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Can Congress Make a President Step Up a War?

Charles Tiefer*

I. INTRODUCTION

May Congress use its appropriation power to direct the President to step up a war?¹ When Congress uses its spending power for intensifying a war—stepping it up, pressing it more aggressively—against the resistance of a “less hawkish” Commander in Chief, who wins?

The subject of spending provisions, also called appropriation riders, that limit the scope or duration of a war has certainly received commentary.² By contrast, no one has discussed Congress’s use of its spending power to compel the President to step up action in the war zone.³ Yet constitutional collisions about stepping up wars do occur and will occur again. Moreover, this new subject stimulates a reconsideration of the constitutional

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1. For general treatments of the subject, see WILLIAM C. BANKS & PETER RAVEN-HANSEN, *NATIONAL SECURITY LAW AND THE POWER OF THE PURSE* (1994); LOUIS FISHER, *PRESIDENTIAL WAR POWER* (2d ed. 2004); THOMAS M. FRANCK ET AL., *FOREIGN RELATIONS AND NATIONAL SECURITY LAW: CASES, MATERIALS AND SIMULATIONS* (3d ed. 2008); MICHAEL GLENNON, *CONSTITUTIONAL DIPLOMACY* (1990); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* (2d ed. 1996).

2. Four years ago, the author wrote about appropriation riders to restrain or end a war, with citations to previous studies of the subject. Charles Tiefer, *Can Appropriation Riders Speed Our Exit from Iraq?*, 42 STAN. J. INT’L L. 291 (2006).

3. That is not to say there is no literature on kindred subjects, e.g., when Congress may enact mandatory appropriations that a President must spend. In addition, there has been one recent article mentioning one particular, relatively obscure way that Congress might get around Presidents who do not wage a particular kind of war. William Young, Note, *A Check on Faint-Hearted Presidents: Letters of Marque and Reprisal*, 66 WASH. & LEE L. REV. 895, 911–12 (2009).

history of appropriation riders about wars generally, which makes it both a relevant and an important topic.⁴

As a commissioner on the federal Commission on Wartime Contracting in Iraq and Afghanistan established in 2008 by Congress, the author has been immersed in the practical interactions between congressional legislation and the conduct of the Afghanistan war. Such experience generates realistic hypotheticals demonstrating how this long, frustrating war may trigger future war-powers clashes in which Presidents get pressed to act “more hawkishly.” Practically speaking, such clashes may occur whenever the opposition to the President becomes as strong in Congress as it did, most recently, from 1995–2000 and 2007–2008.

This Article posits differences of view in the 2010s toward the Afghanistan war as a way to revisit, generally, the history of constitutional disputes over war-related appropriation riders. Describing the differences in *very simplistic* terms,⁵ a “hawkish” opposition in Congress may gain political strength at any time, such as in 2010 or 2014,⁶ not necessarily because of the war issues but perhaps from running on a political platform in which a

4. This Article builds on impressive recent work that shows congressional war powers far stronger than argued by those supporting the positions taken by President George W. Bush. See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 756–57 & n.201 (2008) [hereinafter Barron & Lederman, *Framing the Problem*]; David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008) [hereinafter Barron & Lederman, *A Constitutional History*]; Jules Lobel, *Conflicts Between the Commander in Chief and Congress: Concurrent Power over the Conduct of War*, 69 OHIO ST. L.J. 391 (2008).

5. It is not suggested that wars in general, and the Afghanistan war in particular, fall simplistically into the dichotomies or hypotheticals being discussed. Some members of Congress who otherwise have sterling “hawkish” credentials—they favored maximum efforts in past wars and support full-sized military budgets—might think the United States would do better just to get out of Afghanistan. Conversely, members of Congress who otherwise have “dovish” credentials and usually support any President under “hawkish” criticism might join the “hawks” on particular issues that appeal to them, like eradication of opium poppies. A policy discussion about this would have to concern far more fleshed-out facts and would be nuanced. It is only for illuminating the general constitutional law of war powers that simplistic dichotomies and hypotheticals will serve. For these, too-fine political and policy distinctions would be distracting.

6. For the author’s previous discussion of this pattern in the midterm congressional elections of Presidents’ second terms—a 2004 prediction which proved correct in 2006—see CHARLES TIEFER, *VEERING RIGHT: HOW THE BUSH ADMINISTRATION SUBVERTS THE LAW FOR CONSERVATIVE CAUSES* 315–16 (2004).

“hawkish” view of the war is one of the platform’s explicit or implicit planks.⁷ An elected “hawkish” majority in Congress may want to use tougher measures in the theatre of war than the President. It would enact measures past the bounds of policy set by the President as its way to step up the war.

Meanwhile, a relatively “less hawkish” President may oppose the steps demanded by Congress. As Professor Gregory Sidak noted, “[t]oday, of course, we are so accustomed to thinking of Presidents as more hawkish than Congress that the hypothetical” of a “more hawkish” Congress “would strike many as preposterous. Yet history provides a number of commonly ignored examples.”⁸ This Article will mention those examples in their historical contexts.

