Practice of International Criminal Law*, eds. Leila Sadat and Michael Scharf (Leiden: Brill-Nijhoff Publishers, 2008), 227-252.

⁹²⁰ See John Yoo, "Application of Treaties and Laws to al Qaeda and Taliban Detainees," 9 January 2002, Office of Legal Counsel, U.S. Department of Justice, <https://nsarchive2.gwu.edu/torturingdemocracy/documents/20020109.pdf>; Yoo, "Letter from John Yoo to Alberto Gonzales Regarding Interrogation Methods Legality," 1 August 2002, Office of Legal Counsel, U.S. Department of Justice, <https://nsarchive2.gwu.edu/torturingdemocracy/documents/20020801-3.pdf>; Jay Bybee, "Standards of Conduct for Interrogation under 18 U.S.C. §§2340-2340A," 1 August 2002, Office of Legal Counsel, U.S. Department of Justice, <https://nsarchive2.gwu.edu/torturingdemocracy/documents/20020801-1.pdf>; Yoo, "Military Interrogation of Alien Unlawful Combatants Held Outside the United States," 14 March 2003, Office of Legal Counsel, U.S. Department of Justice, <https://nsarchive2.gwu.edu/torturingdemocracy/documents/20030314.pdf>.

⁹²¹ Yoo, "Application of Treaties and Laws."

⁹²² See James Risen and David Johnston, "Threats and Responses: Hunt for Al Qaeda; Bush Has Widened Authority of CIA to Kill Terrorists," *New York Times*, December 15, 2002, <https://www.nytimes.com/2002/12/15/world/threats-responses-hunt-for-al-qaeda-bush-has-widened-authority-cia-kill.html>; Raul Pedrozo, "Use of Unmanned Systems to Combat Terrorism," *International Law Studies*, Vol. 87 (2011): 217-269; Medea Benjamin, *Drone Warfare: Killing by Remote Control* (London: Verso, 2013). For background information regarding the expansion of the

maintained a longstanding prohibition on assassinations since the 1970s.⁹²³ Nonetheless, the Bush administration primarily used drones for surveillance, reconnaissance, and to eliminate high-ranking al-Qaeda and Taliban figures. After 9/11, Bush authorized the CIA to use drones to target and kill suspected al-Qaeda members virtually worldwide. The administration also carried out the first targeted strike that killed a U.S. citizen suspected of terrorism. Kemal Darwish was killed in Yemen on 3 November 2002. The use of drones steadily increased during the early War on Terror years and at the beginning of the Iraq War, from around 1,500 flight hours per month in 2003 and 2004 to around 9,000 flight hours per month by the middle of 2006.⁹²⁴ Likewise, the number of Defense Department UAVs increased by a factor of forty from 2002 to 2010.⁹²⁵

The Bush administration vastly exceeded what was generally a narrower congressional understanding of the AUMF when enacted. There was nothing in the authorization that explicitly sanctioned the indefinite detention of enemy combatants. There was nothing that explicitly stated how suspected terrorists should be treated during interrogations or detention. Equally, there was nothing that stated how the Geneva Conventions would apply to them, since the AUMF's enemy targets were not specifically named nations, states, organizations, or individuals. Absolutely nothing within the AUMF authorized the use of torture. The administration cited the AUMF as support of Bush's claimed inherent authority as commander-in-chief to wage war abroad. In effect, the administration expanded its own power by coordinating

military use of drones for surveillance and targeted strikes, *see* Elizabeth Bone and Christopher Bolkcom, *Unmanned Aerial Vehicles: Background and Issues for Congress*, Congressional Research Service, RL31872 (April 25, 2003), <https://apps.dtic.mil/dtic/tr/fulltext/u2/a467807.pdf>.

⁹²³ *See* Executive Orders 11905 (Gerald Ford, 1976), 12036 (Jimmy Carter, 1978), and 12333 (Ronald Reagan, 1981).

⁹²⁴ Benjamin, *Drone Warfare*, 56. These statistics reflect hours of use by the U.S. Army.

⁹²⁵ *Ibid.*

statutory authority with false claims of inherent executive power. This resulted in violations of the Constitution, domestic law, and human rights under international law. In the final days of the Bush presidency, the OLC repudiated prior claims of broad presidential and executive power as asserted by Yoo and other OLC officials post-9/11.⁹²⁶

Barack Obama's 2008 election victory seemingly promised a more restrained presidential AUMF interpretation. Obama condemned the Bush administration's use of torture, and he further criticized the use of Guantanamo Bay as a location of indefinite detention for suspected enemy combatants and terrorists.⁹²⁷ He also declared that he would close the detention facility one year after the issuance of his order.⁹²⁸ Yet, Obama failed to close the prison, and he continued using Guantanamo for offshore detention. In fact, Obama's Justice Department cited the same Bush administration AUMF legal framework to continue offshore detentions shortly after he took office in 2009.⁹²⁹ His failure to close the facility was due, in part, to substantial domestic opposition to the transfer of detainees to U.S. prisons.⁹³⁰ On 7 March 2011, Obama signed Executive Order 13567, which represented the

⁹²⁶ See Steven Bradbury, "Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001," 15 January 2009, *Memorandum for the Files*, Office of Legal Counsel, U.S. Department of Justice, <https://nsarchive2.gwu.edu/torturingdemocracy/documents/20090115.pdf>.

