
INTERPRETATION IS A POLITICAL POWER

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INTRODUCTION

How delightful it was to discover that Stephen Griffin’s important new work, *Long Wars and the Constitution*, was to be published the same year as my own, *War Powers: The Politics of Constitutional Authority*. Griffin’s *American Constitutionalism* was one of the first works I read in constitutional theory, and I am proud of the convergence between our efforts to reorient the current war powers debate. In this essay, I will focus on three arenas of overlap and disagreement. I’ll discuss the significance of how each of us sees the meaning of the term “war,” some differences between historical and structural approaches to the problem of war powers, and our usages of the concept of “deliberation.” My aim in this essay is really to illuminate that, for all our common aims, we have made a number of importantly different scholarly choices. I would like to reveal the stakes of those choices. Highlighting these differences will, I hope, serve our common purpose of orienting the war powers debate towards more fertile terrain.

The war powers debate has long been divided between advocates of the presidency and advocates of Congress. Pro-presidency scholars insist that the president has the legitimate power to authorize defensive strikes and—more controversially—to decide on his own what constitutes defensive action.¹ They have a great deal of modern practice on their side. Presidents have rhetorically invoked this position only in the twentieth century, but presidents in the nineteenth century behaved according to its terms from time to time. (Zeisberg p. 7). Pro-Congress scholars, on the other hand, insist that Congress has the responsibility to authorize all wars.² They have original intention on their side.

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¹ See, e.g., John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639 (2002). I use “he” to refer to the president in this essay only for historic accuracy.

² See, e.g., MICHAEL D. RAMSEY, *THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS* (2007).

Those who wrote about the Constitution between the time of its ratification and the Korean War—that is to say, during most of U.S. history—assumed that the text gave Congress ultimate war-making authority.³

Griffin's work is congressionalist in that he asserts that the Constitution places the war decision with Congress. (Griffin p. 17). But unlike most congressionalists, Griffin is critical of the Constitution. He criticizes its ability to generate sound processes for war under modern conditions. (p. 3). He sees no hope for the rebirth of congressional dominance in war-making, and his argument that the Constitution was ill-adapted to modern governance needs—especially the need for global security leadership—implies that congressional dominance undermines some important state goals. (pp. 2-3). Instead of arguing for a return to the original understanding of the Constitution, then, Griffin's work traces the political processes through which, he claims, "the policy objectives of state officials and the public along with new capacities for government action [created] a constitutional order that is in considerable tension with the meaning of the text." (p. 15). Griffin argues that if the Constitution's original processes were inadequate, so too have been the workarounds that political actors have created. (p. 16).

Although Griffin ultimately calls for congressional empowerment, *Long Wars and the Constitution*, like *War Powers*, does not really aim to weigh in on one side of the institutional partisan divide. Instead, the work traces the politics through which the present terms of the war powers debate were themselves constituted. Throughout the book, he insists that these politics cannot be understood absent their institutional, historical, ideological, political, and, importantly, material environments. The book especially shines in demonstrating how the theoretic marginalization of the most significant war of the twentieth century—the Cold War—leaves scholars underequipped to understand the terms of the war powers debate as it is conducted today. (pp. 5, 7).

A focus on material context also distinguishes Griffin from pro-Congress legalists. Griffin argues that doctrinal reasoning will do little to illuminate the Constitution's war powers regime, not only because courts have, in fact, said little about war powers (p. 11), but also because the material capabilities and political opportunities facing officeholders today mean that constitutional text and doctrine are hardly barriers at all to reckless war decision-making. (p. 14). When faced with a fear of nuclear annihilation, the U.S. government set out to transform its material capacities and built up the largest arsenal the world has ever known.⁴ Once this material capacity to wage war was set into place, it was

³ See, e.g., GORDON SILVERSTEIN, *IMBALANCE OF POWERS: CONSTITUTIONAL INTERPRETATION AND THE MAKING OF AMERICAN FOREIGN POLICY* (1997).

