
INIGO MONTOYA GOES TO WAR

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INTRODUCTION

In *The Princess Bride*,¹ the conniving Sicilian Vizzini is constantly declaring that events that are obviously occurring in plain sight are “inconceivable.”² The third time (in the span of five pages) that Vizzini proclaims something that is clearly happening to be “inconceivable,” Vizzini’s then-companion, the Spaniard Inigo Montoya, snaps, “You keep using that word! . . . I don’t think it means what you think it does.”³

The voice of Inigo Montoya (well, actually the voice of Mandy Patinkin, who brilliantly deadpanned rather than “snapped”⁴ a version of the line in the movie adaptation of *The Princess Bride*⁵) was running through my head while I was reading the two books that are paired for this symposium at Boston University School of Law: Mariah Zeisberg’s *War Powers: The Politics of Constitutional Authority*⁶ and Stephen Griffin’s *Long Wars and the Constitution*.⁷ Each author’s analysis centers on single, repeatedly used words that I do not think mean what the authors think they mean. In the case of Professor Zeisberg, the word is “constitutional”; in the case of Professor Griffin, the word is “war.” Interestingly, Professor Zeisberg pays keen attention to the ambiguities latent in the word “war,” (Zeisberg pp. 5, 8, 12-13, 19, 21) while Professor Griffin neatly avoids most of the problems raised by Professor Zeisberg’s use of the term “constitutional” by treating his conception of a “constitutional order” (Griffin pp. 4, 14) as descriptive rather than prescriptive. If one could somehow merge the two books, perhaps Inigo’s voice would be silenced. But as things stand, both books, while immensely valuable resources, are in need of significant clarification.

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¹ WILLIAM GOLDMAN, *THE PRINCESS BRIDE* (1973).

² *Id.* at 88, 89, 92, 94.

³ *Id.* at 92.

⁴ *Id.*

⁵ *THE PRINCESS BRIDE* (20th Century Fox 1987).

⁶ MARIAH ZEISBERG, *WAR POWERS: THE POLITICS OF CONSTITUTIONAL AUTHORITY* (2013).

⁷ STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* (2013).

I

Professor Zeisberg's starting point is a Constitution without clear answers—or at least without clear answers to some very important questions about the employment of military force by the United States. According to Professor Zeisberg, “the US Constitution’s allocation of the power to initiate hostilities is ambiguous.” (Zeisberg p. 5). By this she means at least three things: (1) the text of the Constitution employs key terms, such as “declare War”⁸ and “executive Power,”⁹ whose meanings, both alone and in combination, are not clear and thus give rise to competing accounts of which institutions of the national government can control the exercise of military power in particular circumstances; (2) this textual uncertainty cannot be dispelled by conventional legal tools of interpretation (p.12); and (3) the Constitution does not prescribe an authoritative mode of settlement to resolve differences when executive and legislative actors advance competing and inconsistent accounts of their powers. (pp. 6-8). Thus, she concludes:

Both the Constitution’s text—which apparently commits the elaboration of the meaning of “war” to a potentially rivalrous interbranch relationship—and the history of war powers debates, where the branches’ interpretive claims are transparently driven by partisan, institutional, and policy rivalries, generate one common conclusion: core features of this area of constitutional policy do not intersect well with standard presumptions about the conditions of faithful constitutional interpretation. (p. 8).

Let us assume for the moment (because it is true) that Professor Zeisberg is right that figuring out, for example, whether, when, and how the Constitution empowers the President to commit American troops to combat without congressional approval is not an easy task. At a minimum, any topic that can generate a three-way split, just within the relatively small family of originalist scholars, among Sai Prakash, Mike Ramsey, and Robert Delahunty and John Yoo about something as basic as whether the President can unilaterally respond to another country’s declaration of war against the United States¹⁰ is not likely to be a topic that is prone to generate obvious answers. Let us further grant (because it is true) that each department of the national government must interpret the Constitution in the course of carrying out its functions. And let us

⁸ U.S. CONST. art. I, § 8, cl. 11.

⁹ *Id.* art. II, § 1, cl. 1.

