
**ZEISBERG’S RELATIONAL CONCEPTION OF WAR
AUTHORITY: CONVERGENCE AND DIVERGENCE IN
ACHIEVING A NEW UNDERSTANDING OF WAR POWERS**

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INTRODUCTION

When I first received the manuscript of Mariah Zeisberg’s prize-winning book on war powers, I was delighted because I recognized in her work a kindred effort to break the mold of the standard war powers debate.¹ In this article, I will first describe the convergences between our approaches to war powers by examining the most prominent differences between our theories and the standard debate. As a bonus, I include a critique of the standard Hamiltonian version of the defensive war theory, which is discussed in Zeisberg’s book. I then discuss some divergences between our approaches, especially the use of presidential war powers after 1945, the subject of my book *Long Wars and the Constitution*.² These divergences, however, should not be understood as detracting from my genuine admiration and respect for Zeisberg’s work. In particular, I have no doubt that future scholarship should and will be influenced by her sophisticated “relational” conception of war authority. (Zeisberg p. 18).

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¹ MARIAH ZEISBERG, *WAR POWERS: THE POLITICS OF CONSTITUTIONAL AUTHORITY* (2013).

² STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* (2013).

I. CONVERGENCES

A. *The Need for a New Direction in the War Powers Debate*

At a high level of generality, the war powers debate is concerned with the constitutional conditions under which the United States can take military action. Because presidents have de facto “first mover” status in the contemporary constitutional order, (Griffin p. 17), the debate tends to focus on the nature and limits of presidential war powers. The Supreme Court has not been heavily involved in determining the meaning of the Constitution with respect to war powers. Therefore, neither Zeisberg nor I devote much attention to the contributions of the judicial branch.

Recently, President Obama announced yet another military intervention abroad. He initiated military action against ISIL (or ISIS), the Islamic State of Iraq and the Levant, beginning with air strikes in August 2014.³ Obama gave a speech to the nation on September 10, 2014, claiming he had authority under the Constitution to take these and other military measures against ISIL.⁴ The commentary on his actions provided an excellent illustration of the problems with the standard war powers debate.

At the beginning of his speech, President Obama introduced the topic of his constitutional authority this way: “As Commander in Chief, my highest priority is the security of the American people.”⁵ Providing appropriate details, he then built what might be called a “security context” by which to understand his actions, saying, for example, “ISIL leaders have threatened America and our allies.”⁶ In defending military strikes against ISIL in multiple countries, he referred to “a core principle of [his] Presidency: If you threaten America, you will find no safe haven.”⁷ Obama then directly addressed the question of his legal authority:

My administration has also secured bipartisan support for this approach here at home. I have the authority to address the threat from ISIL, but I believe we are strongest as a nation when the President and Congress work together. So I welcome congressional support for this effort in order to show the world that Americans are united in confronting this danger.⁸

Expert commentary focused on the Obama administration’s specific invocations of authority from the 2001 Authorization to Use Military Force

³ See President Barack Obama, Address to the Nation (Sept. 10, 2014), available at <https://www.whitehouse.gov/the-press-office/2014/09/10/statement-president-isil-1>, archived at <https://perma.cc/34RR-KPS6>.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

("AUMF")⁹ and the 2002 Iraq War Resolution.¹⁰ Many commentators doubted these claims and stated that if the two AUMFs were infirm, the sole basis of authority was the 1973 War Powers Resolution ("WPR").¹¹ For example, Yale Law School Professor Bruce Ackerman, an eminent authority on American constitutionalism, argued that the administration was risking a "constitutional crisis" by failing to observe the provisions of the Resolution.¹² Given that there was little prospect of congressional action on a new AUMF before the November elections, legal scholars turned their attention to the possible "precedential" effect of a congressional failure to act.¹³

Consider this last point in particular. One assumption behind all of the scholarly commentary on Obama's actions concerning ISIL and, indeed, the standard war powers debate, is that the Constitution works for war powers in the same way that it works for, say, an individual rights dispute between ordinary litigants in federal court. From this point of view, judging the use of presidential war powers is a matter of developing legal arguments that would be persuasive in a courtroom. In one sense, this is to be expected. It is the way executive branch lawyers and legal scholars do business.

There is another sense, however, in which a precedential view is highly questionable. Presidential war powers are generally conceded to be in the realm of the "Constitution outside the courts." (*See* Zeisberg pp. 21-24). So why should we expect that reasoning modeled on judicial opinions will yield much insight? Does this not involve assuming that the executive and legislative branches behave like courts? If we agree that the political branches have a different structure, function, and role under the Constitution than the federal judiciary, perhaps we should consider using a mode of constitutional analysis more appropriate to that structure, function, and role. But what would that mode of analysis look like?

Now return to Obama's speech. In one sense, the speech was a model of indirection, referring briefly, for example, to the Commander in Chief power,

⁹ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2012)).

¹⁰ Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (codified as note to 50 U.S.C. §1541 (2006)); Charlie Savage, *White House Invites Congress to Improve ISIS Strikes, but Says it isn't Necessary*, N.Y. TIMES, Sept. 11, 2014 at A10.

¹¹ War Powers Resolution of 1973, Pub. L. No. 93-148 §8, 87 Stat. 559 (codified as 50 U.S.C. §§1541-1548 (2012)).

¹² *War Powers and a Constitutional Crisis*, ON POINT WITH TOM ASHBROOK (Oct. 6, 2014), <http://onpoint.wbur.org/2014/10/06/war-powers-aumf-constitutional-crisis-obama>, archived at <http://perma.cc/DN8Q-XCAG> (discussing the "constitutional crisis" with Bruce Ackerman); *see also* Bruce Ackerman, *Obama's Betrayal of the Constitution*, N.Y. TIMES, Sept. 12, 2014, at A31 (describing the requirements of the War Powers Resolution, and explaining that Obama would "betray[] the Constitution" if he failed to abide by the Resolution).

¹³ Savage, *supra* note 10.

but never stating directly the specific constitutional basis for the president's actions.¹⁴ Was the president invoking his Article II powers? Was he resting his actions on the existing AUMFs? It is hard to say. But if we take a perspective more suitable for studying the Constitution—outside the courts—the speech was a model of clarity.

Before I say why, let me press the problem that, in the scholarly debate over President Obama's actions concerning ISIL, there was far too much emphasis on the brute fact of congressional approval or disapproval in judging their legality. Curiously, commentary tended to focus on what administration lawyers said off the record, rather than examining the President's speech.¹⁵ In addition, the commentary generally did not consider the nature and quality of the interbranch deliberation that could be expected during the peak of an election cycle. After all, the Iraq War Resolution was voted through Congress just prior to the 2002 congressional elections and few now hold that process out as a model to imitate. (*See* Zeisberg p. 47).

Zeisberg and I agree that the use of war powers by the executive and legislative branches should be evaluated by a mode of reasoning more appropriate to the development of constitutional meaning outside the courts. This mode of reasoning should be especially attuned to historical context and to the nature and value of interbranch deliberation. Within this framework, President Obama's speech becomes intelligible. President Obama first built a case for action within what Zeisberg calls a "security order."¹⁶ This security order grounded his argument that using U.S. military forces against ISIL was a justifiable use of his constitutional authority. President Obama's reference to the role of Congress can be understood in the context of what I describe as the "post-1945 constitutional order." (Griffin pp. 95-98). Within that order, presidents have typically claimed that they have the constitutional power to initiate military action, including "war," on their own authority, although they prefer to act with the participation of Congress. (p. 97). So, although presidents do not typically concede that congressional approval is constitutionally required, they make statements that show they believe it to be politically relevant and helpful. (p. 31).