⁴ JAMES T. PATTERSON, *GRAND EXPECTATIONS 175-76* (1996) (describing how the United States' development of the hydrogen bomb, followed by a similar development in the Soviet Union a few months later, spurred the arms race, as well as the "age of nuclear proliferation and of maximum possible destruction").

only a matter of time before a discourse emerged legitimating the President's use of such capacity. In other words, a pro-presidency order was constructed from a certain material and ideological environment. That pro-presidency order has enabled presidents to use the state's capacity towards ends less noble than fending off nuclear annihilation. In particular, this new capacity has been used to wage wars without serious legislative review. Griffin argues that this practice had terrible results. Most persuasively, Griffin argues that the Constitution's "cycles of accountability"—a learning cycle whereby the effects of one security commitment generate critical rethinking about the politics of war, and whereby war-authorizers learn from past mistakes (p. 5)—was undone when the presidentialist order was constructed. (p. 18). Griffin calls for the Constitution's basic structures and practices to be reconceived in order to keep these inter-branch "cycles of accountability" in force in a new historic context. (p. 8).

I. WHAT IS "WAR"?

Griffin's work is arguably not "legalist" because he focuses on the public policy and material contexts of war powers while eschewing doctrinal analysis. At the same time, Griffin and I differ in how we approach constitutional language. His approach is legalist, according to the terms of my book: he argues out of the presumption—shared by most in the field of constitutional studies—that key terms in the Constitution, including the word "war," are subject to formal definition so as to render definite the nature of constitutional processes for war. (Zeisberg ch. 1, 6). This presumption that constitutional processes are definite, or can be interpreted so as to be definite, rests on an implicit meta-theory about what constitutional commitment means. Griffin and I agree on so much, but this background question about the meaning of some constitutional language is our biggest difference.

The problem of defining war is important because Article I of the Constitution gives Congress the power to "declare war."⁵ No single interpreter gets to define this word, especially because the Supreme Court has declined to hear this "political question."⁶ The pivot of today's war powers debate lies in the definition of "war," or, in the language of the President's Office of Legal Counsel, "'war' in the constitutional sense."⁷ What is "war in the constitutional sense"? Does Congress's authority to declare "war in the constitutional sense" leave any room for the President to make war not pre-sanctioned by Congress?

Griffin defines "war" as "full-scale military conflict." (p. 16). He says that war is "unique" from other public policies in the "exceptional burdens" it

⁵ U.S. CONST. art. 1, § 8.

⁶ See, *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); see also *Commonwealth of Massachusetts v. Laird*, 400 U.S. 886, 900 (1970) (denying hearing to a state attempting "to determine whether it is constitutional to require its citizens to fight in a foreign war absent a congressional declaration of war").

⁷ Authority to Use Military Force in Libya, 35 Op. Att'y Gen. 13 (April 1, 2011).

places on a political society, especially the sacrifices made by citizen soldiers. (p. 18). He highlights the policy effects that radiate from the war decision: “[E]ven limited wars tend to subordinate the rest of the nation’s foreign policy to their requirements rather than the reverse.” (p. 242). He cites widespread agreement in identifying the major wars “since 1945—Korea, Vietnam, the 1991 Gulf War, Afghanistan, and Iraq.” (p. 6).

Griffin made a controversial choice in his definition of war. That definition excludes small wars, limited strikes, drone attacks, and other military confrontations that do not require broad sacrifice among citizens. He has, in this work, even defined these important areas of controversy out of the scope of the war powers debate. (p. 250). Griffin is comfortable with that exclusion: he insists that “the original constitutional order was designed to handle questions concerning *war*, not intermittent military operations short of war conducted on a global basis.” (p. 250). He suggests that the Constitution itself may not even address these areas.⁸ Yet these engagements may be transformative to foreign nations or to the global order more broadly. U.S. adventurism in Central America was consequential for that region in the 1980s, even as the United States experienced relatively few domestic costs.⁹ It seems that the Constitution’s war powers regime should be relevant even for wars with few domestic costs. *Which* constituency’s losses matter? Whose violence, what kinds of violence, and what kinds of state purposes make the use of military force “war”?