⁹²⁷ Barack Obama, "Executive Order 13491—Ensuring Lawful Interrogations," January 22, 2009. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 18 September 2019, <https://www.presidency.ucsb.edu/node/285771>; Barack Obama, "Executive Order 13492—Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities," January 22, 2009. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 18 September 2019, <https://www.presidency.ucsb.edu/node/285775>.

⁹²⁸ *Ibid.*

⁹²⁹ "Respondent's Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantánamo Bay," In re: Guantánamo Bay Detainee Litigation, Misc No 08-442, 13 March 2009, <http://www.justice.gov/opa/documents/memo-re-det-auth.pdf>.

⁹³⁰ See the Defense Authorization Act of 2011, which prohibited the detainee transfers to U.S. prisons and ordered Guantanamo prison kept open.

continuance of indefinite detention and trial by military commission.⁹³¹ Suspected terrorists and enemy combatants could still be held at Guantanamo without charge or trial, but the government would begin periodic reviews of detainees' statuses. Obama cited the AUMF as authority to continue detention and begin periodic review.⁹³²

Ultimately, the Obama administration was responsible for a gradual shift in policy, from indefinite detention to review, deportation, and release overseas. The introduction of periodic review and the deportation of detainees held without charge steadily reduced Guantanamo detainee numbers.⁹³³ However, the administration seemingly used this deportation procedure to place suspected terrorists beyond the reach of U.S. courts, which enabled greater ease of use for extra-judicial targeted killing.

The Obama administration was indeed responsible for a dramatic expansion in drone use and targeted killing outside of traditional battlefields and zones of active hostilities.⁹³⁴ In 2005, the Defense Department quoted 10,000 drone flight hours, but

⁹³¹ Barack Obama, "Executive Order 13567—Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to the Authorization for Use of Military Force," March 7, 2011. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 18 September 2019, <https://www.presidency.ucsb.edu/node/290592>.

⁹³² *Ibid.*

⁹³³ Obama claimed the number of detainees had been reduced by 85%. *See* Barack Obama, "Statement on Signing the National Defense Authorization Act for Fiscal Year 2016," November 25, 2015. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 18 September 2019, <https://www.presidency.ucsb.edu/node/311598>.

⁹³⁴ The Bush administration (2001-2009) executed 50 strikes. In contrast, the Obama administration (2009-2017) executed more than 500 strikes. *See* Micah Zenko, "Obama's Drone Warfare Legacy," *Council on Foreign Relations*, 12 January 2016, <https://www.cfr.org/blog/obamas-drone-warfare-legacy>; Director of National Intelligence, "Summary of Information Regarding U.S. Counterterrorism Strikes Outside Areas of Active Hostilities between January 20, 2009 and December 31, 2009," <https://www.dni.gov/files/documents/Newsroom/Press%20Releases/DNI+Release+on+CT+Strikes+Outside+Areas+of+Active+Hostilities.pdf>; "Summary of Information Regarding U.S. Counterterrorism Strikes Outside Areas of Active Hostilities between January 1, 2016 and December 31, 2016," <https://www.dni.gov/files/documents/Newsroom/Summary-of-2016-Information-Regarding-United-States-Counterterrorism-Strikes-Outside-Areas-of-Active-Hostilities.pdf>. There are two targeted killing

in 2010, under Obama, drones were airborne for more than 550,000 hours. Over Afghanistan and Iraq, Predator and Reaper drones were airborne continuously.⁹³⁵ In Pakistan, Obama expanded drone use to even greater levels. While Bush ordered 45-52 strikes in Pakistan during his two terms in office, Obama ordered six times the total of his predecessor in his first term.⁹³⁶ Obama claimed that the AUMF, along with his commander-in-chief power, provided legal authority to kill suspected terrorists abroad.⁹³⁷

Furthermore, the Obama administration released and deported a suspected terrorist previously detained without charge, only to kill him later by drone strike.⁹³⁸ These targeted strikes were not simply limited to foreign nationals; Obama also targeted and eliminated U.S. citizens in several strikes without concern for their constitutional due process rights.⁹³⁹ These citizens were targeted and eliminated, not after judicial processes to establish guilt, but by secret executive branch practices. The only congressional oversight of these practices were monthly meetings during which members of the House and Senate intelligence committees could review videos of the strikes, evidence, and intelligence assessments regarding the claimed identities of suspected terrorists killed.

programs within the executive branch: one operated by the Defense Department under administration guidance and one operated covertly by the CIA.

⁹³⁵ Benjamin, *Drone Warfare*, 20.

⁹³⁶ Ibid, 103.

⁹³⁷ Barack Obama, "Remarks at National Defense University," May 23, 2013. Online by Gerhard Peters and John T. Woolley, *TAPP*. Accessed: 18 September 2019, <http://www.presidency.ucsb.edu/ws/?pid=103625>.

⁹³⁸ Mark Mazzetti, "No. 2 Leader of Al Qaeda in Yemen Is Killed," *The New York Times*, 24 January 2013, http://www.nytimes.com/2013/01/25/world/middleeast/said-ali-al-shihri-qaeda-leader-in-yemen-is-dead.html?_r=0.

⁹³⁹ For example, U.S. citizens Anwar al-Awlaki, his sixteen-year old son Abdulrahman al-Awlaki, Samir Khan, Jude Mohammad, Ahmed Farouq, and Adam Gadahn were killed in targeted strikes during the Obama administration.