¹⁰ Compare Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by “Declare War,”* 93 CORNELL L. REV. 45 (2007) (arguing that only Congress can respond to a declaration of war), with Michael D. Ramsey, *The President’s Power to Respond to Attacks*, 93 CORNELL L. REV. 169 (2007) (arguing that the President can respond, both defensively and offensively, once another nation initiates war against the United States), and Robert J. Delahunty & John Yoo, *Making War*, 93 CORNELL L. REV. 123 (2007) (arguing that the President has an independent power to initiate hostilities even in the absence of a foreign declaration of war).

further grant (because it is true) that the Constitution does not designate any one department the supreme interpreter of the Constitution.¹¹ How, within this framework, would one evaluate the constitutional claims of any given governmental actor?

Professor Zeisberg delineates criteria to assess the interpretative performance of the legislative and executive departments. Because those criteria involve to some extent the ways in which each department engages the other, (pp. 38-39) she terms the theory employing these criteria “relational.”¹² The criteria themselves largely concern the ways in which each institution brings its own distinctive characteristics and expertise to bear on problems, so Professor Zeisberg terms them “processual” (or “processualist”) standards. (p. 19). For example, the President “is able to *command the resources of intelligence, diplomatic, and military establishments*” and has distinctive capacities for “[r]ewarding and elevating subordinates who demonstrate excellence,” “*experimenting with policy,*” and “*responding quickly to changing circumstances.*” (p. 35). Congress, for its part, can facilitate “*divergent paths of reasoning,*” “*harness the power of consensus politics*” in the course of “*lawmaking,*” and “*pool and weigh information from multiple sources.*” (p. 37). Actors within each department must “*link their arguments about constitutional authority to their substantive agendas for security policy.*” (p. 33). The bulk of Professor Zeisberg’s book applies these criteria to legislative and executive assertions of power in a wide range of historical settings to see whether and how various actors brought these capacities to bear on real-world problems.

I am no political scientist, so I would not even venture to speculate whether these criteria provide an apt metric for evaluating the foreign policy performance of governmental actors. They certainly seem plausible to me—but I also found the Sisler metric for rating pitchers plausible,¹³ so what do I know.

Professor Zeisberg, however, means for these criteria to measure the *constitutional* rather than foreign-policy performance of government officials. That is where I think we encounter some problems with words. I have a hard time seeing what is gained by calling this a “constitutional” mode of assessment.

I would have thought that the way to evaluate someone’s constitutional interpretation was by reference to a theory of constitutional interpretation. A

¹¹ On both of the latter propositions, see Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267 (1996).

¹² *Id.* at 41 (“The centrality of well-conducted interbranch responsiveness leads me to name this a *relational conception* of war authority.”).

¹³ This quadratic-like formula— $(2IP-H) + (SO-4/3BB) - 0.25ER/IP$ —was designed to supplant earned-run average as the measure of pitching effectiveness. It died such a quick and grisly death that it does not appear even to merit a Wikipedia entry. But I always thought that it made a lot of sense, especially since the earned-run average of a starting pitcher depends so heavily on the quality of the bullpen.

good interpreter employs a good interpretative theory in an honest, conscientious, and intelligent fashion to reach the result that is correct in a given context of knowledge. If one thinks, as I do, that a certain species of originalism is the uniquely correct way to interpret the Constitution,¹⁴ then it follows that interpretations are good or bad depending on how well they employ that methodology.¹⁵ If one benightedly holds to a different theory of interpretation, one would still expect that theory to guide the judgment about how to evaluate interpretations. In any case, it is no great mystery from the standpoint of interpretative theory “[o]n what basis . . . Congress, or the presidency, [should] develop its constitutional understandings.” (pp. 22-23). They should develop constitutional understandings based on sound applications of sound interpretative theory, just like everybody else. Good interpretations are good interpretations regardless of who makes them. What is sauce for the judge, or the scholar, or the citizen, or the nuclear physicist who happens to be interested in interpretation, is sauce for the President or Congress. The Constitution’s meaning does not change depending on the official title of the person who is reading it at the time.