In formulating a context in which to understand the use of presidential war powers, we are better able to make sense of and judge the legitimacy of

¹⁴ *See* President Barack Obama, *supra* note 3.

¹⁵ *See, e.g.*, Jennifer Daskal, Ashley Deeks, & Ryan Goodman, *Strikes in Syria: The International Law Framework*, LAWFARE (Sept. 24, 2014, 2:25 AM), <http://www.lawfareblog.com/2014/09/strikes-in-syria-the-international-law-framework/>, archived at <http://perma.cc/GJ5D-2GTZ>; Ryan Goodman, *White House Relies on 2002 Iraq Authorization—But What's the Theory?*, JUST SECURITY (Sept. 13, 2014, 8:36 AM), <http://justsecurity.org/14980/white-house-relies-2002-iraq-authorization-but-whats-theory/>, archived at <http://perma.cc/2RUP-UUHB>.

¹⁶ ZEISBERG, *supra* note 1, at 43 (defining a "security order" as a "combination of enacted security policy judgments, plus an enacted system of interbranch war authority to achieve those ends").

Obama's claims to what Zeisberg usefully calls his war authority. (Zeisberg pp. 18-19). By contrast, the standard war powers debate has become an exercise in checking off boxes. It should be a substantive inquiry into whether the sum total of the relevant actions by both branches provide the constitutional authority to take the country into a military conflict. From my perspective, we should concentrate especially on the adequacy of the initial deliberative process inside the executive branch and whether that process was tested appropriately by Congress.

B. *The Zeisberg Intervention*

In her opening chapter, Zeisberg remarks that many see Congress's approval of the 2002 Iraq War Resolution as a moment of constitutional deficiency. (p. 47). Although the controversy over the lack of hard intelligence that Saddam Hussein had developed weapons of mass destruction ("WMDs") is familiar, consider that it has little purchase within the terms of the standard war powers debate. As just described, that debate has focused almost exclusively on the fact of congressional approval or disapproval. As Zeisberg usefully continues:

Yet the Iraq War was legally authorized by Congress acting through its regular procedures. No other war powers theory on offer can account for the common intuition that legislative processes may sometimes be so deficient as to actually impair the constitutional authority of legislative assent. Highlighting the role of the processual standards in generating constitutional authority makes these common intuitions more sensible. (p. 47).

This is a critically important point in understanding the value of Zeisberg's approach to war powers. To a certain extent, the war powers debate has lost its way by stressing the constitutional requirement of congressional approval in a world in which AUMFs are, at the least, not unusual. The near-exclusive focus on brute-fact approval issues, including continuing arguments over the viability of the WPR, have obscured the more significant issue, highlighted by Zeisberg, of the nature and quality of interbranch interaction and deliberation. It is as if the standard debate has forgotten why we are having this argument.

The genius of Zeisberg's "processual standards," referred to in the quotation above, is that they enable us to gain a normative purchase on the inherently complicated task of judging the actions of both branches as they interact during decisions respecting war. The formulation of these standards is pretty clearly fraught with controversy, as it is hardly obvious how to proceed. The Constitution itself does not specify them. Yet Zeisberg persuasively derives the processual standards by enlisting the Constitution's "substantive" standards and separation of powers theory. (p. 19).

Zeisberg begins with the intuition, certainly controversial to some, that both the executive and legislative branches have a sound basis for claiming war authority from the Constitution in a world in which no branch (such as the judiciary) can authoritatively decide between them. (p. 18). Because both branches have a legitimate claim, she therefore advocates a "*relational*

conception of war authority.” (p. 18). On this conception, we do not evaluate the actions of the branches by whether they conform to the indeterminate meaning of the Constitution. Rather, we “evaluate [the branches] in terms of how well they bring their special institutional capacities to bear on the problem of interpreting the Constitution’s substantive standards about war.” (pp. 18-19).

The relational conception is composed of two types of standards: “substantive” standards derived in a fairly direct way from the text of the Constitution and the aforementioned processual standards. Zeisberg is not able to make much headway with the substantive standards, in part because she holds that we cannot derive settled meaning from the clauses that have been the focus of the war powers debate—the “declare war” clause in Article I¹⁷ and the Commander in Chief clause in Article II.¹⁸ Examining the Constitution, Zeisberg winds up with three “capacious categories” of “war, repelling attack, and defensive action,” which are less constitutional limits than boundary markers on an uncertain political terrain. (p. 21).

Zeisberg gets more mileage from “classical separation of powers theory,” (p. 25), with its emphasis on the independent constitutional authority of each branch, their distinctive capacities for governance, and their shared powers. (pp. 25-31). These “design features” suggest norms that can serve “as a basis for generating interpretive standards.” (p. 25). In fact, the design features guarantee “interbranch conflict [that] is both endemic and consequential.” (p. 30). One of Zeisberg’s main insights is that these conflicts are essential *capacities* for the creation of constitutional authority. (pp. 30-31). We are thus encouraged to see the branches in a conflictual relationship that is nonetheless productive. Thanks in particular to Zeisberg’s incisive case studies, we can more easily understand that war powers are not about which branch should always “win,” but how successfully the branches are interacting to produce constitutional authority.

More specifically, Zeisberg uses the capacities of the different branches to generate her processual standards. (pp. 31-40). I will not review these in detail. The basic notion is that we evaluate executive and legislative actions in context and relationship to ask whether they are successfully using their distinctive capacities for governance rather than evaluating them against a rigid list of textual rules. (p. 40). Given the legalized character of the standard war powers debate, however, it is worth emphasizing that evaluation of the branches’ arguments concerning “their substantive agendas for security policy,”¹⁹ (p. 33) (emphasis omitted), is essential to Zeisberg’s normative enterprise. So we must necessarily assess the substantive arguments the branches make about foreign policy and national security, not simply their legal claims narrowly understood.

¹⁷ U.S. CONST. art. I, § 8, cl. 11.

¹⁸ U.S. CONST. art. II, § 2, cl. 1.

¹⁹ *Id.* at 33 (emphasis deleted from original).

Now suppose we are either congressionalists or presidentialists in the standard war powers debate. How does Zeisberg's methodology differ from the approach we are used to? From a congressionalist perspective, the president has no power to initiate military action unilaterally under Article II. We are thus concerned, like Ackerman in my ISIL example above, that the president produce a legal opinion justifying military action under statutory authority such as the WPR or a previously approved AUMF.²⁰ We are not interested, per se, in *why* the president is taking the action or how that action fits into the larger context of advancing U.S. foreign policy and protecting our national security.

By contrast, if we are presidentialists, we believe that the president's Article II authority is always relevant to the constitutionality of any military action. That authority must be acknowledged and preserved for future presidents even if there is an adequate statutory basis for the action. As I argue in *Long Wars*, presidentialists pay more attention than congressionalists to the security context of presidential uses of military force. (Griffin p. 29). Nevertheless, presidentialists pay little or no attention to the role of Congress, regardless of whether Congress has something to contribute.

Both of these perspectives concentrate so intently on what they take to be "the law" that they arguably miss the broader purposes that animate the Constitution, as well as how it continues to structure the interaction of government institutions. Inspired by Zeisberg's theory, I will discuss an example of how the war powers debate can go astray unless it pays attention to both historical context and background constitutional values. Consider the curious case of the defensive theory of war.