The bigger issue is that neither Griffin’s nor any other person’s definition of war is uncontroversial. We can see this when we look at different historic contexts and different belligerencies. I do not deny that the president’s decision to label Korea a “police action” was a historic turning point in the development of U.S. war-making practice, but I must also emphasize that the genocidal Indian Wars of the eighteenth and nineteenth centuries were never declared (Zeisberg p. 13), and I have seen no evidence that contemporaries had any separation-of-powers concerns about using legislative appropriations as the vehicle for fighting Native Americans. Perhaps as a result of cultural imperialism, the Indian Wars were not viewed as wars “in the constitutional sense.” Background cultural premises about the meanings of violence operate to codify certain practices, but not others, as “war.” Consider cyber-war, warfare against Native Americans, drone warfare, the Korean War, and airstrikes against Libya—the use of state power to inflict violence on foreign populations for state aims has never generated straightforward definitions.

This natural controversy over the meaning of “war,” or any other important political concept, is greatly magnified under the Constitution. In fact, I argue

⁸ STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* 250 (2013) (“Contrary to what originalists may think, there is no way to generate meaningful doctrine from the original constitutional order to answer every contemporary military contingency.”).

⁹ See DAVID WALSH, *THE MILITARY BALANCE IN THE COLD WAR: US PERCEPTIONS AND POLICY, 1976-85* 172 (2008).

that controversy over the meaning of “war” is built into our constitutional system. Because war is the boundary line dividing legislative from presidential authority, and because no outside authoritative interpreter exists to enforce any particular meaning of “war,” we should expect enduring struggle over the meaning of that term. I am not the first to observe this: the “invitation to struggle” literature, pioneered by Crabb and Holt and developed by Fisher and Burgess, recognizes enduring contestation around the term “war.”¹⁰ The point is not just that meaning changes through time. More importantly, we should expect the meaning of “war” to transform through contestation, because the political branches have investments and incentives bound to that meaning such that they face enduring incentives to struggle over it, and because no outside enforcer is empowered—in text or in practice—to adjudicate that struggle. President Obama and Congress fought about whether the 2011 interventions in Libya counted as “war” because their relative institutional positioning was at stake in that dispute.¹¹ The victor won not only a political outcome, but an interpretive one as well. Contestation over the meaning of “war,” driven by a variety of governing incentives, is historically recurrent.

War Powers argues that this predictable, institutionally rooted contestation over the meaning of war ought to be embraced in any interpretive theory about the meaning of the war power. (p. 247). This, I argue, is what it means to understand “war” as a political question—debatable and ascertainable, certainly, but within a context that is irreducibly political. (p. 21). The innovation of *War Powers* is to enact a sensible interpretive theory for engaging this fully “political” question.

Griffin’s choice to treat “war” as a definable category, recognizable through time, and mine to treat “war” as a word with political, not legal, content, is the most important difference between our books. I treat interpretation as a political power. As a political power, we should expect interpretation to be wielded by partisan actors who seek particular goals and outcomes. *War*

¹⁰ CECIL V. CRABB, JR. & PAT M. HOLT, *INVITATION TO STRUGGLE: CONGRESS, THE PRESIDENT, AND FOREIGN POLICY* (4th ed. 1989) (analyzing the battle between the White House and Congress for dominance in managing foreign affairs); SUSAN R. BURGESS, *CONTEST FOR CONSTITUTIONAL AUTHORITY: THE ABORTION AND WAR POWERS DEBATES* (1992) (analyzing whether constitutional authority and rule of law are broadened when Congress engaged in departmentalism through the lens of the abortion debate and the war powers debate); LOUIS FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* (6th ed. 2014) (examining the legal and constitutional conflicts between Congress and the president through political and historical contexts); LOUIS FISHER, *CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS* (1988) (arguing that constitutional law is a process of interaction between all three branches, each with their own interpretations).

¹¹ Scott Wilson, *Obama Administration: Libya Action Does Not Require Congressional Approval*, WASH. POST, June 15, 2011, http://www.washingtonpost.com/politics/obama-administration-libya-action-does-not-require-congressional-approval/2011/06/15/AGLttOWH_story.html, archived at <http://perma.cc/H5UV-EBZV>.