Consider how, in 2009, when General McChrystal proposed to commit more troops to Afghanistan, Republican congressional leaders called for General McChrystal to come to Congress and to testify prior to the President’s decision.⁹ Those leaders also called for “full” approval of the general’s proposal.¹⁰ The dispute

7. The Republican majority of the House starting with the 1994 election did not become strong primarily, or even significantly, because of its position, discussed below, that American troops should not serve under a U.N. flag. Yet, once that Republican majority became strong from the rest of its platform (primarily domestic issues), that meant it had strength for its position on controversies over the military serving under a U.N. flag.

8. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 85–86 (1991). Professor Sidak more particularly noted:

Today, of course, we are so accustomed to thinking of Presidents as more hawkish than Congress that the hypothetical of a dovish President would strike many as preposterous. Yet, history provides a number of commonly ignored examples: John Adams resisted calls for a declaration of war against France in 1798 and instead sought authority for the limited and undeclared Quasi-War; James Madison was ambivalent about declaring war on Britain in 1812; Grover Cleveland in 1896 rebuffed the proposal by various members of Congress to declare war on Spain; William McKinley in 1898 reluctantly conceded to the same war fervor; and Woodrow Wilson successfully campaigned for reelection in 1916 on the slogan, “He kept us out of war.”

Id. (footnotes omitted). The 1990s include the example, discussed below, of a Congress that opposed overseas interventions during which troops served under a U.N. flag. In the general environment of seeing the U.N. as committed to “softer” approaches like nation-building and similar action in concert with developing countries, and the U.S.’s commitment to “harder” approaches such as the 1991 Gulf War campaign crushing Saddam Hussein’s armed forces, the U.N. flag issue was, loosely speaking, about how “hawkish” to be.

9. Ann Scott Tyson, *Gates to Boost “Enablers” in Afghanistan Mission*, WASH. POST, Sept. 18, 2009, at A18.

10. Karen DeYoung, *Afghan Policy Battle on Horizon: General’s Call for More Troops Divides Military and Policymakers*, HOU. CHRON., Sept. 22, 2009, at A1.

adumbrated situations in which a working majority in Congress may take a more “hawkish” view than the Commander in Chief, who does not want such anticipatory testimony and who wants a different approach than merely giving such “full” approval. Such disputes are the stuff that constitutional clashes are made of.

Looking at the kinds of examples considered in this Article, suppose Congress passes a mandatory appropriation of several billion dollars for moving militarily, as America has so often done,¹¹ against nearby border “sanctuaries,”¹² in this instance those of the Taliban in Pakistan.¹³ Pakistan’s own increasing willingness in 2010 to challenge the Taliban made this less unthinkable than before. Suppose Congress creates a highly intrusive Select Committee on the War in Afghanistan that pulls generals off the battlefield into the hearing room to “unleash” them so that they will be more aggressive than their President.¹⁴ Or, suppose Congress enacts a mandatory appropriation¹⁵ for a program of

11. Examples from the Indochina War and the Korean War are discussed below. Other examples include a long history of “hot pursuit” and other moves across the boundaries of the continental United States. “Examples extend from President Monroe’s orders to General Jackson in 1818 to pursue Indians in the South into Spanish territory of Florida to President Wilson’s dispatch of troops in 1916 to pursue the Pancho Villa bandits across the Mexican border.” Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771, 1789 (1968). For a more general treatment of the subject, see Note, *International Law and Military Operations Against Insurgents in Neutral Territory*, 68 COLUM. L. REV. 1127 (1968).

12. The example derives from the enormously controversial decision of President Nixon, during the Vietnam War, to send troops into Laos and Cambodia to clear out “border sanctuaries” and the responses from a Democratic Congress to enact appropriation limitations preventing further war-expanding incursions. Barron & Lederman, *Framing the Problem*, *supra* note 4; Timothy Guiden, *Defending America’s Cambodian Incursion*, 11 ARIZ. J. INT’L & COMP. L. 215 (1994).

13. The notion that Pakistan has border sanctuaries for the Taliban in Afghanistan is discussed in SETH G. JONES, IN THE GRAVEYARD OF EMPIRES: AMERICA’S WAR IN AFGHANISTAN (2009); AHMED RASHID, DESCENT INTO CHAOS: THE U.S. AND THE DISASTER IN PAKISTAN, AFGHANISTAN, AND CENTRAL ASIA (rev. paperback ed. 2009).

14. The example discussed below derives from the Committee on the Conduct of the War during the Civil War. It contrasts with highly regarded committees, such as Senator J.W. Fulbright’s performance of invaluable, if belated, oversight on the Vietnam War. See Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1152 & n.204 (1973).

15. Congress words most war appropriations as lump sums as to which the President has limited legal discretion, in consultation with the appropriation committees, to redistribute sums away from certain programs. However, Congress may choose words of a mandatory nature that take away the

spraying defoliants on areas of opium poppy cultivation under Taliban control, a step that clashes with the executive policy (in the Bush and Obama administrations alike) of not wanting to force the local poppy farmers to join Taliban forces.

