

THE WAR POWER

MICHAEL STOKES PAULSEN*

My nearly ridiculous goal for this Essay is to present a comprehensive theory of the Constitution's allocation of war powers and, then, to apply it to every significant issue of the war on terror, in twenty-five pages.

My thesis is straightforward: The allocation of war powers under the Constitution is a classic illustration of the Framers' conception of separation of powers. The Framers regarded the war power as too important to vest it in a single set of hands and so, by conscious design, chopped it up—divided it—and allocated portions of that power to various branches, giving some powers exclusively to each branch and also providing for some areas of overlap, and thus shared authority, among them.

I will make three broad points about the war power as it exists within the Constitution's structural separation of powers. First, the Constitution vests, in the main, *in Congress*, and *not* in the President, the decision to *initiate* war—the authority to *take* the nation into a state of war.¹ Second, the Constitution vests *in the President*, and *not* in Congress, the power to conduct war.²

* Distinguished University Chair & Professor of Law, The University of St. Thomas. This Essay is a revision of a presentation given at the Twenty-Eighth Annual Federalist Society National Student Symposium, held at Yale Law School.

1. For a short textual and structural defense of this proposition, see Michael Stokes Paulsen, *Youngstown Goes to War*, 19 CONST. COMMENT. 215, 238–39 (2002). For outstanding, full-length presentations of the textual and historical basis for this position, see Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by "Declare War"*, 93 CORNELL L. REV. 45 (2007) and Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543 (2002). For fine expositions of the opposing view, favoring unilateral executive war-making power, see Robert J. Delahunty & John Yoo, *Making War*, 93 CORNELL L. REV. 123 (2007), Robert J. Delahunty & John Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations That Harbor or Support Them*, 25 HARV. J.L. & PUB. POL'Y 487 (2002), and John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996).

2. For a brief exposition of this proposition and an important historical illustration, see Michael Stokes Paulsen, *The Emancipation Proclamation and the Commander in Chief Power*, 40 GA. L. REV. 807 (2006) (arguing that the Commander-in-Chief

Each of these powers is, in the main, autonomous of the powers of the other branch and thus to a substantial degree immune from control by the other's powers.

Third, the Constitution vests no *substantive* war powers in the judiciary. But questions of the Constitution's allocation of war powers nonetheless *can be judicial questions*. This susceptibility to judicial decision making does not mean that everything that the courts will decide on such matters is *right*. Nor does it mean even that everything that the courts say should be followed by the other branches of government. Another aspect of the separation of powers is that the Framers regarded the power to interpret law—the power of constitutional interpretation—as another power too important to vest exclusively in any one branch of government.³ It too—like the war power—is a divided, shared power. The political branches thus rightfully may use the constitutional powers at their disposal to resist judicial encroachments on the Constitution's assignments of war powers to them. Nonetheless, the judiciary's power to decide cases, including cases concerning the Constitution's allocation of war powers, and to seek to press its interpretations upon the

Clause vests in the President all decisions with respect to the actions of U.S. forces in time of authorized war—including all matters of military strategy and tactics; general and specific military objectives; rules of engagement; means and methods to be employed; when and under what circumstances hostilities are to be terminated; and all matters of detention, interrogation, and military punishment of captured enemy combatants—and noting that this broad conception of the Commander-in-Chief Clause is an essential ingredient in the lawfulness of President Abraham Lincoln's Emancipation Proclamation). See also Michael Stokes Paulsen, *The Constitutional Power To Interpret International Law*, 118 YALE L.J. 1762, 1812–16, 1835–54 (2009) (developing these propositions and applying them to many contemporary issues). For the most plausible textual and historical argument that Congress rightfully may shackle the executive's Commander-in-Chief Clause powers through its peripheral textual powers concerning regulation of the military, see Saikrishna B. Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. L. REV. 299 (2008). Although I find Professor Prakash's evidence and argument interesting and instructive, I ultimately find it unpersuasive. See Paulsen, *The Constitutional Power to Interpret International Law*, *supra*, at 1852 n.209.

3. This proposition has been a theme of my other scholarship. E.g., Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706 (2003); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994); see also Michael Stokes Paulsen, *Lincoln and Judicial Authority*, 83 NOTRE DAME L. REV. 1227 (2008). On the several branches' independent powers with respect to the interpretation and application of international law, see Paulsen, *The Constitutional Power to Interpret International Law*, *supra* note 2.

other branches with the limited powers at its disposal, is also part of the separation of powers dynamic.

I. THE CONSTITUTIONAL POWER TO INITIATE WAR
(*JUS AD BELLUM*)

Consider first the constitutional power to *start* war—to take the nation from a condition of peace into a state of war. That power is Congress’s, not the President’s. In the American constitutional order, the power to initiate war is a legislative power and *not* an executive power.

A. *Preconstitutional Background Understandings
of the War Power*

Things were not always that way. Indeed, the war power traditionally was understood to be an aspect of the executive power with respect to foreign affairs. The Framers of the U.S. Constitution wrote against a background understanding that the war power was part of the foreign relations executive power of the king—a description attested to by the best legal authorities known in the eighteenth century, including Montesquieu, Blackstone, and Locke. The Framers wrote against that backdrop, but consciously departed from that familiar design by taking some of the powers traditionally vested in the English king and assigning them instead to the legislature. The most important of those re-allocations in the area of war and foreign affairs is Article I, Section 8’s assignment to Congress of the power “[t]o declare War.”⁴

B. *The Constitution’s Allocation of the War-Initiating Power:
Text, Structure, and History*

Congress, and not the President, thus possesses the constitutional power to declare war or not to declare war. This means that Congress, *and not the President*, has the constitutional power to initiate war. The Commander-in-Chief Clause power of the President is (as I discuss below) a formidable, plenary

4. U.S. CONST. art. I, § 8, cl. 11. On the traditional background English understanding, see Ramsey, *supra* note 1, at 1561–63 (citing sources). See also Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 265–72 (2001).

constitutional power of military command. But it does not include a power to declare war on another nation, entity, or group. The President may not—at least not constitutionally—launch a war all on his own. That power belongs to Congress.