Powers argues that there is nothing necessarily deficient about an interpretive politics conditioned by these political features. (p. 10). It offers a strategy for ascertaining defensible meanings of war in context and for making sense of, assessing, and engaging the interpretive work that the elected branches do in the security contexts they face. In person, Griffin sometimes captures the difference between our books by saying that he “treats the text as an independent variable,” by which he means that it has independent meaning and content. I don’t deny that it has independent content, but *War Powers* also treats “war” as a category whose operational meaning is partially constructed through and by the processes we both analyze.

While treating “war” as a category with political content raises many theoretic dilemmas—some of which other essays in this symposium touch on—I maintain that those dilemmas are present, even if hidden, in any theory that treats “war” only as a legal category. As scholars, the choice is between structuring the discussion over the meaning of war as a debate between contending scholarly theories, or, on the other hand, generating a scholarly theory of the war power which itself accounts for such ongoing debate. Griffin’s work, like the great majority of war powers research, chooses the first option. That choice generates, I think, a certain slipperiness the way certain terms are used in *Long Wars*. Griffin articulates a “cycle of accountability” and tethers that cycle to a defined legal process—that Congress would legally authorize a major war. (Griffin p. 262). Throughout the book, however, the concept of a cycle of accountability becomes diffuse as we discover that even the legally authorized Persian Gulf, Afghanistan, and Iraq Wars happened outside of the “cycle of accountability” because of the way that background political assumptions structured—or, more accurately, impoverished—the terms according to which the presidency and legislative branch deliberated together.¹²

Griffin and I are in heated agreement that officials’ non-judicial rhetoric and political behaviors can, at times, amount to constitutional interventions that are highly relevant for scholars of constitutional authority and commitment. But once the conversation has shifted to rhetoric and discourse, we are no longer talking about defined legal processes. We are talking about politics. If Congress is willing to legally offer broad discretionary power without forcing adequate deliberation, then Congress’s processes will not generate the goods that Griffin associates with legislative governance. Griffin identifies the cycle of accountability in terms of adherence to a legal process, but then we discover that the cycle of accountability can be disrupted even when the branches are following legal procedures. I think that the reason for this slippage is that

¹² GRIFFIN, *supra* note 8, at 178 (pointing out that although President Bush received a congressional resolution of support, “the executive and legislative branches never deliberated jointly on a unified set of war aims”); *id.* at 235 (claiming that even if “Congress would have favored a war no matter what, it did not fulfill its role as a check on the executive”).

Griffin uses legal process as a stand-in for discursive responsibility, whereas in fact the two are separate concepts. The argument of chapters five and six is that Congress's acceptance of the idea that the president may use the military to initiate strikes without legislative authorization irreducibly harms legislative deliberation.¹³ But I argue that during the early Cold War, legislators with precisely this belief—Fulbright, Connally, Watkins, Donnell, Milliken, and others—contributed to vibrant constitutional and policy debate about the emergent order of war powers. (Zeisberg *passim*). Rather than assuming that deliberative deficiency is associated with any particular legal or illegal process, I argue for directly assessing the extent to which each branch is fulfilling its discursive responsibilities. In other words, I advance a straightforwardly political approach.

Identifying whether or not branches are fulfilling their discursive responsibilities is irreducibly complex. At the same time, a concern for discursive responsibility seems to motivate a great deal of war powers theorizing, even if that concern is often re-articulated as a concern about legal process. When Griffin criticizes the constitutional politics surrounding the Afghanistan and Iraq Wars, he is tracking a widely shared intuition that these wars were constitutionally deficient in some way.¹⁴ *War Powers* offers terms that make sense of that intuition even as we acknowledge that legal requirements were met in both cases. (p. 47). To criticize these wars on constitutional grounds *means* being attached to the proposition that constitutional commitment involves more than following textually defined procedures.