C. *The Curious Case of the Defensive Theory of War*

At several points in her book, Zeisberg highlights the relevance of the defensive theory of war to contemporary claims of war powers. She states that the terms of the presidential oath of office, "along with the fact that the president's war powers are implied, is widely accepted as indicating that a president's use of military force must be for defensive purposes." (Zeisberg p. 20) She goes on to point out some of the difficulties with using the distinction between the offensive and defensive use of force as a definitive guide for distinguishing between what only Congress can do (the former) and what the president can do unilaterally (the latter). (p. 20). The UN Charter arguably outlawed offensive war, implying to some that there is no further role for Congress under the offensive/defensive distinction. (See p. 20). Yet, Congress has in fact declared or authorized wars in situations (such as both world wars), in which the United States took the position that it was responding defensively to nations that attacked first. (p. 20).

To my knowledge, no one has tried to contextualize the defensive theory itself, that is, provide a historical basis for understanding how it developed

²⁰ See *supra* note 12 and accompanying text.

over time. The contemporary conception of the defensive theory can be quite expansive. During the fall 2013 controversy over President Obama's proposed intervention into Syria, for example, Professor Jack Goldsmith described the president's war powers as follows: "Since the nation's founding, presidents have possessed the authority to use military force abroad in the absence of Congressional authorization when acting in defense of the nation. Over time this self-defense rationale extended to permit the president to use force abroad to protect American persons and property there."²¹

Goldsmith here articulated the classic version of theory of defensive war. As Zeisberg describes, the intuition behind the theory is that when the president uses military force *defensively*, he need not seek congressional approval. (Zeisberg pp. 11-12). Roughly sixty years before Goldsmith's op-ed, the eminent constitutional scholar Clinton Rossiter devoted a substantial section in his book *The Supreme Court and the Commander in Chief* to the topic of "The President's Power to Wage Defensive War."²² Rossiter regarded the power as a practical response to the reality that American wars were often under way "before Congress could get around to declaring the fact."²³ Given that other countries can act first to attack the United States, "it has therefore always been assumed that the President, as commander in chief, could order the armed services to 'meet force with force.'"²⁴ Although Rossiter acknowledged that the scope of this power remained unclear,²⁵ he believed that *The Prize Cases*²⁶ during the Civil War had settled the question of the existence of the president's defensive power.²⁷

These remarks by Goldsmith and Rossiter show that the defensive war theory has come a long way from the famous brief remark at the Federal Convention, often attributed to James Madison, that the proposed change from "make war" to "declare war" would leave "to the Executive the power to repel sudden attacks."²⁸ Because of the widespread assumption (carefully noted by Zeisberg) that the president must have some power to respond to "sudden attacks," (Zeisberg pp. 11-12), we should investigate how Madison's power to respond—seemingly in a *territorial emergency* and certainly in the *absence* of

²¹ Jack L. Goldsmith, Op-Ed., *What Happened to the Rule of Law?*, N.Y. TIMES, Aug. 31, 2013, <http://www.nytimes.com/2013/08/31/opinion/what-happened-to-the-rule-of-law.html>, archived at <http://perma.cc/T47C-QZ4L>.

²² CLINTON ROSSITER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* 65-77 (expanded ed. 1976) (originally published in 1951).

²³ *Id.* at 66.

²⁴ *Id.* at 66 (footnote omitted).

²⁵ *Id.* at 66-67.

²⁶ 67 U.S. (2 Black) 635 (1863) (upholding the blockade of southern ports put in place by President Lincoln as a constitutionally legitimate response to a de facto state of war).

²⁷ ROSSITER, *supra* note 22, at 68-77.

²⁸ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318-19 (Max Farrand ed., 1911) [hereinafter THE RECORDS].

Congress—morphed into Goldsmith's power to, in effect, take the initiative *anywhere* in the world, *regardless* of Congress's availability, when a case can be made that such action is "in defense of the nation."²⁹ The former does not imply the latter!

Curious, for my purposes, means both a phenomenon we should want to know more about, in the sense of sparking our curiosity, and curious in the sense of strange.³⁰ I call the defensive war theory curious for several reasons. First, we have the phenomenon, just noted, of how the power to respond to a sudden attack, presumably against the territory or homeland of the United States, changed over time into a much broader power.³¹ Additionally, we should worry about Rossiter's position when its practical consequence is to deal Congress out of the picture as a constitutional matter. Finally, the theory is strange, indeed incoherent, in light of our actual practice. It is doubly strange because, like Rossiter, contemporary commentators often assume that the defensive war theory is grounded in the lessons of experience.³² In fact, there are significant episodes from our country's diplomatic history which show we should be wary of assuming that the president has the unilateral power to respond even in circumstances when U.S. forces have been suddenly and unjustifiably attacked.³³

Madison's "repel power" remark at the Philadelphia Convention, made to justify replacing "make" war with "declare" war, is well known.³⁴ What historical circumstances could Madison have been contemplating? In 1787, American military capacity was quite limited, and the government had no ability to project force beyond its borders. At the same time, despite the results of the Revolutionary War, the great powers of Europe had not yet lost interest in projecting their power on the North American continent.³⁵ Further, given the substantial difficulties of travel in the eighteenth century, it would have been reasonable to infer that there might be long periods when Congress would not

²⁹ Goldsmith, *supra* note 21.

³⁰ This issue is mooted from the insular perspective of the theory of original public meaning in Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by "Declare War,"* 93 CORNELL L. REV. 45, 94 (2007); Michael D. Ramsey, *Response: The President's Power to Respond to Attacks*, 93 CORNELL L. REV. 169, 169-70 (2007).

³¹ See Goldsmith, *supra* note 21 ("Over time this self-defense rationale extended to permit the president to use force abroad to protect American persons and property there.").

³² See, e.g., Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 YALE L.J. 845, 850-64 (1996) (reviewing LOUIS FISHER, *PRESIDENTIAL WAR POWER* (1995)).

³³ Cf. Saby Ghoshray, *Illuminating the Shadows of Constitutional Space While Tracing the Contours of Presidential War Power*, 39 LOY. U. CHI. L.J. 295, 309 (2008) ("Although isolated scenarios exist where the executive is obligated to defend the sovereign, evidence of unilateral war power simply does not exist.").

³⁴ THE RECORDS, *supra* note 28, at 318.

³⁵ GEORGE C. HERRING, *FROM COLONY TO SUPERPOWER: U.S. FOREIGN RELATIONS SINCE 1776*, at 49 (2008).

be in session and could not be easily recalled. So it is reasonable to assume that Madison and other members of the founding generation were concerned with the prospect of an attack on U.S. territory when Congress was not available. At the same time, the president would always be on duty, and surely he would act to defend the country with whatever forces were available to him.