This proposition should not be controversial. I submit that this is simply the proper understanding of the text—the original public meaning of the words of the Constitution. It is that understanding that should control constitutional practice—not policy, precedent, pragmatism or anything else.⁵ And the original meaning of the word “declare” as used in this context—that is, as applied to the power “to declare War”—was *to initiate by word or action* a legal condition of war.⁶

Some may be unconvinced by bare arguments from original linguistic meaning of the Constitution’s words, but there is more to the argument than that. This understanding of the meaning of the Declare War Clause is supported as well by the *structure* and internal logic of the Constitution. Specifically, the understanding of the power to declare war as a substantive lawmaking power (and not a mere diplomatic or domestic notice-giving provision)⁷ is strongly supported by the location of the power in Article I, Section 8 as one of the specific enumerated lawmaking powers of Congress. The Constitution takes a traditional executive power, relocates it away from the President, and plops it down into a list of substantive powers committed to Congress. The implication from location is not always reliable, but it is hard to avoid here: The Framers took the decision to go to war away from the executive and vested it in the Congress. This inference from structure and relationship is fur-

5. The meaning of the Constitution is the original public meaning that the text’s words and phrases would have had, in context, to an objective, informed reader and speaker of the English language within the relevant political community, at the time the Constitution was written and adopted. Those exercising governmental authority under the Constitution are duty-bound to apply the Constitution in accordance with such an understanding. For a straightforward internal, textual justification for this interpretive methodology and its binding character, see Vasav Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113 (2003).

6. See Prakash, *supra* note 1; Ramsey, *supra* note 1. Professor Prakash and, separately, Professor Ramsey, marshal the evidence convincingly that this is the original linguistic meaning, in historical context, of the phrase “to declare War,” as used in the Article I, Section 8 of the Constitution.

7. That is the incorrect position of Professors Delahunty and Yoo. See Delahunty & Yoo, *Making War*, *supra* note 1; Yoo, *supra* note 1.

ther reinforced by the evident necessity that the Framers felt to assign a specific Commander-in-Chief Clause power to the President in order to make clear what aspects of the war power were *not* thereby assigned to Congress (i.e., the power of armed forces *command*—the power to *conduct* war—which I discuss in the next section). In addition, Article I, Section 10 prohibits states from engaging in war on their own (unless they are invaded or in immediate peril) unless *Congress* consents.⁸ Don't call the President; call Congress—the branch assigned the predominant power to control the decision of the nation (or even a part of it) to engage in war.

Finally, this conclusion is verified by nearly all of the legislative history and early practice. The Constitutional Convention records, the ratification debates, and the statements and practices of early presidents all support this conclusion.⁹

The Constitutional Convention debates provide an interesting perspective.¹⁰ An earlier version of what became the Declare War Clause provided that Congress would have the power “to *make* war.”¹¹ James Madison and Elbridge Gerry moved to substitute “declare” for “make” on August 17. This produced a famous short debate, taking just a few pages in Far-*rard's Records* and Madison's *Notes*, discussing the proposed alteration of the document's language from “to make war” to “to declare war.”¹² Naturally, as with any type of legislative body, the record displays a certain amount of confusion among the delegates as to exactly what the import of the change in wording would be. But two overlapping explanations are prominent. The first is that changing *make* to *declare* would leave in the President, as executive, the traditional executive power to repel attacks on the nation—a *defensive* presidential war power.¹³

8. U.S. CONST. art. I, § 10.

9. Much of this evidence is well set forth in Ramsey, *supra* note 1, at 1603–09.

10. On the propriety of resort to the “secret drafting history,” see Kesavan & Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, *supra* note 5.

11. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318–19 (Max Far-*rard* ed., Yale Univ. Press 1966).

12. *See id.* at 318–20.

13. This is the recorded explanation for the making of the motion in the first place, and part of Madison's description of its intended consequence. *Id.* at 318 (“Mr. Madison and Mr. Gerry moved to insert ‘declare,’ striking out ‘make’ war; leaving to the Executive the power to repel sudden attacks.”).

The second explanation is that “declare” was a superior word choice to “make” because the latter might be taken to imply, wrongly, that Congress, the legislative branch, would have the power to *conduct* war, which was properly an executive function.¹⁴ This little snippet of constitutional drafting history is obviously of interest for its bearing on the meaning of the Commander-in-Chief Clause powers of the President, which I discuss presently in Section II. I like to imagine this discussion occurring under the approving, but studiously silent, gaze—but perhaps arched eyebrows—of the President of the Convention, General George Washington, who had had some familiarity with the problems of wars being run by legislative committees. At all events, the Framers deliberately substituted “declare” for “make,” explained their reasons for doing so, and adopted the text in that form.

There is a natural, intuitive synthesis that comes out of the text, structure, and constitutional drafting history: Congress has the power to take the nation to a state of war where there had been none before, but the President retains the traditional executive power to defend the nation against attacks. There will always be line-drawing issues as to where one power leaves off and the other begins, but this is the nuts and bolts of the Constitution’s division of the war power, in terms of the power to *start* a war.¹⁵

It is significant that the text, structure, and historical evidence of original intention all cohere, pointing in a single direction: The President does not have constitutional power to initiate war on his own. Rather, by conscious structural design, the Framers meant to vest that power in the Congress.

C. *Is Historical Practice a “Gloss” on the
Meaning of the Constitution?*

One might truly observe, however, that a lot of our nation’s actual practice does not conform particularly well to this abstract constitutional division of powers. Presidents seem to

14. *Id.* at 319 n.* (“On the remark by Mr. King that ‘make’ war might be understood to ‘conduct’ it which was an Executive function, Mr. Elseworth gave up his objection, and the vote of [Connecticut] was changed to—ay.”).