This Article does not look at such hypotheticals, of course, to discuss their policy implications.¹⁶ Rather, the discussion seeks to develop the analytical structure about whether a “hawkish” Congress may constitutionally enact various kinds of provisions. The provisions at issue have been chosen so as not to aim at restricting war; rather, these make a reluctant Commander in Chief step up a war.¹⁷

Accordingly, Part II of this Article provides the constitutional history of Congress’s war appropriation riders. It develops the key background events, shedding a special light on the Framers’ intent in wording the potent “No Appropriation” provision in the negative so that Congress would have a great power to limit, not to force, action.¹⁸ Proper appropriation riders derive great support from the plenary nature,¹⁹ venerable history,²⁰ and contemporary significance²¹ of Congress’s power of the purse.²²

President’s legal discretion to withhold funds from a program. The question then becomes one of presidential impoundment. *See infra* Part IV.D.

16. To repeat, the views expressed here are not those of the Commission or any other Commissioner. In fact, they are also not views, as to the policy issues regarding poppy eradication and so on, of this Commissioner. These are pure hypotheticals posed in order to ground the constitutional analysis.

17. Some may ask whether Congress is ever more “hawkish” than a President. The short answer is: several times Congress has declared war when the President would probably have preferred peace. Stand-out examples include the push on President Madison from the congressional “war hawks” in 1812 and the push on President McKinley from the empire-minded congressional Republicans in 1898. *See supra* note 8.

18. Even the strong believers in presidential power would let Congress prevent or stop an intervention by denying it funding. John C. Yoo, *Kosovo, War Powers, and the Multilateral Future*, 148 U. PA. L. REV. 1673 (2000).

19. Raoul Berger, *War-Making by the President*, 121 U. PA. L. REV. 29, 78–79 (1972); Louis Fisher, *How Tightly Can Congress Draw the Purse Strings?*, 83 AM. J. INT’L L. 758 (1989); Michael J. Glennon, *Strengthening the War Powers Resolution: The Case for Purse-Strings Restrictions*, 60 MINN. L. REV. 1 (1975).

20. *See, e.g.*, Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035 (1986).

21. FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, *TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW* (2d ed. 1989).

22. Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343 (1988).

Opposed to this expansive view of Congress's power of the purse is the overall classic²³ and contemporary²⁴ stance of maximal presidential war powers.²⁵ This pro-executive stance supports²⁶ the Commander in Chief power, especially in "an active theater of war."²⁷ This position also draws strength from past presidential pronouncements²⁸ and from the more general "executive Power" clause.²⁹

Crucial developments leading up to World War II show the range of what Congress may try to do. After 1945, America became a truly global power, with many more interested in raising the issue of Congress authorizing *vel non* military action.³⁰ For three key decades, the "Imperial Presidency" grew.³¹ This even included an occasional battle over impoundment of military appropriations³² between the President³³ as Commander in Chief³⁴ and Congress.³⁵

23. Robert H. Bork, *Erosion of the President's Power in Foreign Affairs*, 68 WASH. U. L.Q. 693 (1990); J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162.

24. John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996).

25. See, e.g., Philip Bobbitt, *War Powers: An Essay on John Hart Ely's War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath*, 92 MICH. L. REV. 1364 (1994); Sidak, *supra* note 8.

26. See, e.g., Michael B. Mukasey, *National Security and the Rule of Law*, 32 HARV. J.L. & PUB. POL'Y 831 (2009); John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639 (2002).

27. *Boumediene v. Bush*, 523 U.S. 723, 770 (2008) (noting that the detention facility was not "located in an active theater of war").

28. Executive pronouncements are collected in Robert J. Delahunty & John C. 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 488 (2002). Although many of those statements occurred in contexts where they did not justify a challenged executive intervention, some did. See, e.g., 112 Cong. Rec. 5504 (1966) (report of the Office of the Legal Adviser, U.S. Department of State).

29. Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Robert F. Turner, *War and the Forgotten Executive Power Clause of the Constitution: A Review Essay of John Hart Ely's War and Responsibility*, 34 VA. J. INT'L L. 903 (1994).

30. See, e.g., William S. Cohen, *Congressional Oversight of Covert Actions: The Public's Stake in the Forty-Eight Hour Rule*, 12 HARV. J.L. & PUB. POL'Y 285 (1989); Christopher M. Ford, *Intelligence Demands in a Democratic State: Congressional Intelligence Oversight*, 81 TUL. L. REV. 721 (2007).

31. William G. Howell, *Wartime Judgments of Presidential Power: Striking Down but Not Back*, 93 MINN. L. REV. 1778 (2009).

32. Note, *Impoundment of Funds*, 86 HARV. L. REV. 1505 (1973).

33. John H. Stassen, *Separation of Powers and the Uncommon Defense: The Case Against Impounding of Weapons System Appropriations*, 57 GEO. L.J. 1159 (1969).