Professor Zeisberg would have it otherwise. She thinks that because interpretative theory cannot provide clear answers—what she terms “settlement” (p. 8)—some other criteria for evaluating interpretations must be found. As she forthrightly puts it: “Instead of evaluating whether the branches adhere to determinate textual meaning, we can evaluate them 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). I am happy to grant that this might be a perfectly sensible way of “assessing the branches’ war powers politics.” (p. 31). But I simply don’t get why one would call this a *constitutional* assessment.

Professor Zeisberg’s answer—that the standards that emerge from her analysis of the capacities of the various governmental actors “are distinctively constitutional to the extent that the capacities themselves are constitutional ones” (p. 31)—is a non sequitur. *All* capacities of the President and Congress are “constitutional ones,” in the sense that the President and Congress are created by the Constitution and can only act in the ways empowered by it. That includes the capacity to engage in pork-barrel politics, to exercise dubious discretion in enforcement, and to appoint political hacks to supervise responses to medical pandemics. Professor Zeisberg’s criteria strike me as far better capacities for judging foreign policy than these others, but that is not because

¹⁴ See generally Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47 (2006).

¹⁵ Note that a good constitutional interpretation will not necessarily reflect good foreign policy. The criteria for evaluating foreign policy decisions are unlikely to have much to do with the sorts of things that make for good interpretations of texts, unless one somehow believes that the Constitution uniformly prescribes normatively sound answers to contemporary foreign policy issues, which seems more than a bit unlikely.

her criteria are somehow “more” constitutional. They are all equally constitutional. Constitutionality is not a matter of degree; it either exists or it does not.¹⁶ Professor Zeisberg’s criteria are surely more *appropriate* as a matter of common-sense normative judgment than are some other constitutionally derived criteria that one can imagine, but that does not make their application a “constitutional” determination.

Consider in this regard perhaps the most complete description of Professor Zeisberg’s approach:

What is the methodology of this book? The relational conception starts by identifying the relevant substantive terms at stake in the Constitution’s allocation of power; then identifies the institutional process(es) harnessed to give content to that substantive vocabulary; theorizes the terms on which these different processes are related to one another, if there is more than one (i.e., the terms of interbranch relationship); develops standards related to those institutional processes; and then assesses moments of constitutional politics in terms of those relevant substantive and processual standards. This method enables a normative analysis of constitutional politics in light of constitutional ideals. (p. 223).

Everything is fine until the last two words. We still lack something that translates a metric for evaluating policy into a metric for evaluating interpretations of a text. Invoking constitutional ideals rather than constitutional texts does not do the trick. The Constitution does not contain ideals. It contains provisions. The document’s drafters and ratifiers (real or hypothetical) no doubt hoped and/or expected those provisions to promote certain ideals, but constitutionality consists of adherence to the provisions of the Constitution, not to the hopes or expectations that may have spawned them.¹⁷ It is of course possible for a provision textually to incorporate a hope or ideal or goal; just imagine a provision that reads: “Congress shall have power to take whatever action may be necessary to promote national security.” It just so happens, contingently but factually, that the provisions of the

¹⁶ This is a statement about metaphysics, not epistemology. It *does not* mean that there is a known, determinate answer to every question at each point in time. It simply means that constitutionality is a binary quantity, though which of the two quantities is correct may not always be known.

¹⁷ For more on this, in the specific context of the Sotirios-Barber-like emphasis on the Preamble that Professor Zeisberg seems at times to adopt, see ZEISBERG, *supra* note 6, at 241, and Gary Lawson, *Understanding State Constitutions: Locke and Key*, 93 TEX. L. REV. 203, 207-09 (2015). For now, it is enough to note that the Preamble, while expressing certain ideals, is not a grant of power to any governmental actor. The mechanisms for achieving—or not achieving—those Preambular ideals are the power-granting clauses (and the clauses that limit the exercises of those powers). It is quite possible that the Constitution is a colossal botch job that will utterly fail to achieve the hoped-for ends and ideals. The extent to which the power-granting (and power-limiting) provisions actually serve the hoped-for ends, and thus fulfill the expectations of the Preamble, is an empirical question.

Constitution relevant to the war powers debate do not take this form; there is no abstract “power to promote national security” clause,¹⁸ but simply a series of clauses that the drafters/ratifiers hoped or expected, rightly or wrongly, would promote national security if implemented. At the very least, if Professor Zeisberg believes that the relevant provisions take such a form, there needs to be an argument to that effect.