15. There are also important line-drawing questions as to what constitutes “war” within the meaning of the clause and whether there might exist a residual executive power over non-war military actions. I leave these for another day.

start small and large wars, without Congress's authorization, a fair bit of the time. Has our nation's actual constitutional *practice* in the field of war conformed to the Constitution's *provisions*? If not, should we conclude that historical practice constitutes a "gloss" of sorts on the meaning of the Constitution, altering how we should understand the Constitution today? Or does it mean, quite the reverse, that the Constitution has been materially *violated* on important occasions, and that we should seek to recover the Constitution's true meaning instead of bending it to justify the violations of the past and (furthering the wrong) then use the bent version to justify further departures?

These fundamental questions bedevil many areas of constitutional law, but they are presented in an especially sharp and critical way with respect to war powers. Indeed, much of our constitutional practice today departs from the Constitution's original vision with respect to the allocation of war powers. Specifically, the last fifty years have seen the rapid development of unilateral presidential war-making. Some of our constitutional practice with respect to war powers fits the model I have sketched, but some of the practice simply does not.

To cite just two quick examples: I cannot find a way legally to justify the 1999 Kosovo War under the textual theory I have advanced. That does not mean that America's involvement in this military action was bad from a policy standpoint; it just means that this significant military action did not conform to the text, structural logic, and original understanding of the Constitution's allocation of war powers. The same goes for the Korean War. Congress did not authorize it; President Truman initiated it on his own. It seems impossible to deny that the Korean War was a "war" in the constitutional sense of the term. But it plainly does not fit into the model of constitutionally required congressional authorization. The Korean War may have been a "good" war, but it was an unconstitutional one—if by "unconstitutional" one means "at variance with the Constitution's original public meaning."¹⁶

16. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994). I hope to develop these historical observations—and others—in future work. For now, it is sufficient to note that Kosovo and Korea are prominent examples of sustained, open, armed conflict against an enemy force or power, of an intensity and duration that must be conceded to constitute "war," but where the

This is a classic problem. What happens when constitutional practice does not conform to sound first principles of constitutional interpretation? There are two ways of resolving this dilemma. Under one school of thought, ours is a “living Constitution,” the meaning of which changes with the times. Under another, the Constitution sets forth immutable principles of fundamental law that must never be altered by mere government officials. The “Living Constitution” position is usually associated with “liberal” constitutional theorists, and the “Original Meaning” position with “conservatives.” But in the area of war powers, the positions of the contending parties seem almost exactly reversed. “Conservatives” frequently defend broad presidential war-initiating power, against the greater weight of evidence of original meaning and design. More shockingly yet, they do so largely for *policy* reasons and defend such antioriginalist constitutional revisionism on the basis of consistent modern *practice*—a position that few conservative constitutional scholars would defend in other areas (like criminal procedure, abortion, or expansive conceptions of federal government power). But so too do “liberals” change their constitutional stripes when it comes to war: In few, if any, areas do those who otherwise so fervently defend the idea of an evolving, changing Constitution cling so tenaciously to the Framers and the original meaning of the words of the Constitution!

I am the only principled constitutional interpreter. I do not change my stripes.¹⁷ Where *practice* under the Constitution (or precedent, including longstanding, ostensibly “settled” judicial precedent) departs from the actual original meaning of the Constitution’s *provisions*, one must go with the Constitution and not with the practice. Always.¹⁸ The principled constitu-

war was not authorized by Congress’s declaration of war or equivalent statutory authorization.

17. This is not quite true. There are other principled constitutional interpreters out there. I am sure there are.

18. By this reasoning, it follows (as I have argued elsewhere) that *stare decisis*, in the sense of deliberate adherence to a wrong decision made in the past, is unconstitutional. See Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535 (2000); Michael Stokes Paulsen, *Can a Constitutional Amendment Overrule a Supreme Court Decision?*, 24 CONST. COMMENT. 285, 289 (2007); Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-Third Century*, 59 ALBANY L. REV. 671, 678–81 (1995); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103

tional interpreter must bite the bullet, swallow hard, and be willing to say that much of our nation's actual practice with respect to the power to declare war in fact has been unconstitutional. So much the worse for our nation's practice.

Not all of it, of course: as I noted before, there are many areas of ambiguity and uncertainty in application, including the domain of the word "war" and also the realm of the President's power to "defend" the nation against sudden (or imminent) attacks. But when push comes to shove, I am willing to say that some exercises of military force in our nation's history have been "wars" and that, where they were not authorized, they were unconstitutional.

D. Application: The Lawfulness of the War(s) on Terror

Fortunately, none of this has any salience with respect to the war on terror. At least, none of this *should* have any salience. The Authorization for Use of Military Force of September 18, 2001 (AUMF) is the broadest, most sweeping, embracing, legal declaration of war in our nation's history.¹⁹ The President is expressly

authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.²⁰

This is an absolutely sweeping authorization for military force.²¹ Congress declared war against not only enemy nations (as described), but against *organizations* or *persons*. The sole condition is that "the President determines"—he alone is assigned the power to make the relevant determination—that a

NW. L. REV. 857, 913 (2009); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289 (2005); Paulsen, *The Irrepressible Myth of Marbury*, *supra* note 3, at 2731–34.

19. Authorization for Use of Military Force Against September 11 Terrorists (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2006)). Some of the discussion that follows is based on my earlier work in Paulsen, *supra* note 1, at 250–57.

20. AUMF § 2, 115 Stat. at 224.

21. Some of the discussion that follows is based on my earlier work. See Paulsen, *supra* note 1, at 250–57.

nation, organization, or person has participated in any of a number of ways, direct or indirect, in support of the attacks of September 11, 2001, including “harbor[ing]” persons or organizations who may have “aided” persons or organizations who planned, authorized, or committed those infamous attacks. Combining the links in the chain of legal authorization, the President has plenary power to wage war against anyone connected in any active or even passively supportive way with the organizations or persons responsible for the September 11 attacks. He chooses the targets; he determines the enemies, including not just nations but individual persons and groups; he chooses the timing; he chooses the means; he chooses the ends.