Let's refer to this situation as *Type 1* defensive war—an invasion of the country by a foreign power when Congress is not available. As far as I know, no one in the war powers debate has contested that the president has Type 1 defensive power, either in his or her own right or standing in for Congress. As a matter of constitutional interpretation aside from the text, the power might be based on historical or structural arguments or on considerations of emergency and necessity grounded in prudential arguments.³⁶

Past Madison's remark at the Federal Convention, many commentators trace the origins of the defensive war theory to a critical outburst by Alexander Hamilton in the wake of President Jefferson's 1801 decision to not take overtly offensive action against the piratical Barbary coast state of Tripoli.³⁷ Although Tripoli had declared war on the U.S., Jefferson told Congress that he had instructed the navy that, while reprisals were appropriate, the U.S. could not engage in war without the consent of Congress.³⁸ At a low point in his distinguished career, when he had no political influence,³⁹ Hamilton nonetheless rose to the attack and suggested a broader vision of presidential power, one in which presidents could respond with full force once a foreign power had declared war.⁴⁰ The issue never came to a head because Jefferson obtained authority from Congress to strike back in 1802.⁴¹ When the second Barbary war (the Algerine War of 1815-16) involved attacks on the U.S. similar to those earlier perpetrated by Tripoli, President Madison did not treat those incidents as a justification for a presidentially-ordered "defensive" war.⁴² He requested an authorization for war from Congress, which was granted.⁴³

³⁶ For the methods of interpretation, see PHILIP BOBBITT, *CONSTITUTIONAL FATE* (1983).

³⁷ See, e.g., FRANK LAMBERT, *THE BARBARY WARS* 131 (2005).

³⁸ *Id.* at 125-26.

³⁹ The editor of Hamilton's Papers notes that Hamilton's criticisms of Jefferson in "The Examination" attracted little attention as Hamilton was a spent force in national politics. 25 *THE PAPERS OF ALEXANDER HAMILTON* 452-53 (Harold C. Syrett ed., 1977) [hereinafter *HAMILTON'S PAPERS*]. See also RON CHERNOW, *ALEXANDER HAMILTON* 640-50, 657-58 (2004).

⁴⁰ Lucius Crassus, *The Examination No. 1*, N.Y. *EVENING POST*, Dec. 17, 1801 reprinted in *HAMILTON'S PAPERS*, *supra* note 39, at 444-56.

⁴¹ LAMBERT, *supra* note 37 at 131-33.

⁴² *Id.* at 189.

⁴³ *Id.*

Hamilton's isolated criticism has been accorded considerable respect by constitutional scholars. Rossiter, for example, thought Hamilton had soundly replied to Jefferson.⁴⁴ Hamilton's position is thus worth considering at length:

That instrument [the Constitution] has only provided affirmatively, that, "The Congress shall have power to declare War;" the plain meaning of which is that, it is the peculiar and exclusive province of Congress, *when the nation is at peace*, to change that state into a state of war; whether from calculations of policy or from provocations or injuries received: in other words, it belongs to Congress only, *to go to War*. But when a foreign nation declares, or openly and avowedly makes war upon the United States, they are then by the very fact, already *at war*, and any declaration on the part of Congress is nugatory: it is at least unnecessary. This inference is clear in principle, and has the sanction of established practice.⁴⁵

By way of further explanation, Hamilton remarked that "[t]he moment therefore that two nations are, in an absolute sense, at war, the public force of each may exercise every act of hostility, which the general laws of war authorise, against the persons and property of the other."⁴⁶

Let's refer to Hamilton's theory as *Type 2* defensive war. Hamilton contends that when a foreign nation "openly and avowedly makes war upon the United States,"⁴⁷ a state of war is created. On these terms, note the differences between *Type 1* and *Type 2* defensive war. In Hamilton's view, there is not necessarily a "sudden" attack (in fact, there is not necessarily an attack at all), and whether Congress is available is irrelevant. It is true that some of his examples suggest that Hamilton might have been thinking of circumstances in which Congress was not available.⁴⁸ But what commentators have taken away from Hamilton is a sense that war can be forced on us. We have thus moved some distance from Madison's remark at the Federal Convention.

So what happens next? Hamilton implies, but does not actually say, that the president has the power to respond with "every act of hostility" which may be generated by the "public force" available to him.⁴⁹ This leaves the constitutional basis for the exercise of presidential power unclear. Perhaps Hamilton was providing an argument of necessity, rather than an interpretation of the Constitution, although the context suggests otherwise.

Although the brevity of Hamilton's argument limits its usefulness, it is nonetheless important, because most subsequent statements of the defensive war theory have followed the thrust of his argument that the president has the

⁴⁴ Rossiter described Hamilton's criticism of Jefferson as "scornful and realistic." ROSSITER, *supra* note 22, at 66 n.3.

⁴⁵ Crassus, *supra* note 40, at 455-56 (footnote omitted).

⁴⁶ *Id.* at 455.

⁴⁷ *Id.* at 456.

⁴⁸ *See id.* at 457.

⁴⁹ *Id.* at 456-57.

unilateral authority to respond to an attack, regardless of whether Congress is available or what it might conclude. Many commentators believe that the Hamiltonian position was endorsed in *The Prize Cases*, decided during the Civil War. Consider this summary by the influential Judge Laurence Silberman of the District of Columbia Circuit: “I read the *Prize Cases* to stand for the proposition that the President has independent authority to repel aggressive acts by third parties even without specific congressional authorization, and courts may not review the level of force selected.”⁵⁰ Consistent with Hamiltonian Type 2 defensive war, congressional authorization is irrelevant, although Judge Silberman makes no stipulation that Congress is unavailable. But do the *Prize Cases* support Silberman’s view?

The *Prize Cases* concerned President Lincoln’s decision to blockade southern ports at the outset of the Civil War without the sanction of congressional legislation.⁵¹ Because the blockade affected ships from other countries, the Court initially framed the case as one of international law.⁵² Yet, to resolve the case, the Court turned to domestic law, reasoning that it turned on whether “a state of war existed” under the Constitution.⁵³

The majority opinion by Justice Grier was less clear than it could have been, because it approached the constitutional issue from several directions. As we have seen, Madisonian Type 1 defensive war involves a practical state of emergency because the national territory has been invaded and there is no time to consult Congress. By contrast, Hamiltonian Type 2 defensive war need not involve an invasion or other emergency and does not involve the participation or unavailability of Congress. On balance, the Court’s opinion described the Civil War as a *Type 1* war. The Court reasoned as follows:

If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader,

⁵⁰ *Campbell v. Clinton*, 203 F.3d 19, 27 (D.C. Cir. 2000) (Silberman, J., concurring). For the influence of this formulation by Judge Silberman, see *Padilla v. Bush*, 233 F.Supp.2d 564, 589 (S.D.N.Y. 2002). On the Supreme Court, at least Justice Thomas holds the same view. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 581 (2004) (Thomas, J., dissenting).

⁵¹ For recent commentary on the *Prize Cases*, see DANIEL FARBER, LINCOLN’S CONSTITUTION 138-43 (2003); Andrew Kent, *The Constitution and the Laws of War During the Civil War*, 85 NOTRE DAME L. REV. 1839, 1841 (2010); Thomas H. Lee, *The Civil War in U.S. Foreign Relations Law: A Dress Rehearsal for Modern Transformations*, 53 ST. LOUIS U. L.J. 53, 55 (2008); Thomas H. Lee & Michael D. Ramsey, *The Story of the Prize Cases: Executive Action and Judicial Review in Wartime*, in PRESIDENTIAL POWER STORIES 53, 57 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009); Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149 (2004).

⁵² *The Prize Cases*, 67 U.S. (2 Black) 635, 665 (1863).