Then came the most important appropriation-limiting enactments: in the 1970s for the Vietnam War³⁶ and in the 1980s for the Contra conflict over the "Boland Amendments."³⁷ In the 1990s, further illumination about war-powers provisions occurred

34. Nile Stanton, *History and Practice of Executive Impoundment of Appropriated Funds*, 53 NEB. L. REV. 1 (1974).

35. Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CAL L. REV. 593 (1988); Wm. Bradford Middlekauff, Note, *Twisting the President's Arm: The Impoundment Control Act as a Tool for Enforcing the Principle of Appropriation Expenditure*, 100 YALE L.J. 209 (1990); Cathy S. Neuren, Note, *Addressing the Resurgence of Presidential Budgetmaking Initiative: A Proposal to Reform the Impoundment Control Act of 1974*, 63 TEX. L. REV. 693 (1984).

36. John H. Ely, *The American War in Indochina, Part I: The (Troubled) Constitutionality of the War They Told Us About*, 42 STAN. L. REV. 877 (1990) [hereinafter Ely, *The American War in Indochina, Part I*]; John H. Ely, *The American War in Indochina, Part II: The Unconstitutionality of the War They Didn't Tell Us About*, 42 STAN. L. REV. 1093 (1990).

37. HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR (1990); G.H. Wolohojian, Note, *The Boland Amendments and Foreign Affairs Deference*, 88 COLUM. L. REV. 1534 (1988). Between Vietnam and Iran-Contra, war powers issues arose in 1983 as to Lebanon. See CHARLES TIEFER, THE SEMI-SOVEREIGN PRESIDENCY: THE BUSH ADMINISTRATION'S STRATEGY FOR GOVERNING WITHOUT CONGRESS 123-24 (1994) [hereinafter TIEFER, THE SEMI-SOVEREIGN PRESIDENCY] (Lebanon resolution with time limitation); Martin Wald, Note, *The Future of the War Powers Resolution*, 36 STAN. L. REV. 1407 (1984). As Solicitor of the House of Representatives in 1984-1995, the author represented the House in constitutional cases on national security and was privileged enough to see events like the conflict over the Boland Amendments. See, e.g., *Am. Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153 (1989) (vacating ruling striking down as unconstitutional a classified information provision in an appropriation bill). For a previous article discussing the role of congressional counsel, see Charles Tiefer, *The FAS Proposal: Valid Check or Unconstitutional Veto?*, in *FIRST USE OF NUCLEAR WEAPONS UNDER THE CONSTITUTION, WHO DECIDES?* 143 (Peter Raven-Hansen ed., 1987), reprinted in FRANCK ET AL., *supra* note 1, at 728-32. As Special Deputy Chief Counsel on the House Iran-Contra Committee, the author co-authored the chapter in the committee report on the Boland Amendments. H.R. REP. NO. 100-433, at 489-500 (1987). For a previous discussion drawing on that service, see George W. Van Cleve & Charles Tiefer, *Navigating the Shoals of "Use" Immunity and Secret International Enterprises in Major Congressional Investigations: Lessons of the Iran-Contra Affair*, 55 MO. L. REV. 43 (1990). The author filed the amicus brief for the House Leadership Group in *Garfinkel*. Brief of the Speaker and Leadership Group of the U.S. House of Representatives as Amicus Curiae, *Garfinkel*, 490 U.S. 153 (No. 87-2127). The brief addressed the constitutionality of the appropriation rider in that case, while also arguing the mootness issue, which the Court accepted. The issues were nicely treated in Michael Glennon, *Publish and Perish: Congress's Effort to Snip Snepp, Before and AFSA*, 10 MICH. J. INT'L L. 163 (1989).

during the course of the military interventions of the administrations of President George H. W. Bush³⁸ and of President Bill Clinton,³⁹ including President Clinton's intervention in the 1999 bombing campaign against Serbia.⁴⁰

Most recently, the Bush administration⁴¹ took extreme positions⁴² on the executive's constitutional powers that shape the contemporary discussion of war powers in the Obama administration. These positions related to a range of war contexts,⁴³ such as the "global war on terror,"⁴⁴ commission trials,⁴⁵ detention and extreme treatment of terror suspects and Iraqi war prisoners,⁴⁶ eavesdropping,⁴⁷ and interpretation of the

38. TIEFER, THE SEMI-SOVEREIGN PRESIDENCY, *supra* note 37, at 119–36; Lori Fisler Damrosch, *The Clinton Administration and War Powers*, 63 LAW & CONTEMP. PROBS. 125 (2000).

39. For example, the Republican Congress of the 1990s disagreed with President Clinton about whether American troops should serve under a U.N. flag, producing a constitutional clash. Richard Hartzman, *Congressional Control of the Military in a Multilateral Context*, 162 MIL. L. REV. 50 (1999); see Tiefer, *supra* note 2, at 320–21.