In 2013, the Obama administration updated and issued public a summarized framework for targeted killing.⁹⁴⁰ In its policy standards, the administration outlined several key conditions it supposedly met prior to the killing of suspected terrorists outside active combat areas. The administration stated that any targeted strike would first necessitate: 1) a legal basis for the use of force (e.g. the AUMF and the commander-in-chief power); 2) an imminent threat posed by a specific terror suspect; 3) adherence to specific executive branch criteria—this included: a high probability that the suspect is actually present in a location, a high probability that civilians and non-combatants will not be killed, an analysis and determination that capture is not possible, an analysis that authorities within the country cannot address the threat, and an analysis and judgment that no other options exist except lethal force; and 4) respect for state sovereignty and international law during war. Additionally, the Justice Department would conduct an additional legal analysis for U.S. citizens in compliance with any domestic laws and constitutional civil liberties for terror suspects. Congress would be notified of the administration’s strikes and the identities of suspects whom force had been authorized against.⁹⁴¹

This framework presents many lasting issues concerning the use of targeted killing. First, the AUMF never explicitly authorized targeted killing, either within or outside combat zones. Second, Congress has not enacted any legislation regulating targeted killing, nor has it provided any clear guidelines or rules on targeted strikes outside of active battlefields.⁹⁴² Limited wars under AUMFs must define certain limits on the

⁹⁴⁰ “U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities,” 23 May 2013, *White House*, http://www.whitehouse.gov/sites/default/files/uploads/2013.05.23_fact_sheet_on_ppg.pdf.

⁹⁴¹ *Ibid.*

⁹⁴² For more analysis on the use and legality of targeted killing within and outside combat zones, see Nils Melzer, *Targeted Killing in International Law* (Oxford: Oxford University Press, 2008).

use of force, including provisions on what types of force are authorized. Otherwise, these conflicts risk potential escalation equivalent to declared general wars, in which new methods of force are subject to far fewer congressional restrictions. The argument is that during a limited war the AUMF must state what types of force are authorized to prevent later executive use of weapons or technology not originally sanctioned.

Along with Obama's proclivity for using specialized weapons, his administration also used U.S. special operations forces to carry out missions against high-level terrorist individuals, namely, Osama bin Laden. The 2 May 2011 killing of bin Laden by U.S. Navy SEALs represented a symbolic moment regarding the use of force against the individuals and terror group *directly* responsible for 9/11.⁹⁴³ Instead of ending the War on Terror, Obama continued and magnified the broad military campaign against al-Qaeda, the Taliban, and other global terrorist networks. This expansion was represented most notably against so-called "associated," "affiliate," or "offshoot" forces. These "associated" forces were not directly responsible for planning or carrying out the 2001 attacks. Yet, the Obama administration still claimed that these groups were within the legal scope of the 2001 AUMF. John Brennan, Assistant to the President for Homeland Security and Counterterrorism, publicly announced this policy in 2012. He claimed, "As a matter of international law, the United States is in an armed conflict with al-Qaida, the Taliban, and associated forces, in response to the

⁹⁴³ APV Rogers and Dominic McGoldrick, "Assassination and Targeted Killing—The Killing of Osama bin Laden," *The International and Comparative Law Quarterly*, Vol. 60, No. 3 (July 2011): 778-788; Mark Vlasic, "Assassination and Targeted Killing—A Historical and Post-bin Laden Legal Analysis," *Georgetown Journal of International Law*, Vol. 43, No. 2 (2012): 259-334. Ayman al-Zawahiri succeeded Osama bin Laden as leader of al-Qaeda in 2011.

9/11 attacks, and we may also use force consistent with our inherent right of national self-defense.”⁹⁴⁴

This expansion of the use of force involved numerous other terror organizations, and it extended to Daesh (the Islamic State, ISIS, or ISIL) beginning in 2014.⁹⁴⁵ Daesh—originally founded in 1999 as Jund al-Sham and quickly renamed Jama’at al-Tawhid wa’ al-Jihad (JTWJ) by Abu Musab al-Zarqawi—developed out of the political and social turmoil during the Iraq War; yet, it was not responsible for the 2001 attacks.⁹⁴⁶ Osama bin Laden and Zarqawi formally connected the groups in 2004 after almost a year of negotiations, and JTWJ was renamed al-Qaeda in Iraq (AQI). However, AQI clashed with its parent organization, and rifts emerged over fundamental differences in vision, organization, and strategy. In January 2006, AQI continued its growth, merging with several other terror groups to form Majlis Shura al-Mujahideen (MSM), but Zarqawi died in June. AQI quickly replaced him with Abu Ayyub al-Masri, and a few months later MSM founded the Islamic State in Iraq (ISI).

In early November, Masri pledged allegiance to ISI leader Abu Omar al-Baghdadi. ISI continued to grow over the years (although it did suffer setbacks), increasing its authority to govern large territories. On 29 June 2014, after the Syrian Civil War further destabilized the region and boosted ISI efforts within Syria, ISI formally

⁹⁴⁴ John Brennan, “The Efficacy and Ethics of U.S. Counterterrorism Strategy,” 30 April 2012, Wilson Center, <https://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy>.

⁹⁴⁵ For example, the U.S. has named as affiliate organizations: al-Qaeda in Iraq (AQI), al-Qaeda in the Arabian Peninsula (AQAP), al-Qaeda in the Islamic Maghreb (AQIM), al-Shabaab, Jabhat al-Nusra (also known as al-Qaeda in Syria), Jemaah Islamiyah (JI), and many others.