⁵³ *Id.* at 666.

or States organized in rebellion, it is none the less a war, although the declaration of it be “*unilateral*.”⁵⁴

To be sure, this particular argument does not refer to Congress. The Court's emphasis is on the lack of choice inherent to the situation, one in which the President is “bound to accept the challenge”⁵⁵ of war. However, the Court then explains why the Civil War fit squarely within Type 1 defensive war. The Court asserts that the war “sprung forth suddenly from the parent brain, a Minerva in the full panoply of *war*.”⁵⁶ The Court follows by repeating that “[t]he President was bound to meet it in the shape it presented itself”⁵⁷ In other words, there was a pressing need to repel a Type 1 “sudden attack.” Perhaps the most quoted language of the opinion follows:

Whether the President in fulfilling his duties, as Commander in-chief [sic], in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted.⁵⁸

To return to Judge Silberman's claims, it is understandable, given this language, that he thought the *Prize Cases* stand for the proposition that courts have a limited role in reviewing presidential decisions to use force. It is less clear, however, why he thought that the *Prize Cases* support a broad presidential power to wage war without congressional authorization. Once we draw the distinction between Madisonian Type 1 and Hamiltonian Type 2 defensive war, we can see that the *Prize Cases* are better described as falling under Type 1, although Silberman clearly thinks they support Type 2. In other words, the *Prize Cases* describe the outbreak of the Civil War as justifying a presidential decision to repel a sudden attack when Congress was not available, the exact circumstances Madison referred to at the Federal Convention. The Supreme Court did not go further to endorse the Hamiltonian argument that the president has the power to initiate “defensive” war, regardless of the existence of an emergency and regardless of the need to consult Congress. In fact, the Court's opinion went on to invoke the “legislative sanction”⁵⁹ Congress provided to Lincoln once it convened in July 1861. This was surely legally relevant because, as the Court had earlier noted, “Congress alone has the power to declare a national or foreign war.”⁶⁰

⁵⁴ *Id.* at 668.

⁵⁵ *Id.*

⁵⁶ *Id.* at 669.

⁵⁷ *Id.*

⁵⁸ *Id.* at 670.

⁵⁹ *Id.*

⁶⁰ *Id.* at 668.

Nonetheless, constitutional scholars like Rossiter are correct that the Court's opinion was historically understood to support a broad presidential power to respond once the United States is attacked. The limitations of Type 1 defensive war explicitly stated in the *Prize Cases*, in terms of an *emergency* created by a sudden attack and the *absence of Congress*, were lost over time. This is probably due to the influence of officials and commentators who deliberately promoted the broad understanding of presidential war power underlying Hamilton's Type 2 formulation.

Andrew Kent's insightful discussion of the jurisprudence of the Civil War suggests how this might have occurred. He describes how the issues in the *Prize Cases* were mooted extensively in the years before the case was decided.⁶¹ In particular, William Whiting, the prominent solicitor of the War Department, addressed the issue of presidential power to initiate a defensive war in a widely noted book.⁶² Whiting's discussion is important to understanding later commentary, because he explicitly drew a distinction between offensive and defensive war in a way that differed from the *Prize Cases*. After making the point that a state of war could arise without a declaration, Whiting argued:

Congress has the sole power, under the constitution, to make that declaration, and to sanction or authorize the commencement of *offensive* war. . . . But this is quite a different case from a defensive or a civil war. The constitution [sic] establishes the mode in which this government shall *commence* wars, and what authority shall ordain, and what declarations shall precede, any act of hostility; but it has no power to prescribe the manner in which others should begin war against us. Hence it follows, that when war is commenced against this country, by aliens or by citizens, no declaration of war by the government is necessary. The fact that war is levied against the United States, makes it the duty of the President to call out the army or navy to subdue the enemy, whether foreign or domestic.⁶³

Ironically, it is not clear that President Lincoln agreed with Whiting's argument.⁶⁴ From Whiting's point of view, Congress is irrelevant in a situation in which another government launches a war against the United States. In this case, declarations or authorizations of war are not required by the Constitution, and the President has the authority "to call out the army or navy to subdue the enemy . . ."⁶⁵ How Whiting imagines a president would accomplish this, especially given the circumstances existing at the outset of the Civil War, is

⁶¹ Kent, *supra* note 51, at 1887-92.

⁶² *Id.* at 1874 n.123. See WILLIAM WHITING, WAR POWERS OF THE PRESIDENT (3d ed. 1863).

⁶³ WHITING, *supra* note 62, at 38-39 (emphasis in original).

⁶⁴ See the discussion in David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb – A Constitutional History*, 121 HARV. L. REV. 941, 1001 (2008).

⁶⁵ WHITING, *supra* note 62, at 39.

hard to understand. How was a president supposed to subdue an enemy as formidable as the Confederate States of America without a substantial army or funds? For his part, Lincoln was acutely aware of the appropriate role of Congress, as he applied to it for both an army and funds in July 1861.⁶⁶ In the circumstances prevailing in early 1861, Whiting's argument was impractical due to the meager state of the armed forces. Obtaining congressional authorization for the war was thus unavoidable for Lincoln, although it is true he delayed it by three months.⁶⁷

A further historical irony is that the Civil War itself showed the ambiguities inherent in attempting to classify wars as "offensive" or "defensive." For the question can always be asked: from whose point of view? From the point of view of Lincoln and his Unionist supporters, the South had attacked federal installations and it was therefore the aggressor. From the South's point of view, there was no doubt that the *North* was the aggressor, as it could have easily let the South secede in peace. This indicates that the distinction between offensive and defensive war is unstable and thus unhelpful.

Nevertheless, history shows that subsequent commentators understood the *Prize Cases* through the lens of Whiting's argument. In an influential review of existing precedent in 1920, Clarence Berdahl used Whiting as his lead authority in arguing that the President had the authority "to begin and wage a war of defense . . ."⁶⁸ In turn, Rossiter used Berdahl as *his* lead authority in his 1951 account of the president's power to wage defensive war.⁶⁹ The critical link from Whiting to Berdahl to Rossiter to Judge Silberman to Professor Goldsmith in the present was the inspiration provided by Hamiltonian Type 2 defensive war filtered through a questionable interpretation of the *Prize Cases*.⁷⁰

In evaluating the now familiar contemporary version of Hamilton's Type 2 theory, it is surely worth saying that the Constitution self-evidently does not grant or withhold power based on the status of a war or military operation as "offensive" or "defensive." Rather, we have the power of Congress to "declare war,"⁷¹ usually juxtaposed to the president's power as commander in chief.⁷² Yet Hamilton insisted that if the nation was attacked, this obviated the need to

⁶⁶ Barron & Lederman, *supra* note 64, at 1001, 1003-04.

⁶⁷ See the discussion in PHILLIP SHAW PALUDAN, *THE PRESIDENCY OF ABRAHAM LINCOLN* 80-82 (1994).

⁶⁸ CLARENCE A. BERDAHL, *WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES* 59 (1920). For Berdahl's influence, see Barron & Lederman, *supra* note 64, at 1025-26 ("Berdahl asserted that the President alone is to decide 'how the war is to be conducted' – a 'despotic power,' to be sure, but one that 'nevertheless must be confided by a sound political science to the President.'").

⁶⁹ ROSSITER, *supra* note 22, at 66 n.2.

⁷⁰ For Berdahl's praise of Hamilton's reasoning, see BERDAHL, *supra* note 68, at 63-64.

⁷¹ U.S. CONST. art. I, § 8, cl. 11.

⁷² U.S. CONST. art. II, § 2, cl. 1.

go to Congress. In such a situation, we are to believe that war is already upon us. Later commentators turned Hamilton's isolated conjecture into the defensive war theory.