Professor Zeisberg, perhaps anticipating this analysis, observes that her methodology “varies dramatically from traditional legal modalities of constitutional assessment.” (p. 223). There is nothing at all wrong, and in many contexts perhaps a great deal right, with varying dramatically from traditional legal modalities. But then why call the resulting analysis “constitutional”? Does anything at all change if the adjective “constitutional” is expunged from the passage? Why not just call it a normative assessment, declare victory, and be done with it?

There is a ubiquitous drive on both sides of all relevant legal spectrums to “constitutionalize” almost everything, as though one would not have enough traction for an argument without the word “constitutional” somehow being a part of it. But not everything has a constitutional answer. How well Congress and the President perform their tasks is not necessarily a distinctively constitutional question. The Constitution creates certain institutions and gives them certain powers, subject to certain constraints. That is all that it does. To be sure, that is a great deal, but it is less than everything in the universe. One simply does not violate the Constitution by behaving sub-optimally unless there is some constitutional provision that dictates that functions be performed with a certain degree of optimality.

As it happens, the Constitution *does* actually contain some norms of competence along the lines proposed by Professor Zeisberg. To the extent that the Constitution is a fiduciary instrument, it imposes a duty of care, as well as various other fiduciary duties, that can be used to assess the performance of governmental actors in a genuinely—meaning textually grounded—constitutional sense.¹⁹ It is quite possible that some, and perhaps even most, of Professor Zeisberg’s relational and processual criteria can be derived from these fiduciary norms. It is not at all, as Vizzini might say, inconceivable that Professor Zeisberg is absolutely right about absolutely everything that she says about appropriate constitutional standards for judging the performance of executive and legislative actors. But those norms would have to be derived

¹⁸ The Taxing Clause contains the words “provide for the common Defence,” U.S. CONST. art. I, § 8, cl. 1, but those words merely describe one of the permissible uses of the taxing power; they do not independently grant any power to Congress.

¹⁹ For a brief introduction to this concept, see Gary Lawson, Guy Seidman & Robert G. Natelson, *The Fiduciary Foundations of Federal Equal Protection*, 94 B.U. L. REV. 415 (2014). Guy Seidman and I are currently writing a book that will expand upon and apply the concept to a wide range of settings, including the war power. *See* (even though you can’t because it does not yet exist) GARY LAWSON & GUY I. SEIDMAN, “A GREAT POWER OF ATTORNEY”: UNDERSTANDING THE FIDUCIARY CONSTITUTION (forthcoming 2017 or so).

from a process of interpretation—that is, from the application of a sound interpretative theory to the relevant textual provisions. If those norms do not emerge from such a process, there is no epistemological warrant for calling them constitutional norms—even if they happen, by chance, metaphysically to correspond to genuine constitutional norms.

Similarly, the Constitution contains some actual provisions that specifically call for some of the “relational” inter-branch engagement favored by Professor Zeisberg (and by Professor Griffin as well). The President must “from time to time give to the Congress Information of the State of the Union,”²⁰ and he must also “recommend to their Consideration such Measures as he shall judge necessary and expedient.”²¹ The President must get “the Advice and Consent of the Senate”²² when making treaties or appointing certain officers. If the President chooses to veto a bill, “he shall return it, with his Objections to that House in which it shall have originated.”²³ These are all provisions that demand interdepartmental engagement of some sort. But there is no generalized “consult with the other departments” clause beyond these specific provisions. Again, it may be good prudence to draw on the expertise of others, including other governmental institutions; and if the Constitution is a fiduciary instrument, there may even be a constitutional foundation for some version of that prudential requirement. But there is nothing constitutionally obligatory about interdepartmental consultation unless it derives from such a textually grounded fiduciary principle or a particularized provision.

In sum, I suspect that one could delete the word “constitutional” entirely from Professor Zeisberg’s book and not lose much by the excision. Virtually all of her insights—and they are many, and go unnoted here only because I am focusing on a very narrow point—can be made without invoking the specter of the Constitution.