⁹⁴⁶ Charles Lister, *The Islamic State: A Brief Introduction* (Washington, D.C.: Brookings Institution Press, 2015), 6. Daesh was most recently headed by Abu Bakr al-Baghdadi, who became leader after Abu Ayyub al-Masri and Abu Omar al-Baghdadi were killed in April 2010. After al-Baghdadi’s purported death in October 2019, Abu Ibrahim al-Hashimi al-Qurashi is now leader.

declared itself the Islamic State in Iraq and Syria.⁹⁴⁷ ISIS, since its inception, has been a competing organization with and challenger to al-Qaeda, seeking to become the leader in global jihadism.⁹⁴⁸ Al-Qaeda never pledged allegiance to ISI or ISIS—it long maintained that ISI was subordinate to al-Qaeda—and it openly dissociated itself from extreme ISIS brutality.⁹⁴⁹ In February 2014, al-Qaeda leader Ayman al-Zawahiri stated that ISIS was not a part of al-Qaeda, that they had no organizational relationship, and that ISIS was accountable for its own actions, not al-Qaeda.⁹⁵⁰

Regarding the 2001 AUMF’s scope, the authorization mentioned nothing about “associated forces,” and it provided no framework for judicial combatant review. Just because a terror group states its support for al-Qaeda and its terrorist acts, or later forms connections with al-Qaeda, does not automatically mean that group is now responsible for the 2001 attacks. It only means that they support the terrorist organization responsible for 9/11. ISIS, as constituted in 2011 and at present, did not exist during the 2001 attacks and is not accountable for those attacks.

Obama himself echoed a desire to enact another AUMF specific to ISIS and “associated forces,” and there were at least two proposed bills to replace the 2001 AUMF. However, Congress failed to enact the proposed updates. Obama’s AUMF use, particularly his expansion of targeted killing, established new precedents for successive administrations. Whatever limits Obama believed his presidential

⁹⁴⁷ Ibid, 2.

⁹⁴⁸ Ibid, 3.

⁹⁴⁹ Ibid, 11.

⁹⁵⁰ “On the Relationship of Al-Qaeda and the Islamic State in Iraq and al-Sham,” Al-Fajr Media, February 4, 2014 (<http://jihadology.net/2014/02/02/as-sahab-media-presents-a-new-statement-from-alqaidah-on-the-relationship-of-qaidat-al-jihad-and-the-islamic-state-ofiraq-and-al-sham>).

successor might uphold regarding the 2001 AUMF ended with the election of Donald Trump in 2016.

President Trump has already demonstrated a broad and expansive view of presidential and executive power. In 2017, he conducted unauthorized military strikes within Syria, and he claimed that he would use torture and expand use of Guantanamo Bay to detain suspected terrorists. Trump could theoretically cite the 2001 AUMF as legal justification to detain terror suspects at Guantanamo; however, there could be legal ramifications if he detained suspected ISIS combatants, as there are still questions whether the 2001 AUMF covers them.

Additionally, Trump has continued targeted killing, and his administration is outpacing Obama's use of drone strikes.⁹⁵¹ The U.S. continues to wage the War on Terror against the Taliban in Afghanistan, although Trump has threatened to completely withdraw from Afghanistan. This has significantly affected peace negotiations with the Taliban to end the longest war in U.S. history. Although Trump has withdrawn some U.S. forces—in Northeast Syria, to the detriment of former Kurdish allies—the struggle against Daesh endures, and the War on Terror continues against so-called “associated forces” *not* responsible for 9/11.⁹⁵² We will not know the full extent of Trump's AUMF use until many years after his presidency has ended and all administrative opinions and policies become public.

⁹⁵¹ See Micah Zenko, “The (Not-So) Peaceful Transition of Power: Trump's Drone Strikes Outpace Obama,” *Council on Foreign Relations*, 2 March 2017, <https://www.cfr.org/blog/not-so-peaceful-transition-power-trumps-drone-strikes-outpace-obama>.

⁹⁵² The Trump administration continues to use the Obama administration's argument that Daesh is an offshoot of AQI and therefore covered by the 2001 AUMF. See Rex Tillerson, “Testimony to Senate Foreign Relations Committee on AUMF,” 30 October 2017, https://www.foreign.senate.gov/imo/media/doc/103017_Tillerson_Testimony.pdf.

Conclusions

The 2001 AUMF represents more than just a “twilight zone” of congressionally and judicially unchecked presidential power; it is also the fulfillment of egregiously unconstitutional UET principles and the culmination of more than 200 years of constitutional misunderstanding about Congress' role to regulate the use of military force within explicit rules, regulations, and guidelines. There was nothing limited about the 2001 AUMF that distinguished it from a declared war. Curtis Bradley and Jack Goldsmith even remarked that the 2001 AUMF “is as broad as authorizations in declared wars with respect to the resources and methods it authorizes the President to employ, and with respect to the purposes for which these resources can be used.”⁹⁵³ Under previous declared wars, the acts at least explicitly stated the enemy target the U.S. would be at war with. Yet in 2001, Congress not only had different interpretations of the AUMF's limits, the AUMF itself was vague about naming specific targets. These details were left to the President's determination, which could change at his discretion. The scope of hostilities was also vague, as the President would define what types of military force would be used, where it would be used, and the duration of its use.

Additionally, there were numerous AUMF interpretations, which added more confusion regarding the use of force and the actual law enacted by Congress. Some legislators viewed the AUMF as being limited to only those who perpetrated the 2001 attacks. Other members saw it as the beginning of a general war against all forms of terrorism. Further still, certain Bush administration UET supporters, especially

⁹⁵³ Curtis Bradley and Jack Goldsmith, “Congressional Authorization and the War on Terrorism,” *Harvard Law Review*, Vol. 118, No. 7 (May 2005): 2083.