If normative constitutional theorists were to treat the branches' interpretation not simply as a practice necessary for ascertaining who has political power, but rather as itself a political power, then a new question emerges: Through what processes can this power, the power of interpretation, itself become authoritative? The word "war," like other constitutional language, serves as a boundary line between institutions that is undefined by judicial doctrine ("high crimes and misdemeanors" is another example). At the same time, the processes surrounding the elaboration of those terms are very different (think of the differences between the processes for going to war and the processes for impeaching an official). My approach is textualist in that I believe these different, constitutionally specified processes for giving operational content to contestable words indicate a variety of different pathways—not just one—by which interpretations of constitutional meaning can become appropriately authoritative. I have not yet done the research to support this claim, but I believe that the family of processes appropriate for

¹³ See too GRIFFIN, *supra* note 8, at 49 for this argument in the context of World War II.

¹⁴ See, e.g., Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crises of Presidential Legality*, 109 MICH. L. REV. 447, 447 (2011) (arguing that the "Bush Administration evaded . . . constitutional limits and transformed a well-defined and limited war into an open-ended conflict operating beyond constitutional boundaries").

generating an authoritative meaning for the term “high crimes and misdemeanors” should differ from that which is appropriate for deciding the authoritative meaning of “war.” *War Powers* aims to trace the kinds of politics that can generate authority for the branches’ understandings of war in particular, but its methodology and orientation are easily applicable to other political questions. The point is that no single legal rule determines, or should determine, who wins these interpretive disputes about “political questions” in American political history, but that the interpretive processes that do generate constitutional meaning for political question are nonetheless still subject to reasonable evaluation.

What does it mean to call war a “political question”? The Supreme Court’s list of criteria includes a “lack of judicially discoverable and manageable standards for resolving it” and “the impossibility of deciding [the issue] without an initial policy determination, of a kind clearly for nonjudicial discretion.”¹⁵ Whether to name a military confrontation “war” engages profound questions of public policy and diplomacy—in other words, questions of governance for which the elected branches, routinely governing in foreign policy, are arguably better equipped than a judicial institution. At the same time, if elected officials are to engage in acts of interpretive politics, we should expect that politics to be characterized by behavior that is politically strategic, often partisan, and certainly ideological. *War Powers* offers terms for assessment that are sensitive to these features of the political context.

While I challenge Griffin for treating the concept of “war” as one that can be determined outside of politics, so too Lawson challenges my work for the premise that when branches engage in this interpretive politics, they can do so more or less authoritatively. Lawson asks why we should call this interpretive politics “constitutional” at all.¹⁶ Why not just call it good or bad politics? Actually, on this question, I believe that Griffin and I are united. The easy answer to the question is that in 1950, 1964, or 2011, the branches were not just deciding whether to enter the Korean War, Vietnam War, or combat in Libya. They were also deciding on a matter of interpretation—that the Korean War, for instance, was a “police action” best handled through the administrative apparatus of the executive branch rather than through legislative authorization. In Griffin’s words, “it is hard to deny that beginning with Korea an amendment-level constitutional change did somehow occur.” (Griffin p. 48). Korea was not just a milestone in foreign policy but also a milestone in interpretive politics. Truman’s decision to justify the Korean War as a police action—and Congress’s invitation and applause for this decision—were constitutional events no less significant than *Brown v. Board of Education*.¹⁷ Recognizing these as constitutional moments invites critical theoretic investigation into how all structures—not just the Court, but also national

¹⁵ *Baker v. Carr*, 369 U.S. 186, 217 (1962).

¹⁶ Gary Lawson, *Inigo Montoya Goes to War*, 95 B.U. L. REV. 1355, 1360 (2015).

¹⁷ 347 U.S. 483 (1954).

power, bicameralism, an independent executive, regionally based representation, and more—generate decisive interpretive outcomes. In Griffin’s words, “[c]onstitutional orders . . . are constructed from the actions and norms of multiple institutions.” (p. 14). And in the area of war powers, interpretive events are connected to governance events because the branches interpret as they govern.