Four brief thoughts before moving on: First, nothing that I have said here endorses settlement as a constitutional imperative, or even as a constitutional good. The Constitution does not contain a “settlement” clause. If one chooses to endorse settlement as a normative matter—and I am very, very far from a fan of settlement as a normative matter²⁴—one must import that normative preference from outside the Constitution.

Second, Professor Zeisberg posits “we should be skeptical of accounts of constitutional fidelity that begin with the premise that the ordinary behavior of elected officials is constitutionally deficient.”²⁵ At least some, and perhaps

²⁰ U.S. CONST. art. II, § 3.

²¹ *Id.*

²² *Id.* art. II, § 2, cl. 2.

²³ *Id.* art. I, § 7, cl. 2.

²⁴ See, e.g., Gary Lawson, *Interpretative Equality as a Structural Imperative (Or “Pucker Up and Settle This!”)*, 20 CONST. COMMENT. 379 (2003).

²⁵ ZEISBERG, *supra* note 6, at 9. I assume that Professor Zeisberg urges skepticism towards approaches that yield *conclusions* that much of historical and contemporary practice

many, originalist approaches definitely yield such a conclusion—about war powers as well as other matters. But why should one be skeptical in this fashion, any more than one should start with the premise that everything is unconstitutional? The extent to which the behavior of officials is consistent with the Constitution is decidedly an empirical question, and I am at a loss to see why one would start with a presumption either way. The facts are what they are.²⁶

Third, and somewhat off point in this essay (and I even mention it only because it is a pet peeve), Professor Zeisberg notes that the aim of her approach “is to show how the relational conception illuminates common intuitions,” (p. 51) and she emphasizes that “the relational conception can accommodate common intuitions . . . [and] explain those intuitions . . .” (p. 51). “Common” among whom? Among elite academics? Rural church-goers in Wyoming? The attendees at a meeting of the Atlas Society (dedicated to the study of the thought of Ayn Rand)? I suspect that one will find very different intuitions “common” depending upon which social circles one inhabits. But more fundamentally, why would anyone care for a moment what anyone, including oneself, does or does not intuit? While the idea of rationalizing intuitions has acquired an intellectual cachet of sorts ever since John Rawls used it to assure left-liberals that their prejudices are the starting point, and likely ending point, of moral theory,²⁷ it is a rather peculiar intellectual move when examined carefully. If the intuitions that are the data points of analysis happen to be false, then a theory that accommodates them, or even gives them the time of day, is a giant step backwards. One needs a theory about why intuitions are epistemologically reliable forms of cognition in the context under discussion, and that is a tall order.

Fourth, and most importantly, there is something profoundly unfair to Professor Zeisberg about my entire discussion thus far. Professor Zeisberg was well aware when she wrote her book that people like me would react precisely as I am reacting here. One of her main aims is to present an *alternative* account of “constitutionalism” that does not focus on interpretative correctness. Surely Professor Zeisberg is entitled to use the term “constitutional” in any way that

is unconstitutional; no one takes that as a premise.

²⁶ Somewhat relatedly, it is also hard to see why one would worry that traditional approaches that judge interpretations by how well they interpret “amplify[] conflict between interpretative positions in larger political and academic debate.” *Id.* at 247. Does this mean that interpretative theories are subject to a heckler’s veto that can take them off the table simply by virtue of the fact of disagreement? Conflict is a good thing if there are falsehoods to contest, nothing to fear if truth is on one’s side, and potentially a quite useful epistemological tool if right answers are difficult to determine.

²⁷ See JOHN RAWLS, A THEORY OF JUSTICE 19-21, 47-50 (1971). Is this an unfair characterization of John Rawls and his 500-plus-page model of reflective equilibrium? In a word: No. For the academic, citation-filled version of “No,” see Gary Lawson, *The Ethics of Insider Trading*, 11 HARV. J.L. & PUB. POL’Y 727, 779 n.214 (1988).

she pleases, so long as the term is clearly defined. Why should she have to use the term in my preferred fashion?