Cheney and Yoo, interpreted the AUMF as confirmation of their broad claims of inherent presidential power.

With regards to the continued military use and legal citation of the 2001 AUMF, unless Congress enacts a full repeal or adds a “sunset” amendment to a future counter-terrorism AUMF, presidents will continue to construct their own AUMF interpretations and expand on the law’s provisions to expand presidential war making. There are also concerns that the 2001 AUMF established a precedent for the permanent expansion of presidential and executive power and diminishment of congressional oversight. It represents the congressional abdication of its roles to formulate U.S. foreign policy, authorize use of military force, and regulate the commander-in-chief during wartime. A vague and discretionary AUMF such as that enacted in 2001, coordinated with the executive-claimed commander-in-chief power, enables the President to wage war whenever, wherever, against whomever, without any limitations on methods of force or regard for due process for suspected terrorists, for an indefinite period of time. Such a power not only removes any distinction between a *general* and *limited* war, it also exceeds constitutional limits regarding how the U.S. both initiates and conducts its wars.

Conclusion

The limits of presidential authority and the proper allocation of constitutional powers have been disputed since the American founding. Alexander Hamilton and James Madison contested executive and legislative powers during the 1790s, shortly after constitutional ratification, and their debate continues to impact constitutional interpretation. Madison argued that the treaty-creation process is analogous to the conduct of war; it is shared between executive and legislative.⁹⁵⁴ Neither branch holds sole ownership of either power. Undoubtedly, many presidents have been prepared to use offensive military force *without* congressional authorization, yet others have welcomed statutory sanction. This thesis has examined constitutional limits on congressional authorizations and the history of broad AUMFs that delegate discretionary power to the President. The process for how the U.S. initiates and conducts its wars, whether *general* or *limited*, is integral to understanding present and future conflicts and the constitutionally appropriate role for the different branches of government. Both types of warfare must be clearly distinguished from each other to prevent presidential aggrandizement of congressional war powers.

Although war powers studies, specifically qualitative research examining governmental processes in foreign relations, have generally declined in scholarly popularity since the end of George W. Bush's presidency, this thesis has intended to reinvigorate the topic with a distinct interpretation of primary documents and a new application for established legal doctrines. It will hopefully inspire further scholarship

⁹⁵⁴ James Madison, "Helvidius Number I," in *The Pacificus-Helvidius Debates of 1793-1794: Toward the Completion of the American Founding*, ed. Morton J. Frisch (Indianapolis: Liberty Fund, Inc., 2007).

on the political, legal, and judicial processes of how the President and Congress authorize and initiate the use of military force abroad. It is essential to consider established legal doctrines and the rule of law. While the Supreme Court has recognized executive rulemaking, Congress cannot delegate its lawmaking power to the executive branch under the legislative non-delegation doctrine. Federal laws must also follow the void-for-vagueness doctrine, which specifies that statutes lacking fair notice or warning to those impacted by the statute are unconstitutional. All Americans, including government officials, have a right to know what the law commands or prohibits. The President, as commander-in-chief and the administrator of an AUMF, is entitled to fair notice regarding how it must be executed. War authorizations, as decision rules, must comply with procedural due process.

The full history of *authorized* war making must also be considered to ensure that fundamental constitutional principles—separation-of-powers, checks and balances, and the rule of law—are maintained when Congress enacts AUMFs and when the President uses military force. Although there were early cases of vague and discretionary AUMFs, presidents generally interpreted them narrowly. The 1802 authorization sanctioning the First Barbary War is the best example of an early discretionary AUMF. Jefferson was constrained by the limited size of the armed forces from conducting warfare more broadly, if he had so desired. This was true for many 19th century presidents; the limited size and capability of the U.S. navy restricted more expanded presidential wars. The Korean War was a watershed for congressionally *unauthorized* presidential use of force. Truman delegated substantial war making authority to General MacArthur to wage a general war. MacArthur essentially wielded the President's commander-in-chief power and Congress' power

to regulate the armed forces. While AUMFs have impacted presidential war powers since the 1798 Quasi-War, those enacted post-Korean War established a legislative precedent to explicitly empower the President with discretionary authority.

The case studies analyzed within this thesis illustrate the executive branch's historical role in the *legislative* process of drafting and enacting war declarations and AUMFs. They also highlight preemptive executive strategizing, its groundwork with Congress, and how these factors have influenced the formulation and enactment of discretionary AUMFs that grant broad and unconstitutional powers to the President.

President Dwight Eisenhower was committed to obtaining congressional authorization before engaging in offensive hostilities to combat perceived communist threats. However, in a situation necessitating military action without authorization, he was willing to proceed, endure the political consequences, and risk impeachment and removal from office. The 1950s resolutions established a new precedent: preemptive, deterrent, and discretionary AUMFs that were widely supported by legislators. An exception to this trend, Senator Wayne Morse upheld the need for greater congressional and multilateral foreign policy activism, opposing these resolutions as “blank check” authorizations. Morse claimed that these AUMFs sanctioned a declared war but without a declaration of war.

Yet, Morse was unaware of the void-for-vagueness doctrine and was thus unable to explain, both constitutionally and with judicial precedent, exactly *why* these resolutions were unconstitutional grants of war making authority. The 1955 Formosa Resolution empowered the President with plenary discretion to use military force

against the Chinese Communists. No regulations and guidelines were included to direct limited use of military force, thus removing the delineations between a *general* and *limited* war. It additionally included the word “authorized,” which indicates that the President is *unauthorized* to exceed the AUMF or act unilaterally beyond statute.