Moreover, the AUMF’s “whereas” clauses embrace essentially the pro-presidential view of constitutional power to initiate war, including preemptive war, against terrorism: “Whereas, the President *has authority* under the Constitution to take action to deter and prevent acts of international terrorism against the United States”²² Congress, in enacting the AUMF, sweepingly—and in separation-of-powers terms somewhat surprisingly—declared *its acceptance* of unilateral presidential military action to deter and prevent acts of terrorism against the United States, and of the claim of unilateral presidential constitutional authority to do so.

All of this is extraordinary. The AUMF marks a stunning, landmark paradigm shift in the constitutional practice of war powers, light years distant in tone and attitude from the War Powers Resolution of 1973,²³ which was not so much repealed as simply overwhelmed by the September 18, 2001 AUMF. The AUMF was passed by a vote of 420-1 in the House²⁴ and 98-0 in the Senate.²⁵ It has no time limit—no expiration date.

There is more yet. The separate congressional enactment authorizing use of military force specifically with respect to Iraq is

22. AUMF § 2, 115 Stat. at 224 (emphasis added).

23. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (2006)). On the War Powers Resolution, see Paulsen, *supra* note 1, at 242-50.

24. H.R.J. Res. 64, 107th Cong. (2001) (enacted); see also Paulsen, *supra* note 1, at 252 n.106.

25. S.J. Res. 23, 107th Cong. (2001) (enacted).

also, legally, a fully functional declaration of war for that specific enemy or theater.²⁶

Thus, whatever the scope of legitimate debate over whether the President may, in certain circumstances, employ military force on his own unilateral constitutional authority, notwithstanding Congress's enumerated power "to declare War," that debate is moot with respect to these wars. Congress has added its powers to those of the President. In *Youngstown*-ish terms,²⁷ the wars of September 11, 2001, including the Iraq war, are "Category I" wars: They are fully constitutionally authorized, on *any* view of the Constitution's allocation of war powers.

More than that, Congress legislated sweepingly in support of presidential power with the enactment of the Military Commissions Act of 2006.²⁸ That act gives the President the authority to interpret international law for the United States, and delegates broad war powers with respect to the capture, detention, interrogation, and military punishment of unlawful enemy combatants.

If ever it were the case, it is certainly true here that presidential power to wage war—authorization to use force and the manner of its conduct—is at its maximum. Congress has added essentially all of its powers to those that the President possesses by virtue of his independent constitutional powers under Article II. In such a situation, military action commanded by the President is, as Justice Jackson aptly put it in his concurring opinion in *Youngstown*, "supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it."²⁹

26. See Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (codified at 50 U.S.C. § 1541 (2006)).

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

28. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10 U.S.C.); see also Paulsen, *The Constitutional Power to Interpret International Law*, *supra* note 2, at 1847–51.

29. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

II. THE CONSTITUTIONAL POWER TO CONDUCT WAR
(*JUS IN BELLO*)

Who has the constitutional power to conduct war, where war has been legally authorized by Congress or where military action falls within the residual executive power to defend against sudden or imminent attacks? The Constitution's answer is clear and categorical: The President has the power to conduct war, and Congress does not.

A. *The Executive Power and the Commander-in-Chief Clause*

Once again, it is fairly easy to discern the Framers' separation-of-powers design in dividing, allocating, and checking power. At the level of grand design, the Framers split the war power between the power to initiate a legal condition of war—now vested in the legislative branch—and the power to conduct war, retained in the executive. At the level of specific text, this division is reflected in the initial grant, in gross, of “the executive Power” to a single chief magistrate, the President, in Article II.³⁰ That grant is then qualified by the reassignment, in whole or in part, of certain traditional executive powers to the legislative branch by specific enumeration.³¹ Notably, these powers include the power to declare war³² and to raise and support armies³³—traditional executive powers of the Blackstonian king in England³⁴—and the qualified legislative role in treaty making.³⁵ Such specific textual reassignments of power—deviations from the traditional model—in turn required clarifications of what was *not* meant to be reassigned. Most significantly, the power to direct and command the nation's use of military force, another clearly executive power under traditional understandings (as indeed *all* war power previously had been understood as executive), was intended to be retained by the President—not reassigned to Congress. Thus, the crucial Commander-in-Chief Clause. The Commander-in-Chief Clause of Article II is the Constitution's definitive clarification that the

30. U.S. CONST. art. II, § 1, cl. 1.

31. U.S. CONST. art. I, § 8.

32. U.S. CONST. art. I, § 8, cl. 11.

33. U.S. CONST. art. I, § 8, cl. 12.

34. See, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES *249–51.

35. U.S. CONST. art. II, § 2, cl. 2.

traditional executive power to conduct, manage, and direct—in short, to *execute*—war is retained in the executive power, to be exercised solely by “a President of the United States.” Congress decides whether or not to start a war. The President decides how to carry it out.

In her plurality opinion in *Hamdi v. Rumsfeld*, Justice O’Connor quipped that “a state of war is not a blank check for the President.”³⁶ Well, then, what kind of check is it? Like most judicial aphorisms, this one is more witty than astute. A declaration of war (to extend Justice O’Connor’s metaphor) writes a check in the full amount of the exclusive Commander-in-Chief Clause power of the President to conduct war against the enemies designated by the declaration.

The AUMF writes an enormous check. It is, as noted above, in legal effect a declaration of war triggering the full extent of the Commander-in-Chief power to wage war against those against whom it was declared and to protect the nation from attacks by those enemies. There is no question that the AUMF gives the President the absolute maximum of his constitutional authority to wage war and authorizes him to do so against persons and organizations connected to the September 11 attacks in a way he determines sufficiently proximate to justify action to prevent future such acts of international terrorism against the United States. The Authorization for Use of Military Force in Iraq does the same, specifically with respect to the Iraq theater.³⁷

Congress’s power to authorize war is not a power to manage the conduct of war. That is a portion of the executive power the Framers did *not* reassign to the legislative branch, but a part retained and reaffirmed as solely vested in the President through the Commander-in-Chief Clause. To switch metaphors, “Congress’s power to declare war is an on-off switch, not a thermostat” that Congress can adjust to whatever level it prefers.³⁸ Once the switch is flicked to the “on” position, and for so long as it remains in that position, the President has the power to conduct war. *And Congress does not.*

36. 542 U.S. 507, 536 (2004).

37. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (codified at 50 U.S.C. § 1541 (2006)).

38. Paulsen, *The Constitutional Power to Interpret International Law*, *supra* note 2, at 1840. *Contra* Prakash, *supra* note 2, at 347 (stating that Congress’s war powers are more analogous to a dimmer switch than an on-off switch).

What is the scope of the President's Commander-in-Chief Clause power, fully triggered here by Congress's sweeping authorizations for the use of military force? I submit that power, in a time of authorized war, extends to all matters of military strategy and conduct with regard to the waging of that war, including rules of engagement, interception of enemy communications, choice of weaponry and tactics, rules of interrogation and investigation, and the imposition of military punishment for violation of the laws of war.³⁹

The Commander-in-Chief power, correctly understood, is a formidable power—and quite properly so. It is a dangerous power, as all power is dangerous. But that is inherent in the nature of the power to conduct war and in the decision to vest the power of ultimate military command in a single individual. The President, and not Congress, decides when and where to attack, whom to attack, how hard to attack, and what the strategic and tactical objectives are. The President, and not Congress, directs the capture, detention, interrogation, and military punishment for law-of-war violations of enemy combatants. He decides what to do with regard to interception of enemy communications. He exercises the power to interpret and apply international law for purposes of executing the power to wage war.⁴⁰

This position is controversial. It has dramatic implications. It means that the President has the power—if I may be blunt and maybe a bit over-dramatic—to decide whether or not to kill, capture, hold, interrogate, torture, or play loud music in the face of enemy armed forces.⁴¹ In saying this, I am, of course, only making a statement about constitutional power. I am not saying whether any or all of these things are good or bad from a policy standpoint. Constitutional power is the power to do or not to do any or all of these things. One can flip the hypothetical exactly around and see that President Obama's recent and

39. I have developed and supported the propositions in this paragraph and the several that follow at greater length elsewhere. See Paulsen, *The Constitutional Power to Interpret International Law*, *supra* note 2, at 1839–42; Paulsen, *The Emancipation Proclamation and the Commander in Chief Power*, *supra* note 2, at 814, 827–31.

40. See Paulsen, *The Constitutional Power to Interpret International Law*, *supra* note 2, at 1839–41; Paulsen, *The Emancipation Proclamation and the Commander in Chief Power*, *supra* note 2, at 827–31.

41. See Paulsen, *The Constitutional Power to Interpret International Law*, *supra* note 2, at 1840.

proposed actions are justified by this same broad understanding of the Commander-in-Chief Clause power. The reason it is constitutionally permissible for the President unilaterally to *close* Guantanamo, to *release* prisoners, to *refrain* from serious, aggressive interrogation, to *not* seek the capture of certain terrorists, to *reveal* interrogation techniques and classified internal legal memoranda, to *decline* to intercept enemy communications or to refrain from serious intelligence gathering, to pull back from military engagements, to play softer, gentler music for war prisoners, or to *indulge* war criminals' preferences for ordinary civilian criminal trials rather than military tribunals is that, constitutionally, these determinations about how to conduct war are for the President of the United States. They may be used in one direction or another.

B. Congress's Legislative Powers

The alternative is that these powers and these choices—in one direction or another—are subject to Congress's control.⁴² Congress could prohibit—or *require*—torture, harsh interrogation, or loud music. Congress could prohibit the closing of Guantanamo, the disclosure of interrogation methods, the interception of enemy communications, or any other military action.

This is an utterly implausible reading of the Constitution's allocation of war powers, considered holistically. To be sure, Congress has certain powers under the Law of Nations Clause, the Rules Concerning Captures Clause, and the Government and Regulation of the Armed Forces Clause.⁴³ Those little powers are significant ones and can be used to leverage checks against the President. But none of them, fairly construed, extends to the President's core power to direct the conduct of war, nor do all of them combined do so. Were it otherwise,

the Commander-in-Chief Clause would be a title only, not an independent, substantive presidential power. The power to prescribe the actions and conduct of the nation's armed forces against the enemy would be Congress's, as a result of the accumulated weight of several peripheral powers, none of which addresses the power of military command directly. This is hard to square with the text of the Constitution and

42. See generally Prakash, *supra* note 2.

43. U.S. CONST. art. I, § 8, cls. 10, 11, 14.

with what we know of the history of the Framers' decisions in allocating war powers between Congress and the President.⁴⁴

C. *The Power to Terminate War*

My final point concerning the constitutional separation and allocation of the war power between Congress and the President concerns the power to *terminate* war. This power is likewise (in practical effect) a shared power of Congress and the President, but in a somewhat different sense than the allocation of war-making powers discussed above. With respect to those powers, each branch has an exclusive province that cannot properly be invaded by the other.⁴⁵ The President cannot properly invade Congress's legislative power to declare war, and Congress cannot properly invade the President's executive power to conduct war. The war-making power is shared in the sense that it is divided and portions of it are made the exclusive province of branches that are constitutionally independent of one another (even as each possesses strong checks on the other by virtue of its possession of certain exclusive war powers). The power to terminate war—the power, as it were, “to declare peace”⁴⁶—is a shared power in the sense that it results from the overlapping intersection of Congress's power to initiate (or not initiate) war and the President's power to execute (or not execute) war, so that *either* branch has the practical power (within limits and subject to other checks) to *stop* war.

Start with the President. I submit that it follows from the above discussion of the President's Commander-in-Chief

44. Paulsen, *The Constitutional Power to Interpret International Law*, *supra* note 2, at 1840–41. Congress also possesses power under the Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18, to legislate *in support of* the President's exercise of his war-executing power under the Commander-in-Chief Clause, by passing laws it judges “necessary and proper for carrying into execution” the President's power. The power is a sweeping one that enlarges the overall scope of national government power, *see* Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 HARV. J.L. & PUB. POL'Y 991, 1001 (2008), but it is not properly a power that may be used to *subtract* from the President's constitutional powers under the Commander-in-Chief Clause. Although Congress of course may use the auspices of the Necessary and Proper Clause to press its views of the limits of presidential war power, the Clause is not a power to *dis-empower* another branch, but a power to grant other branches powers ancillary to their constitutional powers.