Put that way, the answer is, of course, that she is under no obligation, moral or epistemological, to use words in the fashion that I prescribe. My concern is this: the most common, and even standard, account of the word “constitutional” is a lot closer to my usage than to Professor Zeisberg’s (even if my account of how to fill in the *content* of that term is better described as “wildly idiosyncratic” than “standard”). There is accordingly a very high risk of equivocation when a non-standard definition is introduced. The standard account, which links constitutionality with the correct application of theories of constitutional interpretation, gives the term “constitutional” certain connotations and implications that may not be warranted if the term is instead used to mean something like “consistency with relational and processual forms.” For example, some people (I am not one of them, but I encounter them from time to time) think that calling something “constitutional” entails certain normative obligations of obedience, or at the very least calls for a certain measure of respect and consideration. But that implication ordinarily stems from a conception of “constitutional” that involves derivation of propositions from textual analysis, not from policy-based applications of institutional capacities. An argument that substitutes Professor Zeisberg’s conception of constitutionality for the text-based conception cannot continue to employ the implications of the text-based conception unless there is an argument, which I have not yet seen, that shows how those implications flow naturally when one switches from one meaning to the other.

To be sure, these risks of equivocation can be minimized or avoided through careful identification of the term’s usage and frequent reminders in the course of arguments that connotations and implications of the standard account do not apply to the non-standard usage. I do not see those reminders in Professor Zeisberg’s work. Indeed, my reading of the book—and I am quite willing to be told that I have misread it—is that Professor Zeisberg affirmatively believes that the standard connotations and implications of the term “constitutional” fully apply to her usage. In that sense, and with that clarification, instead of saying that I do not think that the word “constitutional” means what she thinks it means, I should say that I do not think that the word, as she employs it, connotes and implies what she thinks it connotes and implies.

So how, from within a traditional interpretative framework, would one assess the constitutional performance of the President or Congress when the constitutional text is indeterminate? Quite simply: if there is no constitutionally grounded basis for assessment, then one should not make a constitutional assessment. If one cannot judge an action by reference to its consistency with the properly interpreted Constitution, then why try to say anything about it at all in constitutional terms? It does not suffice to point out that “[t]o refrain from [constitutionally] evaluating the interpretive politics behind [the allocation of war authority] . . . is to remove highly consequential domains of governance from constitutional scrutiny.” (p. 9). Perhaps so. What of it? Why

does everything consequential have to come within constitutional scrutiny? After all, one can make all sorts of judgments about actions—political judgments, moral judgments, and even aesthetic judgments—that do not involve the rightness or wrongness of their underlying interpretations as a matter of constitutional interpretation. But without an interpretative grounding in the meaning of the Constitution, nothing but equivocation is gained by calling those judgments “constitutional.”

I am not expressing here any view as to which, if any, of the difficult interpretative problems surrounding the war power have definitive solutions. The point is only that any “constitutional” assessment of that debate, as with any “constitutional” assessment of the interpretations advanced by the President, the Congress, the Supreme Court, or Jack Bauer, must be made with very careful attention to what it means for something to be “constitutional” and the connotations and implications that accompany that meaning. I fear that Professor Zeisberg wants to have her processual Constitution and eat the interpretative one, too.

II

I have far less to say about Professor Griffin’s *Long Wars and the Constitution*, for the simple reason that it is much more about long wars than it is about the Constitution. As Professor Griffin puts it, his book “is more of an analytical history of presidential decisionmaking than a legal treatise . . .” (Griffin p. 6). It is part history, part political science, part foreign policy, and I can plausibly claim competence in none of the above. To the extent that legal issues intertwine with these other analyses, however, Inigo Montoya whispers in my ear the word “war.”

War is a critical concept for understanding the United States Constitution. While the word “war” specifically appears only four times—Congress is granted the power to “declare War,”²⁸ States may not maintain “Ships of War in time of Peace” or “engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay,”²⁹ and treason against the United States is defined as “levying War against them”³⁰—the idea of war permeates the document.³¹ Powers that do not make specific reference to war often gain shape from wartime. For example, during war, the President acts as a super-legislator governing occupied territory³² in a fashion that would defy any

²⁸ U.S. CONST. art. I, § 8, cl. 11.

²⁹ *Id.* art. I, § 10, cl. 3.

³⁰ *Id.* art. III, § 3, cl. 1.