The 1957 Middle East Resolution was just as broad, and while Congress was more aware of “blank check” concerns, it continued to provide the President with *carte blanche* authority to wage war in the Middle East. The legislature also specifically changed key wording in the 1957 resolution from “authorizing” the use of force to the U.S. being “prepared,” subject to the President’s determination, to use force. The resolution never included a requirement for further congressional authorization if the President did determine that force was needed. It also never specified enemy targets, included no territorial restrictions, set no limits on what types of force could be used, and fixed no time limits. Had Morse been able to successfully communicate to his colleagues the unconstitutional nature of these resolutions, Congress may have reconsidered enacting such broad delegations of power.

Eisenhower ultimately refrained from using these resolutions to conduct large-scale wars; nevertheless, another President could have escalated each crisis into a general war under the vague and discretionary language of the resolutions. Both resolutions empowered the President with the power to define the legislation, wage a general war, and regulate the armed forces. They also became templates for the AUMFs of the 1960s and beyond.

Lyndon Johnson immediately began preparations for greater American military involvement in Vietnam after he became President in 1963. His administration conducted extensive AUMF drafting and congressional groundwork in the months prior to the August 1964 Gulf of Tonkin incidents. It preempted the legislative process and employed presidential allies such as Senator William Fulbright to guarantee a swift enactment process with virtually no committee level scrutiny. Congressional assumptions about the deterrent AUMFs of the 1950s—that the President should decide any use of military force and be empowered to do as such—resulted in acquiescence to executive promises and the enactment of the vague and discretionary Tonkin Resolution, after dubious claims of evidence for North Vietnamese offensive actions in the Tonkin Gulf.

Only Senators Wayne Morse and Ernest Gruening opposed the Tonkin Resolution, and both delivered notable speeches in the shortened Senate debate prior to resolution enactment. Morse repeatedly explained that the resolution was a “blank check” authorization. He was, however, unaware of the early Supreme Court cases differentiating general and limited wars. Congress does not need to declare war every time military force is used. Nevertheless, Senator Morse’s reasoned arguments against such a dangerous resolution should be recognized as a courageous effort to uphold separation-of-powers and prevent presidential aggrandizement.

The Tonkin Resolution contained no time, location, enemy, appropriations, or type of force limits in Southeast Asia and beyond. Johnson and Nixon used the resolution so broadly that Congress finally acted to repeal it in 1971. Yet, even repealing the authorization was not sufficient to curb Nixon’s prerogative use of force beyond

Vietnam. Congress enacted the War Powers Resolution (WPR) over Nixon's veto to prohibit presidential aggrandizement of the war power, yet it failed to achieve its intended purposes. The WPR failed to acknowledge the Tonkin Resolution's discretionary language and prohibit the enactment of similar resolutions.

Constitutional powers cannot be altered by federal statute; yet, the WPR granted the President discretionary authority to wage general or limited war without authorization. It additionally neglected to include international law compliance provisions, such as a requirement to obtain UNSC authorization. Lastly, the federal courts repeatedly dismissed legal challenges to the Vietnam War, often ruling that the issues were non-justiciable political questions.

Prior to the Persian Gulf War, President George H.W. Bush and key administration officials failed to anticipate Saddam's invasion of Kuwait, draft a deterrent AUMF, and conduct preemptive groundwork with Congress to obtain legislative support. This lack of planning, and indeed the lack of prior executive AUMF drafting, contributed to an extended congressional authorization process for Bush after his unilateral military deployment to Saudi Arabia. There were numerous opportunities for the administration to secure either a congressional AUMF, including WPR provisions, or a resolution supporting UNSC decisions. The administration received a draft resolution on 12 September from congressional Democrats that included an AUMF, concurrent with the WPR. However, the administration rejected it, viewing the WPR language as unacceptable. Many legislators preferred the use of airstrikes and the navy, instead of ground force operations, but Congress never considered enacting an AUMF to approve *only* offensive airstrikes and use of the navy. This lack of

legislative awareness of its own power to regulate and set specific restrictions on the use of force contributed to a challenging and extended AUMF enactment process.

Dellums v. Bush (1990) illustrates contemporary judicial willingness to consider war powers issues.⁹⁵⁵ Judge Harold Greene did not consider political question doctrine or remedial discretion as sufficient to dismiss the case. The issue of ripeness led to dismissal, but Congress could have acted to pursue additional litigation to inhibit President Bush from using unauthorized offensive military force. For example, had Congress voted to reject an AUMF, then it would have taken legislative action, fulfilling the ripeness requirement. Or, Congress could have enacted a resolution prohibiting presidential use of force. Even if vetoed, this legislative action might have fulfilled the ripeness requirement for litigation.

Given the Bush administration's claims about inherent power, it is reasonable to assume that the Vietnam War experience was a factor in the President's decision to refrain from offensive military actions prior to authorization. Subsequent presidents have not conducted congressionally unauthorized large-scale military operations with sustained use of massive ground forces. This illustrates the significance of the political processes of the Persian Gulf crisis, which remains the only instance when a President complied with both international law and constitutional requirements, obtaining explicit UNSC authorization *and* congressional authorization prior to offensive use of force.

⁹⁵⁵ *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990).