40. Charles Tiefer, *Adjustable Sovereignty: Contemporary Congressional–Executive Controversies About International Organizations*, 35 TEX. INT'L L.J. 239 (2000) (noting that the Kosovo and Serbia bombing campaign fits other aspects of Congressional–executive controversies); Charles Tiefer, *War Decisions in the Late 1990s by Partial Congressional Declaration*, 36 SAN DIEGO L. REV. 1 (1999) [hereinafter Tiefer, *War Decisions*]; Michael Hahn, Note, *The Conflict in Kosovo: A Constitutional War?*, 89 GEO. L.J. 2351 (2001). For a survey of these 1990s provisions, see Michael D. Ramsey, *Presidential Declarations of War*, 37 U.C. DAVIS L. REV. 321 (2003). For a strong criticism of presidential claims to war powers culminating in criticisms of both the Bush and Clinton administration positions, see Louis Fisher, *Unchecked Presidential Wars*, 148 U. PA. L. REV. 1637 (2000).

41. This Article uses "the Bush administration" to refer only to the administration of President George W. Bush, and not that of his father, President George H.W. Bush.

42. CHARLES TIEFER, *VEERING RIGHT* (2004).

43. David Gray Adler, *George Bush and the Abuse of History: The Constitution and Presidential Power in Foreign Affairs*, 12 UCLA J. INT'L L. & FOREIGN AFF. 75, 120–30 (2007).

44. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005). But see David Abramowitz, *The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism*, 43 HARV. INT'L L.J. 71 (2002) (discussing how actual compromise on the September 14, 2001 resolution moderated presidential power).

45. Doran G. Arik, Note, *The Tug of War: Combatant Status Review Tribunals and the Struggle to Balance National Security and Constitutional Values During the War on Terror*, 16 J.L. & POL'Y 657 (2008).

46. See generally Diane Marie Amann, *Abu Ghraib*, 153 U. PA. L. REV. 2085 (2005).

authorization of force after 9/11 in Afghanistan and beyond.⁴⁸ The Bush administration also claimed enhanced power over asserted congressional micromanaging and about the role of presidential signing statements.⁴⁹

The Bush administration's expansive interpretations drew many reactions. The Supreme Court delivered rebukes of the Bush

47. U.S. DEP'T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT (2006), available at <http://www.justice.gov/opa/whitepaperonnsalegalauthorities.pdf>; Christopher M. Ford, *Intelligence Demands in a Democratic State: Congressional Intelligence Oversight*, 81 TUL. L. REV. 721 (2007); Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels*, 29 CARDOZO L. REV. 1049 (2008).

48. Professor Michael Van Alstine has noted: "The Bush Administration has relied on claims of implied and inherent Article II authority for an assertion of a broad array of powers, including those regarding the war in Iraq and the detainment of alleged supporters of international terrorism." Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 UCLA L. REV. 309, 312 n.8 (2006). See also U.S. DEP'T OF JUSTICE, *supra* note 47, at 1, which Professor Van Alstine notes as "asserting that the [P]resident has 'inherent constitutional authority . . . to conduct warrantless surveillance for intelligence purposes.'" Van Alstine, *supra*, at 312 n.8. Also see Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President, & William J. Haynes II, Gen. Counsel of the Dep't of Def. 11-15, 32-34 (Jan. 22, 2002), which Professor Van Alstine notes as "supporting the presidential detention of alleged foreign terrorists on the basis that '[f]rom the very beginnings of the Republic' the Vesting Clause of Article II 'has been understood to grant the President plenary control over the conduct of foreign relations.'" Van Alstine, *supra*, at 312 n.8. Similarly, Professor Van Alstine cites Memorandum from John Yoo, Deputy Assistant Attorney Gen., & Robert J. Delahunty, Special Counsel, to William J. Haynes II, Gen. Counsel of the Dep't of Def. 14-16 (Jan. 9, 2002), as "supporting detention and use of force against alleged terrorists in the United States on the same grounds." Van Alstine, *supra*, at 312 n.8. Additionally, see Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 548 (2004), which notes that "[i]n recent years" the implied executive powers argument "has gained newfound popularity" among the Bush Administration and its supporters.

49. See, e.g., Sofia E. Biller, Note, *Flooded by the Lowest Ebb: Congressional Responses to Presidential Signing Statements and Executive Hostility to the Operation of Checks and Balances*, 93 IOWA L. REV. 1067 (2008); Note, *Context-Sensitive Deference to Presidential Signing Statements*, 120 HARV. L. REV. 597 (2006); Malinda Lee, Comment, *Reorienting the Debate on Presidential Signing Statements: The Need for Transparency in the President's Constitutional Objections, Reservations, and Assertions of Power*, 55 UCLA L. REV. 705 (2008).

administration in the major cases of *Hamdan v. Rumsfeld*,⁵⁰ *Rasul v. Bush*,⁵¹ and *Boumediene v. Bush*.⁵² Congress passed provisions like the McCain Amendment (the “Detainee Treatment Act”), which prohibited extreme treatment of detainees.⁵³ President Obama reacted against his predecessor’s assertions of power, to a measured extent, by a promise to rein in signing statements.⁵⁴

Part III of this Article uses the just-summarized constitutional history to set up and to apply a basic structure to categorize congressional appropriation riders. Although the main focus is to contextualize provisions for stepping up a war, the approach also yields insight regarding all war-related appropriation riders. In light of history, whether provisions are presumptively unconstitutional depends on whether the provision goes to the very core of the Commander in Chief’s more “central” concerns in the war zone:⁵⁵ command,⁵⁶ disposition of forces, and military campaigns.⁵⁷

50. 548 U.S. 577 (2006); see Gordon G. Young, *Youngstown, Hamdan, and “Inherent” Emergency Presidential Policymaking Powers*, 66 MO. L. REV. 787 (2007).