To dispel the theory's air of plausibility, let's initially notice the difference between arguing that a war can begin without a literal declaration and that a war can begin without a government decision. The former is certainly true while the latter is certainly false. Nevertheless, the two have been confused time and again in the war powers debate. Hamilton assumed that an attack by a foreign power necessarily catapulted the country into a state of war. The crucial Hamiltonian fallacy is to take the decision for war out of the arena of political choice. To see this point more clearly, consider two perhaps startling examples from American diplomatic history. These examples show that even a flagrant attack by a foreign power on our military forces does not necessarily create a state of war.

In China in 1937, the Japanese attacked the USS *Panay*. Historian George Herring recounts:

The *Panay* was sunk; forty-three sailors and five civilians were injured, three Americans killed. FDR and other top officials were furious and contemplated a punitive response. But this shockingly brutal and unprovoked attack sparked little of the rage of the *Maine* or *Lusitania*. Indeed, Americans seemed to go out of their way to keep a war spirit from building. Some even demanded that U.S. ships be pulled out of China. Apparently as shocked as the United States, the Japanese government quickly apologized, promised indemnities for the families of the dead and injured, and provided assurances against future attacks. Even more telling, and revealing a different side of Japanese society, thousands of ordinary citizens, in keeping with an ancient custom, sent expressions of regret and small donations of money that were used to care for the graves of American sailors buried in Japan.⁷³

Another example of an unprovoked attack occurred in the 1967 Six Day War between Israel and Egypt, Jordan and Syria. Herring describes how the Israeli air force attacked the U.S. electronic surveillance ship *Liberty*:

On the afternoon of June 8, Israeli aircraft and then gunboats struck the *Liberty* with rockets, napalm, and torpedoes, killing 34 sailors, wounding 171. At first believing that Egypt or the Soviet Union was responsible, the United States dispatched aircraft from a nearby carrier. In the meantime, learning that Israel had attacked the ship and fearing escalation of the war, it recalled the planes. Israel naturally fell back on mistaken identity, a claim only the most gullible could believe . . . Israel apologized and paid an indemnity. United States officials accepted the apology without much further questioning.⁷⁴

⁷³ HERRING, *supra* note 35, at 512 (footnote omitted).

⁷⁴ *Id.* at 748.

The reason Americans have never heard of our 1937 war against Japan or the 1967 war against Israel is because it is possible for our forces to be deliberately attacked and suffer loss of life without that bare fact forcing the nation into a state of war. In evaluating Hamilton's argument, we should keep in mind that a decision for war or, for that matter, any form of military action is a *choice*. Without trying here to decide the debate between congressionalists and presidentialists, a choice for war is a political and policy matter committed to the relevant officials identified by the Constitution. Further, it is logically possible that the choice may not be driven, or even influenced significantly, by the mere fact of an attack, however unjustified.

In the case of the Civil War, Lincoln's constitutional authorization to respond to secession and the attack on Fort Sumter was justified only by a necessity firmly rooted in Madison's Type 1 defensive war. Because it was possible for Congress to render judgment at a later time, it follows that Lincoln's actions would have been unconstitutional had they not been ratified by Congress. If the Supreme Court in the *Prize Cases* was in fact following Hamilton (contrary to what I argued above), they erred for the fundamental reason that there is no avoiding that going to war is a choice.

So American history provides no support for the notion that an attack on our military invariably produces a state of war. Moreover, the distinction between offensive or defensive war is inherently unsound. Exactly how do we determine whether a war is offensive or defensive? Was World War II a "defensive" war because Japan struck first at Pearl Harbor and Hitler's Germany declared war on the United States? Was the U.S. still acting "defensively" when we firebombed Japanese cities, dropped atomic bombs on Hiroshima and Nagasaki, planned a massive invasion of the Japanese home islands, and demanded Japan's unconditional surrender? Or are these operations better described as "offensive"? Perhaps the war against Japan is not well described as "defensive" or "offensive." Although this argument may seem questionable if one has, so to speak, grown up with these categories, what is surely more relevant with respect to the decision for war against Japan and Germany was our war aims and our strategy for achieving them, not whether the aims or strategy are best described as offensive or defensive.

It thus becomes apparent that the real issue is not whether a war is "defensive" or "offensive" but, roughly, whether it advances the foreign policy and protects the national security of the United States.⁷⁵ Thinking about the defensive or offensive character of a war is a false trail that steers us away from the reality that going to war with a foreign power is always a risky decision. As history shows, there are reasons for declining to respond to an attack as if we were automatically in a state of war. Again, whether to go to war is a political choice that inevitably involves considerations of domestic politics, diplomatic policy, and national security strategy. Because it is a choice, it can be the object of deliberation. Because interbranch deliberation is

⁷⁵ I employ and defend this phrasing in GRIFFIN, *supra* note 2, at 3.

implied very strongly by the constitutional plan, there is no reason not to involve both the executive and legislative branches.

I suspect that the real story behind the historical development of the defensive war theory, at least subsequent to the Civil War, is that it was perceived as useful in the early twentieth century when commentators like Berdahl wished to justify a broader scope for executive action, especially with respect to the maintenance of the Monroe Doctrine in the Western Hemisphere. As a policy position, this may have been defensible in light of the circumstances existing at the time. However, this does not mean that the time-honored distinction between offensive and defensive war ever made much constitutional or practical sense, at least when interpreted in Hamiltonian terms.

II. DIVERGENCES

In discussing the divergences between my approach to war powers in *Long Wars* and Zeisberg's relational theory, we can begin by asking why we should care about the issue of war powers, especially the use of presidential war powers after 1945. I am not alone in thinking that the use of presidential war powers during this period has been uniquely problematic in American history. Describing the difficulties President Obama encountered in rounding up support to fight ISIL, *Washington Post* columnist David Ignatius writes:

The United States' problem since World War II is that it has chosen to fight limited wars that had ambiguous outcomes, at best. This was the case in Korea, Vietnam, Iraq and Afghanistan. Only in 1991's Operation Desert Storm did the United States win a decisive victory, but it had limited objectives and faced a weak adversary. As Henry Kissinger recently observed, the fight against the Islamic State comes when the American public is already demoralized by this chain of non-success.⁷⁶

Ignatius refers to the "ambiguous outcomes" of the wars the U.S. has fought since 1945.⁷⁷ But why have the outcomes been so disappointing? Although Zeisberg and I largely agree on what methodology to use to analyze war powers, especially when compared to other scholars, I doubt we agree completely on whether questions such as this should be front and center. Zeisberg says that the war powers literature is centered on three "conventional controversies": "Does a president who uses discretionary power to move the country toward war undermine legislative war authority? Can Congress delegate its war power to the presidency? When and how is a president justified in engaging in independent acts of war?" (p. 51).

⁷⁶ David Ignatius, *The Problem with America's Limited Wars*, WASH. POST, Oct. 9, 2014, http://www.washingtonpost.com/opinions/david-ignatius-reality-check-on-limited-war/2014/10/09/19c8c95e-4ff2-11e4-babe-e91da079cb8a_story.html, archived at <http://perma.cc/K6EL-EHN5>.

⁷⁷ *Id.*

Some of these questions, especially the third, are relevant to my own project. But, in all candor, I think they are some distance away from both what I understand the standard war powers debate to be about, at least among legal academics, and also the questions I believe to be most significant. Consider a minor league illustration of what I believe to be a relevant issue. Why do we subject decisions for war to *less* legislative scrutiny than significant domestic policy decisions such as, say, whether to reform the health care system? In a recent valuable account of the domestic policy process, Elaine Kamarck describes the key role of the Congressional Budget Office (“CBO”) in “scoring” (estimating budgetary costs) legislation.⁷⁸ She states quite plausibly that CBO scoring is often critical to whether legislation is passed.⁷⁹

Now consider: when was the last time the CBO “scored” a proposal for war? Why do we seem to give major wars, arguably the most consequential public policies of all, less scrutiny in the policy process than anything else? The projected costs of domestic policies (or, for that matter, foreign aid!) are usually scrutinized with care. What is it about major wars that make them exempt from such scrutiny?⁸⁰ This is at least worth thinking about.