The horror of the 9/11 attacks and subsequent enactment of the 2001 AUMF has led to the longest war in U.S. history.⁹⁵⁶ Presidents have used military force in the War on Terror for nearly two decades, and the conflict presently continues against an ever-growing range of persistent and adaptable terror organizations. The days following the attacks exemplified the “rally-round-the-flag” effect, as the George W. Bush administration obtained the most vague and discretionary AUMF to date. Political scientist Andrew Rudalevige observed:

In times of crisis—and not coincidentally as the administrative response to crisis itself institutionalizes—legislators are naturally and sorely tempted to shift the burden of action from the Congress to the executive. It is, frankly, easier for legislators (and voters) to delegate powers to the president than to deliberate on their proper scope.⁹⁵⁷

Unlike previous discretionary AUMFs, however, Unitary Executive Theory (UET) proponents within the administration, namely Dick Cheney and John Yoo, successfully incorporated the key theory tenets into the AUMF drafting process. The administration draft even included provisions to use force *within* the U.S., unprecedented for an AUMF. The preamble clauses directly referenced UET claims about presidential power, even though a resolution’s preamble is not legally operative. Nevertheless, the administration still claimed plenary authority on this basis to combat *any* terrorist organization globally based on the AUMF and the commander-in-chief power.

Presidents Bush, Barack Obama, and Donald Trump each used the 2001 AUMF inconsistently and arbitrarily. The authorization has been cited for the large-scale invasion of Afghanistan, the indefinite detention of alleged enemy combatants at

⁹⁵⁶ Zachary Laub, Kevin Lizarazo, and Jeremy Sherlick, “The U.S. War in Afghanistan,” 5 March 2020, Accessed: 3 September 2020, <https://www.cfr.org/timeline/us-war-afghanistan>.

⁹⁵⁷ Andrew Rudalevige, “George W. Bush and the Imperial Presidency,” in *Testing the Limits: George W. Bush and the Imperial Presidency*, ed. Mark Rozell and Gleaves Whitney (Lanham: Rowman and Littlefield, 2009), 260.

Guantanamo Bay, the targeted killing of suspected terrorists with impunity and without due process, and military operations against so-called “associated forces” not responsible for 9/11. Obama cited it as legal justification for the targeted killing of U.S. citizens and to wage war against ISIS, a terror group that did not even exist in 2001. Trump’s AUMF implementation is still ongoing, although it is likely that his administration has continued many of the same policies established by his predecessors, while expanding the boundaries for the use of force in new and unpredictable ways. The vague and discretionary 2001 AUMF, combined with assertions of the commander-in-chief power, enables presidential wars whenever, wherever, against whomever, without any limitations on the methods of force, for an indefinite period of time. Such an authorization constitutes an egregious violation of American founding principles, constitutionally assigned powers, and established legal doctrines.

Executive, Legislative, and Judicial Guidance

There are two opposing perspectives for presidential guidance. Based on the case study information presented within this thesis, an advocate for greater presidential dominance and "persuasiveness" would advise that executive administrations draft prior AUMFs for every potential crisis.⁹⁵⁸ Administrations should also conduct extensive congressional groundwork to enable a smooth enactment process. However, this thesis has sought to emphasize a contrasting perspective, that the President as commander-in-chief is an administrator of the law and is entitled to procedural due process rights. Thus, the President must be provided with clear limitations and specific guidelines for the use of force within AUMFs. Additionally, he must execute

⁹⁵⁸ See Richard Neustadt, *Presidential Power* (New York: John Wiley & Sons, 1960).

and follow the law as it is written and not act beyond congressional restrictions. Presidents should seek both congressional and UNSC authorization prior to offensive use of force abroad. Lastly, the President should request a war declaration or AUMF before Congress, not proclaim, as James Polk did, that the nation is in a state of war.

Regarding advice for Congress, the legislature holds far greater foreign relations power than is currently acknowledged, and it must reassert itself to restrain executive aggrandizement and balance constitutionally apportioned powers. As Andrew Rudalevige remarked, “Any sort of imperial collapse will have to be precipitated by a Congress newly willing to utilize its own authority.”⁹⁵⁹ First, legislators must be educated about the history of war declarations and AUMFs. There are key Supreme Court cases that illustrate how AUMFs correspond to *limited* war, and this history should be provided to Congress.⁹⁶⁰

Second, there is a critical difference between what type of conflict a presidential administration *envisages* and what type of conflict Congress *authorizes*. Congress has a constitutional responsibility to regulate the commander-in-chief and the armed forces through specific limitations in AUMFs. Third, the legislature must draft its own AUMFs and refuse to accept executive drafts. In too many cases the executive branch preempted Congress with its own broadly worded drafts. Fourth, Congress should repeal the 2001 AUMF and all prior authorizations. It should also repeal the WPR, as it has not only failed to restrain unauthorized presidential war making but also effectively delegated discretionary war power to the President to conduct unregulated war for 60-90 days. A 21st century WPR should be enacted to confirm

⁹⁵⁹ Rudalevige, “George W. Bush and the Imperial Presidency,” 260.

⁹⁶⁰ See *Bas v. Tingy*, 4 U.S. 37 (1800); *Talbot v. Seeman*, 5 U.S. 1 (1801).

Congress' power to regulate the armed forces, the commander-in-chief, and its power to declare *general* war and authorize *limited* use of force. It should include requirements for specific provisions to be included in every new AUMF, and it should prohibit the use of vague and discretionary language.