³¹ See Gary Lawson, *Ordinary Powers in Extraordinary Times: Common Sense in Times of Crisis*, 87 B.U. L. REV. 289, 290-91 (2007) (discussing the general provisions in the Constitution that deal with crises the nation might face by allocating authority to Congress, the states, and the President).

³² See GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* 151-52 (2004) (“[T]he power of the United

plausible understanding of “executive Power” during peacetime.³³ Searches that would be obviously “unreasonable”³⁴ during times of peace may be eminently reasonable during times of war. Statutes that are “necessary and proper”³⁵ for effectuating federal powers in wartime could fail that test during peacetime. It makes a very big constitutional difference, across a large range of powers and limitations, whether the country is or is not at war. As Professor Griffin puts it in a slightly different context: “War is different.” (p. 3).

One difference, of course, may concern whether the President’s use of military force in a given context is legal. If the President’s power to deploy the American military in a certain fashion depends upon the existence of a state of war, and if the President does not have the unilateral power to create or ascertain that state, then the President is legally constrained in his or her ability to use military force, even if the President believes such use of force to be wise policy. Much of Professor Griffin’s book traces the history of such deployments. He does not purport to resolve the relevant legal issues in any definitive fashion—that would require, at a minimum, articulation of an interpretative theory within which to resolve them—so it is not my place here to critique his brief discussion. My only point here is that Professor Griffin does not really define what he means by “war,” and I am not sure that he can get away without such a definition.

The meaning of the “declare War” clause has long been hotly contested, both within and without originalist circles. One theory, associated most closely with John Yoo, suggests that the power to “declare” war means only a power to bring into play certain international and domestic norms of conduct; it does not mean the power to control the use of force, which is vested in the President by virtue of the “executive Power.”³⁶ Professor Griffin roundly rejects this position.³⁷ While I think that Professor Yoo’s (and Professor Delahunty’s)

States to govern occupied territory stems, not from the grants to Congress of power to govern territory that belongs to the United States, but from the provision in Article II granting the President the “executive Power,” which includes the power to wage war in accordance with international norms.”).

³³ That, of course, has not prevented presidents from advancing, and courts from endorsing, wildly implausible understandings of “executive Power” in this context when felt needs seemed to call for it. *See id.* at 166-87 (providing a breakdown of the events surrounding war tariff collection by the military government in California that led to *Cross v. Harrison*).

³⁴ U.S. CONST. amend. IV.

³⁵ *Id.* art. I, § 8, cl. 18.

³⁶ *See* Delahunty & Yoo, *supra* note 10; John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167 (1996) (examining the historical and legal background of the war powers in the Anglo-American world of the seventeenth and eighteenth centuries).

³⁷ *See* GRIFFIN, *supra* note 7, at 41-45 (arguing that John Yoo’s position was “created by presidentialists after 1950 in order to help justify the change in the constitutional order required by the new circumstances of the Cold War” and “had no prior role in the American

theory has more to commend it than is often recognized,³⁸ let us go with Professor Griffin and say that the power to “declare War” vests in Congress, and only in Congress, the power to bring the United States into a state of war. What does that mean retrospectively for past presidential actions and prospectively for future ones?

If “war” means every aggressive use of the American military,³⁹ so that the exclusive congressional power to “declare War” means the power to determine the timing, terms, and conditions of those uses, then virtually every President has committed impeachable offenses,⁴⁰ because virtually every President has made some aggressive use of the American military without even an informal congressional declaration of war. On the other hand, if the “declare War” clause only requires congressional authorization to *create* a state of war but not to *respond* to a state of war that already exists,⁴¹ then the inquiry about presidential action shifts to whether a state of war actually existed in any particular instance and whether presidential action was an appropriate response to that state of war. And of course both inquiries could be pertinent: one could believe, in addition to the “response” theory, that some aggressive uses of force are not “war” and are therefore committed to the President through the “executive Power,” that some aggressive uses of force are neither “war” nor committed to the President and are therefore constitutionally forbidden to any federal actor, or that all aggressive uses of force are “war” and therefore require congressional authorization.

constitutional tradition”).