Let’s turn to the major league questions. Why have so many major wars since 1945 gone disastrously wrong? Is this situation connected to the constitutional order—that is, how the Constitution is implemented within a particular historical era—and can we do anything about it? Along the same line, consider this recent summary by former United States ambassador-at-large and Columbia University Professor Stephen Sestanovich, who, in his insightful study of American foreign policy since 1945, describes how it oscillates between periods of “maximalism” and “retrenchment”:

From one presidency to another, maximalism that crashes and burns always looks basically the same. Harry Truman in 1950 and then in 1953, Lyndon Johnson in 1965 and then in 1968, George Bush in 2003 and then in 2006—all three transformations tell a story of power and authority brought low, a painful reversal of national fortune in which presidents seem helpless to correct their mistakes.⁸¹

One theme sounded by Sestanovich is consistent with Ignatius—we have experienced a series of foreign policy disasters. Note, however, the new theme of presidential helplessness. What makes presidents so infirm? Why do they

⁷⁸ ELAINE C. KAMARCK, *HOW CHANGE HAPPENS—OR DOESN’T: THE POLITICS OF US PUBLIC POLICY* 8 (2013)

⁷⁹ *Id.*

⁸⁰ Think, for example, of the Shinseki controversy in the run-up to the 2003 Iraq War. See PETER BAKER, *DAYS OF FIRE: BUSH AND CHENEY IN THE WHITE HOUSE* 243, 248 (2013) (discussing Gen. Shinseki’s general concerns in the Iraq war plan and his controversial estimate, voiced in front of the Senate Armed Services Committee, of the potential number of troops required in post-Hussein Iraq).

⁸¹ STEPHEN SESTANOVICH, *MAXIMALIST: AMERICA IN THE WORLD FROM TRUMAN TO OBAMA* 298 (2014).

seem basically alone in both making initial decisions for war and then being unable to change course? So, here is my first divergence with Zeisberg's account. Can we use Zeisberg's processual standards to understand these issues—to comprehend, that is, the *contemporary* war powers debate? Can Zeisberg's processualist approach enable us to model and engage with the debate Americans have been having over war powers, especially since Vietnam?

Although I have objections to what I have termed the “standard” war powers debate, I am certainly trying to make a contribution to the contemporary war powers debate. As I understand it, the debate involves issues such as: worries about the president's de facto first-mover status given our permanently large, globalized military; the often pro forma character of congressional authorizations; the lack of genuine deliberation on decisions for war, in the country at large and even inside the executive branch itself; the role of presidential deception of Congress and the public in making decisions for war; and profound ongoing disagreements over the status of what Zeisberg calls “security orders.” (Zeisberg p. 43). Moreover, although I also have reservations with respect to the concept of the “imperial presidency,” (Griffin pp. 264-69), it is worth bearing in mind that many scholars accept this conception and understand the contemporary debate through its lens.⁸²

As my comment on security orders implies, some of the concerns of the contemporary debate can be modeled and thus understood through Zeisberg's relational conception. But other concerns pose challenges. There is arguably a large measure of agreement on both sides of the war powers debate that after 1945 there was a sea change in the global responsibilities of the United States and thus in the power of the presidency. According to many scholars working from a variety of disciplinary perspectives, this led to what Gordon Silverstein terms an “imbalance of powers” between the branches.⁸³ This was certainly the sense of the congressional authors of the WPR, particularly in the Senate. (p. 166). But what happens to the processualist framework in the wake of informal constitutional change that fundamentally alters the relationship between the branches? To oversimplify, the relational conception assumes that a meaningful and substantive exchange relationship between the branches already exists. But suppose one branch has a dominant position?

To be sure, nothing in Zeisberg's model excludes this possibility. But Zeisberg's presentation implies that her model depends on positing that the branches today are in at least rough equipoise. Recall that Zeisberg's initial inspiration for the processual standards comes from separation of powers theory. (Zeisberg pp. 25-31). That theory assumes that the three branches are, in some sense, coequal. They all participate in governance and possess

⁸² See GRIFFIN, *supra* note 2, at 333 n.1 (citing scholars who view the contemporary debate through the lens of “imperial presidency”).

⁸³ GORDON SILVERSTEIN, *IMBALANCE OF POWERS: CONSTITUTIONAL INTERPRETATION AND THE MAKING OF AMERICAN FOREIGN POLICY* (1996).

effective checks against the actions of the others, particularly actions that might “encroach” or “aggrandize” their powers, as the Supreme Court likes to put it. (pp. 31-40).

The contemporary war powers debate is based on the felt historical reality that this process broke down at some point. Does Zeisberg’s model allow for this possibility? The intuition is that the legislature cannot contribute meaningfully to a decision for war because its position and capacities have been undermined by actions of the executive branch. Yet Zeisberg’s model appears to adhere to the assumption that each branch has a unique capacity to contribute to a war powers decision *and* has successfully maintained that capacity over time. We should have the ability to model what would happen if one branch developed the ability to undermine the decision-making capacity of another branch. Because the relative capacities and thus the positions of the branches can change, I believe it is useful to resort to a theory of constitutional orders that can account properly for these informal constitutional changes over time. (See Griffin pp. 14-18).

I have distinguished between the standard war powers debate and the contemporary war powers debate for the following reason. A hardline congressionalist would characterize the historical situation as one in which the executive branch aggressively usurped the role of Congress. The typical solution is to call for a rededication to the Constitution’s terms and to deal Congress back into meaningful participation in decisions for war, possibly with the help of reforms to the WPR. Setting aside the question of solutions, I do not endorse this position in *Long Wars*. I argue that the focus of the war powers debate should shift to investigating the ability of the executive branch to make sound decisions for major wars, both overt and covert, under the terms of the post-1945 constitutional order. (pp. 14-18). So, whereas the standard debate focuses somewhat obsessively on congressional authorization of each and every military action, no matter how minor or trivial, I move the inquiry back several frames to examining the foreign policy context in which military decisions are made by both branches over time.

Thus, although I do not endorse every element of the congressionalist position, it seems hard to deny that some change in the constitutional order occurred in the wake of World War II, which impaired the relative position of Congress. Yet, how can we make progress in analyzing this situation by using processualist standards that seem to assume that this could not occur? That is my basic difficulty with Zeisberg’s model. I agree with Zeisberg that Congress participated actively in the formation of a new constitutional order in the early Cold War. (Zeisberg pp. 92-145). This is one reason why it is unhelpful to talk in terms of executive “usurpation” of congressional war powers. Once the executive branch was legitimately given new capacities for action, however, Congress was indeed hard-pressed to keep up.⁸⁴ Zeisberg admirably shows how the processualist model makes sense of our intuitions in many different

⁸⁴ Zeisberg comes closest to making this argument in her book at 112-13.

historical situations. In my judgment, however, once we move beyond the early Cold War and into the Vietnam era, there is a truth at the core of the congressionalist position that Zeisberg is ultimately reluctant to acknowledge and accommodate.