Congress should, at minimum, incorporate the criteria outlined by Curtis Bradley and Jack Goldsmith for determining broad/narrow AUMFs to set clear guidelines on the use of force and regulate the commander-in-chief.⁹⁶¹ Doing so will clearly distinguish *limited* wars under AUMFs versus *general* wars under declarations. The case study AUMFs clearly demonstrated a lack of comprehensive inclusion of these criteria: the purpose or objectives for the use of force, the authorized resources, the authorized methods of force, designated enemy targets, and timing or procedural restrictions. While the 1991 AUMF included provisions pursuant to UNSC resolutions, most other authorizations enabled the President to decide the scope of hostilities.

Lastly, the judiciary can, as it demonstrated in the early republic, actively engage with and settle war powers issues. Presidential authority to use military force under congressional authorization is not simply a political question that can only be resolved between the executive and legislative branches. The congressionally authorized nature presents significant and unique constitutional issues regarding vagueness doctrine, specifically substantive and procedural due process. It also presents legislative delegation issues, as discretionary AUMFs delegate Congress' powers to declare war and regulate the armed forces to the President. As legal scholar Stan Todd claimed, "To avoid improper exercise of lawmaking authority, either by the courts themselves

⁹⁶¹ Bradley and Goldsmith, "Congressional Authorization and the War on Terrorism," 2072.

or by administrators, the federal courts must shift the lawmaking authority back where it belongs. This they can do through voiding the enactment for vagueness.”⁹⁶²

Legislative delegation and vagueness are significant issues that must be examined within the text of AUMFs. Doing so will not lead to excessive judicial activism but rather judicial preservation of separation-of-powers and the rule of law.

All three government branches have roles to play in the proper initiation, conduct, and oversight of authorized military force abroad. The President as commander-in-chief is limited in his direction of the military by Congress and is bound to only execute the law. Congress is empowered to regulate executive use of force, not delegate its constitutional powers to the President. The judiciary can review war powers issues, check executive and legislative improprieties in the war authorization process, and curtail presidential aggrandizement in war making. These processes are essential for upholding separation-of-powers and ensuring that the President and Congress adhere to the Constitution.

James Madison once remarked that war was the most dreaded enemy to public liberty and that during war:

...the discretionary power of the Executive is extended; its influence in dealing out offices, honors, and emoluments is multiplied; and all the means of seducing the minds, are added to those of subduing the force, of the people...No nation could preserve its freedom in the midst of continual warfare. Those truths are well established. They are read in every page which records the progression from a less arbitrary to a more arbitrary government, or the transition from a popular government to an aristocracy or a monarchy.⁹⁶³

⁹⁶² Stan Thomas Todd, “Vagueness Doctrine in the Federal Courts: A Focus on the Military, Prison, and Campus Contexts,” *Stanford Law Review*, Vol. 26, No. 4 (April 1974): 860.

⁹⁶³ James Madison, “Political Observations,” 20 April 1795, in *Letters and Other Writings of James Madison, Fourth President of the United States*, Vol. 4 (Philadelphia: J.B. Lippincott & Co., 1865), 491-492.

Madison's thoughts resonate even louder today in such volatile times. Vague and discretionary AUMFs must be contested, both constitutionally and politically. Congress has a constitutional duty to regulate the President with AUMFs, not delegate unlimited power to wage war to the commander-in-chief. Asserting Congress as a significant foreign policy actor will not only resolve war powers imbalances between executive and legislative, it will result in adherence to founding principles and the rule of law.

Bibliographic Abbreviations

AQI	al-Qaeda in Iraq
AUMF	authorization for use of military force
AWF	Ann Whitman File
CBGF	C. Boyden Gray Files
CCP	Chinese Communist Party
CFOA	Confidential File Oversized Attachments
CIA	Central Intelligence Agency
DAP	Dean Acheson Papers
DDEPL	Dwight D. Eisenhower Presidential Library
EPPUS	Eisenhower Papers as President of the U.S.
EXCOM	Executive Committee
FAA	Foreign Assistance Act
FMB	Files of McGeorge Bundy
GEP	George Elsey Papers
GHWBPL	George H.W. Bush Presidential Library
GPO	Government Publishing Office
GWP	Gulf War Papers
HFAC	House Foreign Affairs Committee
HSTPL	Harry S. Truman Presidential Library
ISI	Islamic State in Iraq
ISIL	Islamic State of Iraq and the Levant
ISIS	Islamic State of Iraq and Syria
JFPD	John Foster Dulles Papers
JTWJ	Jama'at al-Tawhid wa' al-Jihad
KWF	Korean War File
LBJ	Lyndon B. Johnson
LBJPL	Lyndon B. Johnson Presidential Library
LMS	Legislative Meetings Series
MDAA	Mutual Defense Assistance Act
MDT	mutual defense treaty
MF	Miscellaneous Files
MP	Memos to the President
MSM	Majlis Shura al-Mujahideen
NCF	Nicholas Calio Files
NSC	National Security Council
NSF	National Security File
OLC	Office of Legal Counsel
PLBJ	Papers of Lyndon B. Johnson
PPGB	Public Papers of George Bush
PRC	People's Republic of China
PWWR	Papers of Walt W. Rostow
ROC	Republic of China (Taiwan)
RPGC	Records on the Persian Gulf Conflict
SEATO	Southeast Asia Treaty Organization
TAPP	The American Presidency Project
UAV	unmanned aerial vehicle
UET	Unitary Executive Theory
U.N.	United Nations
UNSC	United Nations Security Council
U.S.	United States of America
WPR	War Powers Resolution

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