³⁸ I am not convinced that anyone has successfully answered the intricate textual and intra-textual argument that lies at the heart of the Yoo-Delahunty position. *See Delahunty & Yoo, supra* note 10, at 139-58. Argument has tended to center around history and practice, both of which are potentially useful aids to textual interpretation but both of which are decidedly the handmaidens of textual analysis rather than vice versa. To be sure, I am not at all certain that the “executive Power” vested by Article II includes the power to initiate a war of aggression, so I am not at all certain that Professors Yoo and Delahunty are right in their ultimate conclusion, but the question is, I think, closer than many are willing to credit.

³⁹ It seems to be common ground among everyone that the President can authorize purely defensive actions without congressional approval. It is not at all clear to me how at least some of the various theories of the war powers derive that position, but let us leave that for another day. I use the term “aggressive” to describe uses of the military that do not respond to immediate attacks.

⁴⁰ Professor Griffin appends an exclamation point to the claim “that presidents should be impeached (!) when they fail to get congressional authorization for *any* military intervention, regardless of the circumstances.” GRIFFIN, *supra* note 7, at 240. But if the underlying substantive view is correct, so that “war” means any use of the American military, then impeachment seems like an eminently appropriate remedy to rein in a rogue President. Impeachment is only an outlandish idea if the underlying substantive view is mistaken.

⁴¹ That is essentially the position of Mike Ramsey. *See Ramsey, supra* note 10.

Professor Griffin makes it very clear that his discussion does not encompass all possible uses of force,⁴² which implicitly means that he does not treat all uses of force as “war” for constitutional purposes. For instance, he describes as “consistent” (p. 201) with his approach the Office of Legal Counsel’s determination that American military intervention in Haiti to overthrow a military government “was not a ‘war’ within the meaning of the Declaration of War Clause.”⁴³ While that intervention was invited by a government that the United States recognized as legitimate, the OLC opinion did not rest on that fact alone but considered “the nature, scope, and duration of the deployment.”⁴⁴ Specifically, it said, “we believe that ‘war’ does not exist where United States troops are deployed at the invitation of a fully legitimate government in circumstances in which the nature, scope, and duration of the deployment are such that the use of force involved does not rise to the level of ‘war.’”⁴⁵ Professor Griffin takes a similar tack, albeit without the lever of an invitation from a recognized government, when he says of the 2011 American military intervention in Libya that “there was nothing about the Libya operation that made it close to a war or even remotely likely that it would become one.” (pp. 250-51).

I am unclear why having lots of bombs dropping on people from American military aircraft is not “close to a war.” Maybe it isn’t a war, or even close, but one needs a worked-out theory of what constitutes a constitutional “war” in order to make that judgment. The OLC *Haiti* opinion, with its “this is not a war because we say that it isn’t a war” flavor, shows the difficulty of that task.⁴⁶ I can well understand why Professor Griffin wants to avoid it, and because his focus is on describing events in major conflicts that are wars by any plausible understanding, I suppose that he can get away with it. But in a book about war, it would be helpful to know how we are supposed to recognize a war when we see one. If Professor Griffin means to endorse something like the OLC position, then I cannot really say that I do not think that “war” means what he thinks it means, because I will be unable to ascertain what he thinks it means. To the extent that there are any distinctively constitutional implications to Professor Griffin’s study, we need to know what he thinks it means.

⁴² “Many people believe, for example, that important questions are at stake every single time the president orders the use of any sort of military force. By contrast, I closely analyze presidential decisionmaking concerning major wars” GRIFFIN, *supra* note 7, at 6. *See also id.* at 30 (“[D]ebate should be centrally concerned with the ability of the executive branch to initiate war, ‘real’ wars, major wars, rather than under what circumstances it can use military force”); *id.* at 31 (“[T]he issue at hand is not presidential use of any sort of military force. The issue is war.”).

⁴³ *Deployment of United States Armed Forces into Haiti*, 18 Op. O.L.C. 173, 177 (1994).

⁴⁴ *Id.* at 178.

⁴⁵ *Id.* at 179.

⁴⁶ For a nice summary of some of the many thorny issues surrounding the definition of “war,” see ZEISBERG, *supra* note 6, at 19-20.