45. *See* *Lichter v. United States*, 334 U.S. 742, 778–79 (1948).

46. I hope to develop this theme in a subsequent essay provisionally entitled *The Power to Declare Peace* (unpublished partial manuscript on file with author).

Clause war power with respect to decisions concerning the *conduct* of war that the decision to *end* a war (or to refrain from pursuing it aggressively) is an aspect of the “executive Power” and the Commander-in-Chief Clause power of the President. The President may terminate war by reaching a treaty that would legally terminate it, and the President may functionally terminate a war by declining to continue to pursue it, or by reaching an armistice or a truce (a non-treaty “executive agreement”) that would functionally end, though perhaps not *legally* terminate, a constitutionally authorized war.⁴⁷

Finally, and most radically, it follows from the President’s unilateral Commander-in-Chief and executive power over the conduct of war that the President has the power to *decline to execute* a declaration of war. If the Commander-in-Chief Clause power is taken seriously, it is the President’s decision when to end—when to quit—a war. To put the matter colloquially (and in a retro-, sixties-ish sort of way), what if Congress threw a war and nobody came—or more specifically, what if the President did not show up to fight? The constitutional answer is that the President has the constitutional power not to fight a war, or to end it, by the non-exercise of his exclusive war power under the Commander-in-Chief Clause.

Congress has some powers in this regard, too. Congress could repeal a declaration of war and strip whatever legal authorization comes with such declaration (in those overwhelming majority of situations in which such authorization is required)—leaving a war no longer legally authorized. Congress did essentially this with respect to the Vietnam War by repeal-

47. On the legal force of executive agreements, see Paulsen, *The Constitutional Power to Interpret International Law*, *supra* note 2, at 1787–99. My preliminary view is that a war that is “ended” as a practical matter by a presidential executive agreement with the hostile force or power—an armistice or truce—constitutionally may be resumed by the President (or a successor President), without renewed legislative authorization, when, in the President’s judgment, the executive agreement is no longer in the United States’s interest. A peace treaty that complies with the Constitution’s treaty-making requirements has the status of supreme U.S. law, under Article VI of the Constitution. It is difficult to imagine circumstances in which such a treaty would not be understood as legally terminating Congress’s statutory declaration or equivalent authorization of war (no matter one’s view as to whether the “last-in-time” rule with respect to the relative legal force of statutes and treaties is correct, *see id.* at 1773 n.28). Again, I expect to develop and refine this point in a subsequent essay. Paulsen, *The Power to Declare Peace*, *supra* note 46.

ing the Tonkin Gulf Resolution.⁴⁸ In addition, Congress possesses the appropriations power and can employ such a power to defund an authorized war.⁴⁹ The exercise of that power could *effectively* (though, again, probably not *legally*) terminate a war. Congress did this with respect to the Vietnam War, too, conditioning its post-Tonkin-repeal military appropriations in such a way as to essentially shut down the war in Indochina, leading to America's practical tactical defeat and evacuation.⁵⁰

Some folks mistakenly take this to mean that Congress's *real* war power is the appropriations power and that the "declare War" clause is either toothless, mere surplusage, or must mean something other than a war-authorization power.⁵¹ Not at all. The power to declare war—or not—remains the relevant *substantive* power of Congress. The power over appropriations is merely Congress's trump-card, "shoot-out" power—a *different* substantive power, but a powerful one that Congress may employ to *effectuate* its other constitutional powers, including its substantive constitutional power to initiate war. But note that de-funding does not de-authorize; a resumption of funding would return to the President the practical ability to continue to wage war without need for re-authorization. There remains a legitimate debate over the propriety of Congress using its ap-

48. The Tonkin Gulf Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964), was, in my opinion the legal equivalent of a congressional authorization of war, albeit a fairly imprecise, vague, and general delegation to the President. In 1971, Congress repealed the Tonkin Gulf Resolution, in a one-sentence amendment to an unrelated bill. See Act of Jan. 12, 1971, § 12, Pub. L. No. 91-672, 84 Stat. 2053, 2055 (1971). In the case of the Vietnam War, the repeal of the Tonkin Gulf Resolution may not have had the effect of repealing all congressionally granted authority. See JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 32–34 (1993).

49. See J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 99–108 (1991) (discussing several versions of this proposition).

50. In 1973, Congress passed, and President Nixon signed, the Joint Resolution Making continuing appropriations for fiscal year 1974, § 108, Pub. L. No. 93-52, 87 Stat. 130, 134 (1973) ("Notwithstanding any other provision of law, on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia.").

51. See Delahunty & Yoo, *Making War*, *supra* note 1, at 127–29; Delahunty & Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations that Harbor or Support Them*, *supra* note 1, at 491–93; Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, *supra* note 1, at 174, 176–82.

appropriations power so as to leverage it into impairment of the President's Commander-in-Chief Clause powers—but without having repealed a declaration or authorization of war. This may be unfair, but it too would seem to be a part of the separation-of-powers game. The branches may attempt to leverage the powers they have in order to press their respective positions with respect to the Constitution's (sometimes debatable) allocations of the war power. And the branches may, and should, resist such leveraging by the others with the powers at their disposal. Put concretely, Congress may push but the President should push back.⁵²

With respect to the power to terminate war, it is interesting that neither party may force the other to engage in war (at least not constitutionally). This means that, if the constitutional plan is honored, each branch possesses a unilateral power to stop war.⁵³

In that font of legal insight, the movie *Ghostbusters*, all hell breaks lose if the "Gatekeeper" and the "Keymaster" act in

52. James Madison of course saw all this clearly, as a matter of general principle. See THE FEDERALIST NO. 49, at 314 (James Madison) (Clinton Rossiter ed., 1961) ("The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers[.]"); THE FEDERALIST NO. 51 (James Madison), *supra*, at 320–22 ("To what expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments as laid down in the constitution? The only answer that can be given is that as all these exterior provisions are found to be inadequate the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. . . . In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own[.] . . . [T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.").