Where Griffin and I may differ is as to the extent to which we can assess these interpretive events as constitutionally authoritative. Griffin’s work does not suggest more or less faithful pathways for the political construction of constitutional orders. Under the terms of *Long Wars*, it seems that an act or speech is constitutionally faithful if it reflects the “correct” understanding of constitutional meaning, and what fixes this “correctness” would be either the theorist’s (i.e., Griffin’s own) first-order argument about textual meaning, or judicial doctrine. At other times, he suggests sympathy with the view that some behavior and rhetoric may be more constitutionally authoritative than others. I am not sure if Lawson believes that Supreme Court doctrine can be more or less authoritative—if, for example, he believes *Brown v. Board of Education* is a more authoritative statement of constitutional meaning than *Plessy v. Ferguson*.¹⁸ I do. According to *War Powers*, constitutional authority—the authority of a particular interpretation of what the war power means—is secured not through judicial articulation, but rather when the branches exert their governance and interpretive capacities well (according to the criteria I develop and defend in the book). (Zeisberg p. 187). On my account, authority does not amount to producing a Razian set of “content-independent reasons” for action,¹⁹ but instead amounts to a branch’s facility in maneuvering within a field of interpretive politics in relation to its own governance responsibilities, the security realities of the moment, and the demands of the other branches. Authority is an emergent relation, which, in a republican system, will always be subject to challenge.

II. HISTORY AND STRUCTURE

A second important difference between the books is that Griffin’s work is historical. Griffin wishes to identify change. The book beautifully historicizes the current war powers debate as itself an artifact of the Cold War and discusses how key pieces of evidence within this debate, including the famed list of executive-led interventions, were generated within the executive branch and then reproduced unselfconsciously by scholars. (Griffin pp. 77-78). Griffin sets the terms of the war powers debate into a developmental story about the evolution of threats and political and state responses to threat. Griffin argues decisively that there is no turning back to a pre-Cold War context; institutional capacities have changed so deeply that an amendment-like moment is called for. (p. 237).

¹⁸ 163 U.S. 537 (1896).

¹⁹ JOSEPH RAZ, *THE MORALITY OF FREEDOM* 35-37 (1986).

I worry that Griffin's argument that the modern context is unique leads him to be overly sanguine about the quality of congressional debate prior to Korea and overly hopeful that legislative involvement will necessarily improve policy success. The cycle of accountability was apparently intact in the Mexican-American War and Spanish-American War because both were legally authorized within an order that rhetorically emphasized legislative authority over war, but the consequential governance failures in both contexts have been well-documented.²⁰ High-quality institutional performance has *never* been a given. Congress and the president have always had opportunities to shirk their duties. If all wars in history have suffered from some measure of legislative and executive branch dysfunction, then by what standard do we critically assess them today?

My own work asks about authority, not about developmental shifts—a normative concern. While acknowledging the importance of historic context for understanding any particular war powers order, I also want to draw attention to how structural commonality generates common dilemmas, solutions, and terms of legitimation over time.

It is always fascinating to read, for instance, the Pacificus Helvidius debate—the first challenge between the branches on the question of their relative war powers.²¹ On the one hand, the debate reveals a profound historic shift. The precise controversy in the Pacificus-Helvidius debate was about whether it is constitutionally acceptable for the president to offer an interpretation of a treaty with a foreign sovereign.²² Nobody would argue today, as Helvidius (Madison) did, that presidential interpretation of treaties undermines legislative war authority.²³

At the same time, the terms of the debate are so very familiar. Madison challenged Hamilton's defense of the president by arguing that the president could not be trusted to commence a war—and such were the possible implications of a treaty interpretation in that context.²⁴ Hamilton asked, in turn, how the president could execute a coherent foreign policy without some measure of interpretive power.²⁵ Madison charged that presidential interpretation of treaties would displace Congress's agency.²⁶ The two also

²⁰ See, e.g., GRAHAM A. COSMAS, AN ARMY FOR EMPIRE: THE UNITED STATES ARMY IN THE SPANISH-AMERICAN WAR (1998); DAVID M. PLETCHER, THE DIPLOMACY OF ANNEXATION: TEXAS, OREGON, AND THE MEXICAN WAR (1973); JOHN H. SCHROEDER, MR. POLK'S WAR: AMERICAN OPPOSITION AND DISSENT, 1846-1848 (1973).