51. 542 U.S. 466 (2004); see Ari Aranda, *The Supreme Court’s Post-9/11 War-on-Terror Jurisprudence: Special Considerations, Threshold Determinations, and Anticipatory Review*, 73 BROOK. L. REV. 645 (2008).

52. 553 U.S. 723 (2008); see Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973 (2009); Case Comment, *Extraterritorial Reach of Writ of Habeas Corpus*, 122 HARV. L. REV. 395 (2008).

53. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 801, 119 Stat. 2739, 2744; see Harold Hongju Koh, *Can the President Be Torturer in Chief?*, 81 IND. L.J. 1145 (2006).

54. Neal Devins, *The More Things Change, the More They Stay the Same*, 12 GREEN BAG 137, 142–43 (2009).

55. For a different way of evaluating the extent of infringement of a provision on the Commander in Chief concerns, see Tiefer, *supra* note 2, at 320–25.

56. Training of British Flying Students in the U.S., 40 Op. Att’y Gen. 58, 61–62 (1941) (“[T]he President’s responsibility as Commander in Chief embraces the authority to command and direct the armed forces in their immediate movements and operations . . .”). In an apt distinction:

[Congress] also has a distinct enumerated power to provide for armies and navies, and to prescribe the uses to be made for them. There is nothing inconsistent between this proposition and another one, which arises from a combined reading of the declaration of war clause and the President’s power as Commander in Chief. This is the proposition that under those circumstances in which Congress has affirmatively embraced a commitment to belligerent activities overseas on a sustained basis, it may not presume to dictate the minute strategy and tactics of the President’s conduct of the authorized enterprise.

A different category of provisions do collide with those “central” concerns, but not at the core and only to the extent of infringing those concerns at their periphery.⁵⁸ Finally, the last type involves “shared” (rather than President-“central”) provisions: issues as to which Congress does not go squarely against those specifically Commander in Chief-centered issues. For these, Congress may have express Article I grants of powers or a full history of legislative action. This approach parallels the “three zone” classification used by the key opinion in *Youngstown Sheet & Tube Co. v. Sawyer*.⁵⁹

Part IV proceeds to apply the analysis to three hypothetical measures, one in each of these categories that Congress might enact years from now in the Afghan conflict. First, Congress may enact a provision that directs the President to make an armed incursion into “border sanctuaries” within Pakistan.⁶⁰ Such congressional action would collide with the core of the Commander in Chief’s central issue of campaigning.⁶¹

The next Section of Part IV studies a congressional mechanism for intrusively overseeing command—a special oversight committee. This Section delves into the under-appreciated history of congressional wartime inquiries. It compares the infamous joint committee that oversaw the conduct of the Civil War with the

Charles Bennett et al., *The President’s Powers as Commander-in-Chief Versus Congress’ War Power and Appropriations Power*, 43 U. MIAMI L. REV. 17, 46–47 (1988) (statement of Professor William Van Alstine).

57. See 27 Op. Att’y Gen. 259, 260 (1909) (upholding as constitutional a Congressional provision mandating that 8% of detachments aboard naval vessels consist of marines).

58. Lobel, *supra* note 4.

59. 343 U.S. 579, 635–38 (1952). For recent treatments of the Bush administration’s initiatives in light of *Youngstown*, see, for example, Joseph C. Hansen, *Murder and the Military Commissions: Prohibiting the Executive’s Unauthorized Expansion of Jurisdiction*, 93 MINN. L. REV. 1871 (2009); Mark D. Rosen, *Revisiting Youngstown: Against the View That Jackson’s Concurrence Resolves the Relation Between Congress and the Commander-in-Chief*, 54 UCLA L. REV. 1703 (2007); Kathryn L. Einspanier, Note, *Burlamaqui, the Constitution, and the Imperfect War on Terror*, 96 GEO. L.J. 985 (2008).

60. See Ingrid Brunk Wuerth, *International Law and Constitutional Interpretation: The Commander in Chief Clause Reconsidered*, 106 MICH. L. REV. 61 (2007).

61. This is one of those issues of the Commander in Chief power in which international law overlaps with constitutional interpretation. See *id.*

praiseworthy major oversight inquiry at the start of the Korean War.⁶²

The third Section of Part IV analyzes a hypothetical provision as to “shared” issues of Congress and the President,⁶³ in contrast to the prior examples that affect the “central” Commander in Chief issues.⁶⁴ Namely, this Part considers a congressional provision mandating a poppy eradication program. Also, this Part reviews the complex history of military impoundments.⁶⁵

Part V, this Article’s conclusion, discusses how consideration of the issues surrounding “more hawkish” congressional action shakes up habitual ways of thinking. This approach invites observers to rethink their settled presumptions. The unspoken assumption has been that a strong Commander in Chief power invariably drives an unwelcome expansion of war. To think otherwise opens new frontiers for study of the war power.