53. Of course, with respect to Congress's exercise of any of its legislative powers, the President retains the qualified veto set forth in Article I, Section 7. Congress's exercise of its legislative powers is thus internally checked. Nonetheless, the veto power is not a very effective power with which to *compel* Congress to do anything. (A shield is not much of a sword. But it might be used somewhat as one.) To the extent congressional inaction is sufficient to accomplish certain ends—inaction yields nonfunding—the veto is a very weak check on Congress's power silently to declare peace.

concert, but only if they act in concert. Neither controls the actions of the other.⁵⁴ So too the war power under the Constitution is unleashed only if Congress authorizes and the President executes war. One loads the gun and the other pulls the trigger. Neither controls the other. And just as war cannot constitutionally occur without the concurrence of both, war constitutionally may terminate either when Congress stops loading or the President stops firing.

III. THE RELEVANCE AND IRRELEVANCE OF THE JUDICIARY

What about the third branch? When I first started teaching a specialized course in the constitutional law of war powers—in October of 2001, immediately after the events of 9/11—and up until 2004, I would have said (and did say) that, in matters of war and peace, the judiciary has been a rare, hesitant, timid player. The courts historically have been inclined to duck constitutional issues of war powers, finding lack of standing, dismissing cases on “political question,” “ripeness,” or other “non-justiciability” grounds, or deferring substantively (even sometimes cravenly) to the executive branch’s constitutional interpretations. (I think of cases like *Dames & Moore* as an illustration of the last phenomenon, and even more extraordinarily, *Korematsu* and *Hirabayashi*.)⁵⁵

Such abstention, deference, and ducking are wrong. Under our system of separation of powers, the judicial branch is (as Hamilton explained in *Federalist* No. 78) incomparably the

54. GHOSTBUSTERS (Columbia 1984).

55. The cases of craven deference to the executive branch, referred to in the text, are *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943). For recent representative judicial decisions holding war-powers questions nonjusticiable, see *Campbell v. Clinton*, 203 F.3d 19, 20–24 (D.C. Cir. 2000) (finding lack of congressional standing to challenge unilateral presidential war-making); *Kucinich v. Bush*, 236 F. Supp. 2d 1, 3–11 (D.D.C. 2002) (finding lack of congressional standing to challenge presidential conduct of war); *Dellums v. Bush*, 752 F. Supp. 1141, 1144–46, 1149–52 (D.D.C. 1990) (finding challenge to threatened unilateral presidential war-making unripe (but not otherwise a nonjusticiable “political question”)); *Ange v. Bush*, 752 F. Supp. 509, 510 (D.D.C. 1990) (finding challenge to presidential troop deployment a nonjusticiable political question). I have previously criticized the courts’ use of the so-called “political question” doctrine to avoid decisions in matters of war powers. See Paulsen, *The Constitutional Power to Interpret International Law*, *supra* note 2, at 1816–22; Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1293–96 (2004).

weakest of the three, unable successfully to attack either of the others. It possesses neither force nor will, but merely judgment.⁵⁶

But it must render judgment. The Constitution does not contemplate, and its text does not support, a free-floating restriction on judicial power to decide issues otherwise properly presented to them simply because they involve constitutional questions of war and peace. Neither the political sensitivity of an issue nor the importance of an issue disables the judicial power entirely (as some applications of the political question doctrine almost seem to hold) or generates a judicial obligation to decide a case wrongly in deference to what other actors have done wrongly.

Since 2004, the pendulum has swung dramatically, even radically, in the opposite direction with cases like *Hamdi v. Rumsfeld*,⁵⁷ *Rasul v. Bush*,⁵⁸ *Hamdan v. Rumsfeld*,⁵⁹ and *Boumediene v. Bush*.⁶⁰ Each of these decisions was, in my view, wrongly decided—very badly so, and with potentially harmful consequences to the nation’s security.⁶¹ But note well: It is not the *fact* of judicial decision in this area, but the *substance* of the actual judicial decisions in this area, that constitutes the problem. Courts have the power to address constitutional issues of this nature. They simply have no rightful power to decide them *wrongly*. That is a mis-exercise—a misuse—of the constitutional power of the courts to render independent judgment.

What, then, do you do when the judiciary suddenly begins to intrude on the Constitution’s allocation of powers, interfering with the proper Article II presidential power to wage war, detain prisoners, and impose military punishments on unlawful enemy combatants? One option is simple legislative correction.

56. See THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 52, at 469.

57. 542 U.S. 507 (2004).

58. 542 U.S. 466 (2004).

59. 548 U.S. 557 (2006).

60. 128 S. Ct. 2229 (2008).

61. A full defense of this proposition would constitute an article in itself. I have made many of those substantive points in other writings, and discussed and embraced objections made by others. See Paulsen, *The Constitutional Power to Interpret International Law*, *supra* note 2, at 1834–42. My central point here, however, is the one to which I proceed in the next paragraph: Assuming the existence of a wrongly decided, harmful-to-national-security judicial decision—certainly not an unthinkable proposition, given the Court’s recent decisions in these cases—what does the idea of separation of powers have to say about the executive’s obligation to follow such decisions?