²¹ LETTERS OF PACIFICUS AND HELVIDIUS, ON THE PROCLAMATION OF NEUTRALITY OF 1793.

²² George Washington, *Proclamation of Neutrality*, in LETTERS OF PACIFICUS AND HELVIDIUS ON THE PROCLAMATION OF NEUTRALITY OF 1793.

²³ HELVIDIUS NO. 4 (James Madison).

²⁴ *Id.*

²⁵ PACIFICUS NO. 1 (James Madison).

²⁶ *Id.*

disagreed on whether the “executive power” clause independently vests the executive with power, or simply names him.²⁷ In their *noms de plume*, Hamilton and Madison positioned themselves as defenders of peace (*Pacificus*) and republicanism (*Helvidius*). These tropes, concerns, and terms of legitimation are deeply familiar to any modern student of constitutional politics, such that, Griffin’s objections notwithstanding, it is plausible for scholars to treat the exchange as the “precursor of a two-sided debate . . . that has continued until the present day.” (p. 19). In fact, Griffin criticizes the modern war powers debate because defenders of the presidency focus on desired policy outcomes (flexibility or global leadership, for example) and defenders of the legislature focus on democratic values. But the *Pacificus-Helvidius* debate shows us how recurrent those terms of legitimation are.

Structure also helps explain why certain proposed remedies are so recurrent. Griffin suggests reorganizing Congress as a way to engage the accountability problems associated with war governance today. (p. 256). Legislative reorganization has been an endemic recommendation for managing the governance burdens of war because large, plural, non-hierarchical, bodies face predictable challenges in making their voices heard. Congress reorganized to deal with war challenges in the War of 1812, when the nature of committees in Congress was transformed;²⁸ in the Legislative Reorganization Act of 1946, when Congress gave itself professional staff;²⁹ and in the early Cold War, when committees started to take on the task of managing cooperation between certain legislators and the executive branch.³⁰ Illuminating the centrality of structure to the ongoing processes of constitutional interpretation gives us grounds for understanding recurrent themes in institutional functioning and also helps create the analytic materials necessary for comparisons between cases in different historic contexts. Comparing structurally parallel cases to one another through time makes normative work more realistic, more tethered to the concrete possibilities of American politics, than does a free-floating theoretic standard of excellence.

A concern that Griffin and others have raised about focusing on war powers through the lens of structure pertains to the matter of institutional asymmetry. For example, the president has certain advantages in terms of visibility and

²⁷ Compare *PACIFICUS* NO. 1 (Alexander Hamilton) (“The general doctrine of our constitution then is, that the *executive power* of the nation is vested in the president; subject only to the *exceptions* and *qualifications*, which are expressed in the instrument.”), with *HELVIDIUS* NO. 3 (James Madison) (describing how powers given to the executive are more “of *dignity* than of *authority*”).

²⁸ Gerald Gamm & Kenneth Shepsle, *Emergence of Legislative Institutions: Standing Committees in the House and Senate, 1810-1825*, 14 *LEGIS. STUD. Q.* 39 (1989).

²⁹ Legislative Reorganization Act of 1946, Pub. L. No. 79-601, § 201(c), § 202, 60 Stat. 812, 834-36.

³⁰ See generally ROBERT DAVID JOHNSON, *CONGRESS AND THE COLD WAR* (2006); Philip J. Briggs, *Senator Vandenberg, Bipartisanship and the Origins of United Nations’ Article 51*, 60 *MID-AMERICA* 163 (1978).

agenda-setting. Once he has committed troops, Congress may be reluctant to challenge him even if it disagrees with his decision, not wanting to display a vacillating foreign policy or be seen as undermining troops in the field. It is true that the branches are not structurally parallel. In fact, at no point in American history can we say that Congress and the president encountered each other on equal footing. Usually one branch is preeminent (consider Wilson's attack on Congressional government). The argument in *War Powers* is not that the branches must be balanced or symmetrical in their powers, but that they must be in an appropriate discursive relationship with one another. (Zeisberg p. 40). As long as asymmetry does not disable the possibility of challenge, then asymmetry is not a problem for my account of war powers. We should also remember that Congress has resources that eclipse the president's when it comes to organizing state capacity. Finally, Schilde's essay in this volume reminds us about the impoverishments and distortions of the presidential voice.³¹ Even the president's "voice" is muted by the "embeddedness" of executive branch politics within a military industrial complex. Her essay suggests that the most important problem may be that both branches are distanced from their constitutionally distinctive capacities, not that they are asymmetrical with regards to each other.