A republic decays into an empire when its people no longer rule in wartime. Yet, the conduct of national combat requires unity of command. Will the constitutional law of war powers harmonize these seemingly irreconcilable principles, not only when the legislature wishes to restrain the executive, but when it seeks to step up the war?

II. CONSTITUTIONAL HISTORY

To treat the relevant constitutional history about Congress, appropriations, and war powers, this Part divides it into three sections: original intent (going back to English and colonial precedents); the period up to 1945; and since 1945. Most of the instances concern interactions in which Congress limited or restricted war, with few having to do with Congress stepping up a war. From the limitation provision examples, the author derives a sense of what Congress does that collides with Commander in Chief central issues at their core, Commander in Chief central

62. BRUCE TAP, *OVER LINCOLN’S SHOULDER: THE COMMITTEE ON THE CONDUCT OF THE WAR* (1998).

63. See, e.g., J. Andrew Kent, *Congress’s Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843 (2007).

64. For example, in the mid-1990s, the Republican Congress did move a number of measures that raised such issues. James P. Terry, *The President as Commander in Chief*, 7 AVE MARIA L. REV. 391, 417 (2009) (not enforcing an arms embargo against Bosnian Muslims).

65. Roy E. Brownell, II, *The Constitutional Status of the President’s Impoundment of National Security Funds*, 12 SETON HALL CONST. L.J. 1 (2001) (the leading work on military impoundment).

issues at their periphery, or shared issues between Congress and the President.

A. Original Intent

Of all the Constitution's clauses, the one with the greatest importance for appropriation provisions, from its text and history, is the "No Appropriations" clause: Article I, Section 9, Clause 7 provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."⁶⁶ The Framers placed this clause with, and worded it sternly like, the other emphatic interdicts in Article I, Section 9, rather than with the general affirmative powers in Article I, Section 10. From the "No Appropriations" clause, Congress derives the great power to attach conditions to funding, such as attaching to military appropriations during the Indochina War in the 1970s that "none of the funds shall be used" for ground operations across the borders in Laos and Cambodia.⁶⁷

1. British Antecedents

In terms of original intent, the wording of the constitutional text for Congress's spending power provisions, against the background of English and colonial traditions, vests the power of the purse in the legislature for specific reasons. Spending control aimed to keep power over the initiation of war in the people's representative bodies. Parliament moved in that direction in the Tudor and early Stuart years⁶⁸ and in steps leading up to the English Civil War.⁶⁹ Parliament established that the Crown must accept the conditions accompanying the revenues to initiate wars.⁷⁰

66. U.S. CONST. art. I, § 9, cl. 7; see *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414 (1990).

67. FISHER, *supra* note 1, at 142–43.

68. The historic conflict in England between the Stuart monarchs and the House of Commons led to these clauses, which specifically established the legislative power to dictate the terms and conditions for spending revenue upon shaping the initiation of war. Gerhard Casper, *Appropriations of Power*, 13 U. ARK. LITTLE ROCK L. REV. 1, 3–5 (1990).

69. Meanwhile, the same era laid the foundation for the modest original intent of the Commander in Chief clause. In 1641, Parliament had brought on the English Civil War by conferring control of the standing army on the Earl of Essex, who was under Parliament's authority, rather than leaving it with Charles I. Francis L. Coolidge, Jr. & Joel David Sharrow, Note, *The War-Making Powers: The Intentions of the Framers in the Light of Parliamentary History*, 50 B.U. L. REV. (SPECIAL ISSUE) 5, 9 (1970).

70. Casper, *supra* note 68, at 3–5.

After the Restoration, Parliament did let the King gain back the right of command⁷¹—prefiguring the Commander in Chief clause. However, the King did so within the constraints of conditions on funding war.⁷² Soon thereafter,⁷³ the English Bill of Rights of 1689 memorialized the Commons' victory and anticipated the United States Constitution.⁷⁴ The 1689 measure provided, "[T]he raising or keeping a standing army within the kingdome in time of peace unlesse it be with consent of parlyament, is against law."⁷⁵

More significantly for this Article, the English Bill of Rights of 1689 worded its power of the military purse in a way that prefigured the "No Appropriations" clause. The English charter said that "levying money for or to the use of the Crowne by pretence of prerogative without grant of Parlyament *for longer time* or in other manner then the same is or shall be granted is illegal."⁷⁶ This language speaks potently about the origins of the Constitution's "No Appropriations" clause. The language realized a strong desire for means, through temporal limitation, to restrain the executive. First, of course, it speaks in the negative—taking unauthorized funding is illegal—but not spending authorized funding falls under other provisions, which may not pack the same wallop.