This solution is available when the Court rests its decision on a separation of powers ground that the President's action legally requires congressional authorization and such authorization has not been given. Regardless of whether such a judicial decision is sound or unsound, it often can be remedied by the expedient of going to Congress for the authorization the Court thought necessary. This is what happened in the aftermath of the Court's 2006 decision in *Hamdan*—an egregious and potentially dangerous decision, but one that proved capable of legislative correction because it ultimately rested on the ground that the President's military commission procedures were unconstitutional only because not legislatively authorized. President George W. Bush chose to put the issue to Congress—and raised the stakes by transferring several high-value terrorist unlawful combatants to Guantanamo.⁶² Congress responded with the Military Commissions Act of 2006 (MCA).⁶³ The MCA was, in effect, a sweeping legislative repudiation of *Hamdan* and a broad reaffirmation of President Bush's position, buttressing presidential power.⁶⁴ Congress (to use *Youngstown*-speak) added its legislative powers to those that the President possesses in this area by virtue of his exclusive Article II powers. Presidential actions consistent with the MCA fall within the safest harbor of *Youngstown's* "Category I" of most-indisputably-authorized presidential actions. The MCA thus gave President Bush, and now President Obama, all the authority he could possibly need with respect to military commissions and war prisoner detentions. When one adds the MCA to the already-existing authorizations for use of military force, it is impossible not to conclude that the waging of the war on terror, with respect to matters of capture, detention, interrogation, and military punishment, stands on anything but the firmest of constitutional footings. The President is at the very height of his constitutional powers. One could think of this as *Youngstown* Category I on steroids—a sort of a super-duper *Youngstown* Category I situation.

62. *President Moves 14 Held in Secret to Guantanamo*, N.Y. TIMES, Sept. 7, 2006, <http://www.nytimes.com/2006/09/07/us/07detain.html>.

63. Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10 U.S.C.).

64. For discussion and elaboration of this point, see Paulsen, *The Constitutional Power to Interpret International Law*, *supra* note 2, at 1835–38.

Just about the only aspect of *Hamdan* that the MCA did not repudiate was the proposition that such legislative authorization was constitutionally necessary in the first place. Is there not a certain implicit weakening of presidential power by the very act of acquiescing to the supposed need to get Congress's approval? Not necessarily, but one can certainly understand the concern that asking Congress for authority implies, or could be taken to imply, a lack of independent authority. There is also the concern that Congress might refuse to act or might legislate in support of the President's position in a not fully-supportive way. This concern no doubt influenced the Bush administration's decisions not to seek specific legislative authority or support in the first instance. With respect to the MCA, the story had a mostly happy legislative ending. But what if it had not?

Sometimes, the Court will erroneously hold legislative authorization necessary for presidential action and Congress will not grant that authorization to the full extent the President feels necessary. And sometimes the Court keeps invalidating presidential action, notwithstanding congressional authorization, or finds aspects of the authorization unconstitutional. This is an apt description of what happened in *Boumediene*.⁶⁵ What then?

I submit that the scheme of separation of powers—the logic of the Framers' design and the clear implication of the words they used to explain and defend that design—must permit the President, as Commander-in-Chief, *to refuse to be bound by erroneous decisions of the Supreme Court that pose a serious harm to the nation*.⁶⁶ I expect that President Bush would have so refused, had he thought it necessary. This position, of course, is controversial in today's legal culture. But it should not be. The idea of "executive review" of unlawful Supreme Court decisions follows from the same premises that justify judicial review of

65. 128 S. Ct. 2229, 2262–72 (2008) (invalidating a provision of the MCA as contrary to the Writ Suspension Clause of Article I, Section 9).

66. I have advanced versions of this proposition in other articles. See Paulsen, *The Irrepressible Myth of Marbury*, *supra* note 3; Paulsen, *Lincoln and Judicial Authority*, *supra* note 3; Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 *CARDOZO L. REV.* 81 (1993); Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, *supra* note 3; Michael Stokes Paulsen, *Nixon Now: The Courts and the Presidency After Twenty-five Years*, 83 *MINN. L. REV.* 1337, 1345–68 (1999); see also Paulsen, *The Constitution of Necessity*, *supra* note 55, at 1260–63.

congressional decisions: No one branch is bound by the constitutional interpretations of any of the others.⁶⁷ Indeed, I submit that it would be a violation of the President's oath if he were, in a case endangering the nation's security, deliberately and consciously to adhere to what he concludes is an erroneous judicial determination that poses a grave threat to national security. President Lincoln clearly understood this duty and saw in the Presidential Oath Clause a duty to defend the nation and to resist erroneous judicial decisions threatening the Constitution and the constitutional order.⁶⁸ The President swears an oath to "preserve, protect, and defend" the Constitution, a personal, nondelegable, nondefeasible moral and legal obligation that logically includes the preservation, protection, and defense of the nation whose Constitution it is and upon whose existence everything else in the Constitution depends.

To put it as plainly as I can: It would be a violation of the President's oath to accede to a judicial violation of the Constitution that endangers the nation's security. If, in consequence of *Hamdi*, *Hamdan*, *Boumediene*, or any other erroneous judicial decision, the President of the United States would be required to take action endangering the nation's security, he should announce that he will, to that extent, refuse to honor that judicial decision.

CONCLUSION

The war power, like any other power too important to vest in a single set of hands, is a divided, separated, shared power. In crude overview: In general, the power to initiate war is Congress's and not the President's. Similarly, the power to execute war, but not to initiate it, is the President's. Each branch possesses exclusive powers that the other may not properly infringe or usurp. But each branch may leverage its war powers, and its other constitutional powers, to check the others' exercise of theirs—or to attempt precisely such an improper usurpation. That is how the separation of powers game

67. Paulsen, *The Irrepressible Myth of Marbury*, *supra* note 3, at 2724–38. See generally Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, *supra* note 3.

68. Paulsen, *Lincoln and Judicial Authority*, *supra* note 3, at 1277–1301; Paulsen, *The Constitution of Necessity*, *supra* note 55, at 1264–67.

works, as a general proposition, and the interaction of war powers is no exception.

The courts, as the third branch in this game, have the important and proper role—and duty—of deciding genuine Article III cases involving war powers, in accordance with the Constitution's true allocation of war powers. They have no substantive war powers, but an important, co-equal interpretive province. They should not shirk the exercise of their true constitutional powers, but neither should they abuse that power. Where they do, a further aspect of the separation of powers game is that the other branches may, and should, resist those encroachments on their exclusive provinces—encroachments in violation of the Constitution—by the exercise of their co-equal interpretive powers.