III. DELIBERATION

A third difference rests in how we each treat deliberation. Because we both talk about inter-branch deliberation so much, it may be easy to subsume the very different ways we invoke this key category. Griffin repeatedly emphasizes the importance of inter-branch deliberation. His idea of a "cycle of accountability" amounts to a deliberative cycle:

Once a cycle is created, each branch knows that its decisions will be reviewed by the other. A pattern of mutual testing and deliberation results. Having a cycle of accountability means there is the potential to learn from mistakes. The cycle is an ongoing institutional practice in which both branches are held accountable. (Griffin p. 5).

He argues that in a cycle of accountability,

[e]ach branch knows it will be judged by the other and by the people. Each branch thus feels the weight of responsibility and decision. This creates the potential for learning from experience. Each cycle increases the chance that policy the next time around will be formulated against the backdrop of the 'lessons of history.' By contrast, the lack of a cycle increases the chance of poor policy, indeed, policy disasters. (p. 18).

For Griffin, deliberation means the measuring of war's policy consequences, such that responsible choices can be made in the future about new wars and conflicts. The central question for him concerns the extent to which the

³¹ Kaija Schilde, *War Powers, Private Actors, and National Security State Capacity*, 95 B.U. L. REV. 1369 (2015).

operational inter-branch structure maintains its deliberative qualities and so grapples appropriately with the tremendous costs of war.

In *War Powers*, I examine not only policy deliberation but also constitutional deliberation—deliberation about the constitutional positions that the branches enact as they engage in war politics. In some ways, my standards for deliberation are more demanding than Griffin’s because I ask for policy deliberation, as well as constitutional deliberation that is sensitive to the outcomes of policy debates. I also ask for the branches to deliberate in ways that are connected to their distinctive capacities; so, for example, the president is asked to consult with intelligence agencies and elevate those who perform successfully over and above those who perform less successfully, but Congress is asked to provide a forum for the development of minority or even marginal points of view on foreign policy, security, and war.

In other ways, my standard for deliberation is far less demanding than Griffin’s because I don’t argue that the branches must always exchange reasons with each other for their interventions to be constitutionally appropriate. My discussion of the Cuban Missile Crisis defends Kennedy’s decision to implement a blockade relative to Nixon’s decision to bomb Cambodia. (Zeisberg p. 183). While Congress did not deliberate on either decision, I argue that Kennedy made better use of distinctively executive branch resources in formulating his policy and constitutional arguments, and drew on a more coherently articulated legislatively-endorsed security order, and that for these reasons the strike is relatively more constitutionally justifiable. (p. 182). *War Powers* argues that no magic bullet will protect the branches from policy failure. Too much emphasis on exchanging reasons can itself trigger policy failure, as many believe happened, or almost happened, in the lead-up to World War II, where adherence to a strict inter-branch deliberative process blocked U.S. intervention until the final hour and thereby almost allowed the Axis powers global domination. (pp. 57-58). Contra Griffin, I do not view inter-branch deliberation as key to legitimating acts of war; I argue that the branches must use their capacities effectively, but their capacities include the capacity to act quickly and decisively.

CONCLUSION

Long Wars and *War Powers* are on common ground in seeking to reorient the war powers debate away from a standoff between contending institutional partisans and to open it deeply to questions of history, structure, and public policy. We are both emphatic about the need to assess the policy consequences of the constitutional orders in U.S. political history, and Griffin, especially, is sophisticated in tracing how a debate that positions itself as timeless has in fact been so deeply inflected by its particular historic pedigree. I can only wonder what a Griffin-esque analysis would say about our own dispute today! I count myself fortunate indeed to engage it with such an esteemed interlocutor.