A second divergence between my approach and Zeisberg's is her seeming reluctance to contextualize the eighteenth century. I will avoid rehashing the debate over the historical meaning of the Constitution's war clauses. For Zeisberg, this is the site of an unproductive exchange between pro-Congress and pro-president "insularists." (pp. 10-19). Zeisberg's analysis throughout her book is deeply historicist and relentlessly contextual, something that is very welcome. Yet, she is not willing to discuss war powers issues within the context of the adoption of the Constitution. For example, was "war" something with which the members of the founding generation were familiar? Were delegates to the ratification conventions concerned with what powers the Constitution granted to the executive? I agree with what I take to be Zeisberg's implicit position that we must be exceedingly wary of reading our contemporary concerns back into the eighteenth century. Yet, Zeisberg does not hesitate to contextualize the nineteenth-century Mexican War, a conflict that in some respects is further removed from the concerns of our own time than at least some of the issues the founding generation considered.

Zeisberg's reluctance to engage the eighteenth century suggests she is skeptical that there is something to be learned by doing so. Indeed, how can Americans today meaningfully share concerns over executive power with Americans in the eighteenth century? Given the vast changes since then, how is this possible? Unlike some other theories of informal constitutional change, my approach treats the text as an independent variable. One of the implications of this is that we should be open to the possibility that a concern that animated a clause in the eighteenth century remains with us today. In general, Zeisberg treats the congressionalist side in the war powers debate as if it is dependent on a consensus held only in the past. But is this the case?

Zeisberg's approach to the war powers debate arguably bypasses a key issue that is genuinely trans-historical—the concern over whether one leader should be able to take the nation to war. This concern can be trans-historical, because the presidency is structured as unitary in the relevant sense that it is still vested in one person. I argue in *Long Wars* that this simple structural fact had vast consequences once the national state shifted to a permanent war-fighting stance in the wake of the 1950 Korea decision. By contrast, Zeisberg starts with the assumption (here, expressed as a processualist standard) that I put in question—the notion that "the president is able to command the resources of intelligence, diplomatic, and military establishments, branch-specific research agencies, and consultative forums like the cabinet or National Security Council (NSC)," (Zeisberg p. 35) (emphasis omitted), in order to make good decisions.

I realize that Zeisberg is often highly critical of whether presidents have met this standard, particularly in her incisive case studies of Cambodia and the Iran-Contra affair. (pp. 146-221). Yet, she seems unwilling to consider the

possibility that the flaws in the national security process exhibited so well by these episodes are endemic to the executive branch and are well illustrated by every decision for a major war after 1945. As I argue in *Long Wars*, this is ultimately a consequence of the jerry-built nature of the post-1945 constitutional order, an order implemented alongside the original order established by the Constitution.

Zeisberg also seems to question the distinction I posit between major wars (all certainly “war” in the constitutional sense,” to use the Office of Legal Counsel’s influential phrasing),⁸⁵ and other minor interventions. (pp. 19-20). Scholars have certainly had trouble defining “war” for the purposes of the Constitution. This is one reason why it is helpful to use a historicist approach to constitutional change. The account I present in *Long Wars* supports making a new distinction—between wars in which the president did not have the military capacity or resources to conduct them beforehand (such as the 1798 Quasi-War with France, the Mexican War, World Wars I and II) and wars in which the president did have that capacity (such as President Johnson’s 1965 invasion of the Dominican Republic, Reagan’s 1983 invasion of Grenada, Bush’s 1989 invasion of Panama). (See Griffin pp. 1-10). The former have always featured congressional authorizations and declarations of war given that the president must obtain the assent of Congress to fight at all. The only exception is Korea, which is one of the reasons President Truman’s decision to intervene is still controversial and a focus of the war powers debate. The latter generally do not feature such authorizations or declarations, except in the Eisenhower administration (the Formosa and Middle East resolutions).⁸⁶

Now, what should we make of this pattern? To me, it suggests we shouldn’t agonize over the precise definition of “war.” As I argue in *Long Wars*, what matters is the contemporary constitutional order with respect to foreign affairs and national security. Moreover, consistent with Zeisberg’s concept of “security orders,” (p. 43), there is no shortcut around grappling with the policy reasons why presidents sometimes launch short-term military ventures. Zeisberg does go further along this line in saying that “wars anticipated to be little and cheap can become big and expensive.” (p. 20). If her point is that presidents (and thus Congress) cannot predict in advance which wars will be major, I disagree. In fact, this might be called the “Shinseki fallacy.”⁸⁷ This is an interesting and, to me, startling conclusion of my project. Believe it or not, at least after 1945, presidents *always* know when they are starting a war—that is, making a major commitment of American forces to the battlefield. (Griffin pp. 259-60). That is because, so far, no “major” war can be fought and won

⁸⁵ Authority to Use Military Force in Libya, 2011 WL 1459998, at *12 (O.L.C. Apr. 1, 2011).

⁸⁶ Formosa Resolution, Pub. L. No. 4, ch. 4, 69 Stat. 7 (1955); Middle East Resolution, Pub. L. No. 85-7, § 2, 71 Stat. 5 (1957).

⁸⁷ See *supra* note 80 (highlighting the Shinseki controversy).

without “boots on the ground.” (pp. 57-58). Certainly the casualty lists since 1945 amply support this proposition. (p. 50-51).

So, better stated, the relevant distinction is not between big and small wars or major and minor wars, but rather between military operations that are relatively low-risk and “wars” that are always highly risky. “Wars” have this quality because, to date, they have always involved the commitment of ground forces. Of course, what the president tells the country is another question. But I hope Zeisberg’s *War Powers* and my *Long Wars* lead to a more realistic appreciation of not only the challenges presidents face in conducting U.S. foreign policy, but the signal necessity of meaningful interbranch deliberation.

CONCLUSION

I will close with some relevant quotations from Robert Gates’s recent memoir, *Duty*.⁸⁸ Gates served several presidents over many decades and was Secretary of Defense from 2006 through 2011, during the Bush 43 and Obama administrations. In *Long Wars*, I spin out my argument as a historical story. My particular hope was that this way of proceeding would reinforce the point that war is a unique sort of governmental policy. I thus feel fortunate that the Gates memoir provides strong evidence for this proposition:

Several lessons, none new to me, were hammered home during my four and a half years as defense secretary. Above all, the unpredictability of war—that once the first shots are fired or first bombs fall, as Churchill said, the political leader loses control. Events are in the saddle. It seems that every war is begun with the assumption it will be short. In nearly every instance, going back far into history, that assumption has been wrong.⁸⁹

Gates is obviously thinking of the wars he supervised in Afghanistan (as well as other Middle East locales) and Iraq. He continues in this vein, commenting on the sort of war decision-making that predominates in the executive branch:

Wars are a lot easier to get into than out of, a point I hope I have made clear. Those who ask about exit strategies or what happens if assumptions prove wrong are rarely welcome at the conference table when the fire-breathers argue we must act militarily—as they did when advocating an invasion of Iraq, intervening in Libya and Syria, or bombing Iranian nuclear sites.⁹⁰

Gates is right on target. Wars are hard to get out of because they involve not just sunk costs, but the lost lives of our fellow citizens. It is only natural for presidents to desire to redeem this kind of sacrifice, something that has

⁸⁸ ROBERT M. GATES, *DUTY: MEMOIRS OF A SECRETARY AT WAR* (2014).

⁸⁹ *Id.* at 589.

⁹⁰ *Id.* at 590.

encouraged too many administrations to stick with a war until the bitter end.
As Gates implies, don't the American people deserve better?