Second, though, the 1689 language carries a special message besides its operation in the negative. Strikingly, the clause's asymmetric drafting obliges the Crown to submit to Parliament as to funding wars "*for longr time*," although that drafting expressly chooses *not* to make the Crown submit to Parliament as to warring "*for shorter time*."⁷⁷ The House of Commons made express its fear of the Crown warring after the waning of the Commons' support—

71. *Id.*

72. Parliament maintained its purse control over troop deployments, for example, requiring by a 1678 act that the funds granted be used to disband the forces stationed in Flanders. GLENNON, *supra* note 1, at 287.

73. The expulsion of James II in favor of William III in the Glorious Revolution established that Parliament, not the King, would decide where, and on what terms, to unleash military force. Casper, *supra* note 68.

74. The United States Constitution has parallel provisions on raising armies derived from the English Bill of Rights of 1689, factoring in colonial experience that revived and newly intensified the issues of Tudor and Stuart times in England. Bernard Donohue & Marshall Smelser, *The Congressional Power to Raise Armies: The Constitutional and Ratifying Conventions, 1787-1788*, 33 REV. POL. 202 (1971).

75. Coolidge & Sharrow, *supra* note 69, at 9 (quoting Bill of Rights, 1 W. & M., sess. 2, c. 2 (1689) (U.K.)).

76. *Id.* at 8 (emphasis added) (quoting Bill of Rights, 1 W. & M., sess. 2, c. 2).

77. *Id.*

“for longr time.”⁷⁸ The Commons had no corresponding concern about the Crown warring too briefly or too frugally for the Commons’ taste.

That wording implements a great historic lesson in the rise of Anglo–American democracy. It did not arise from any desire for Parliament itself to produce temporal expansion of the war toward a “longr time.” That is, it did not arise for Parliament to prevent the executive from a moderate, “non-hawkish” conduct of war. It might be called the “ceiling” or “downward ratchet” message of the “No Appropriations” clause: the Commons may command that the King not take wars up above a ceiling, but he can conduct wars of shorter duration or less intensely, and they cannot prevent him from going in that direction.

2. *Constitutional Text*

An influential study of the Constitution’s war provisions identifies the universal fear of executive excess warring to gain glory. With that suspicion went a corresponding trust of the popularly based legislature to restrain the executive’s trip down glory road—without any such concern for some need to goad the executive into more warring.⁷⁹

One could describe Parliament, and the population it represented, as having a case of what has been termed for 40 years now as the “Vietnam War syndrome.” That is, an unhappy and oppressive experience with a King’s or President’s taste for making, continuing, and escalating war motivated each generation of legislators. The British Parliament of the 1600s and the Constitutional Convention of 1789 corresponded to what occurred after Vietnam in the United States Congress in the 1970s, namely, each time the legislators spoke for a population mortally skeptical and critical about the executive’s taste for more war.⁸⁰

The asymmetrically drafted English Bill of Rights had similar roots with the purely negative “No Appropriations” clause and the reform war-restraining legislation of the 1970s—both of which had the English Bill of Rights as their antecedent. Each of these strengthened the power of the legislature, by appropriation limits, to restrain the executive’s war making. Yet none of them gave any

78. *Id.*

79. William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695 (1997).

80. The legislatures and charter writers of the 1600s, 1789, and the 1970s, and the populations they spoke for, in no way coupled their extreme skepticism of war stepped up by executives with any intense desire that their legislatures ratchet up wars over the reluctance of executives.

precedent for a legislature stepping up a war. Colonial governments similarly used riders on war-funding legislation to control their governors⁸¹—not to step up wars.

Textually, and as a matter of original intent, Article I spells out Congress's appropriations power far more powerfully than most of Congress's other powers. The "Raise and Support Clause" provides "That the Congress shall have Power . . . To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years."⁸² Article I confers upon the Congress the power to "declare War."⁸³ Article I provides a number of other specific grants of authority regarding war and the military. These range from the clause empowering Congress to make "Rules" and "Regulation[s]"⁸⁴ for the military to Congress "organizing, arming, and disciplining, the Militia,"⁸⁵ today's state national guards.

On the other hand, Article II, Section 2, Clause 1, provides that "The President shall be Commander in Chief of the Army and Navy of the United States."⁸⁶ And, Article II, Section 1, Clause 1, begins, "The executive Power shall be vested in a President of the United States of America."⁸⁷

Because in England the monarchy at least had the power to declare war (albeit potentially subject to purse-string control), and under the Constitution only the Congress would have that power, Alexander Hamilton, in *The Federalist*, gave a famous explanation of the limited authority of the Commander in Chief.⁸⁸ The Framers had a modest view of the Commander in Chief clause.⁸⁹ Even the

81. BANKS & RAVEN-HANSEN, *supra* note 1, at 18–26.

82. U.S. CONST. art. I, § 8, cl. 12.

83. *Id.* cl. 11.

84. *Id.* cl. 14.

85. *Id.* cl. 16.

86. *Id.* art. II, § 2, cl. 1.

87. *Id.* § 1, cl. 1.

88. Hamilton remarked:

The president is to be commander in chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies, all which; by the constitution under consideration, would appertain to the legislature.

THE FEDERALIST NO. 69, at 357 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

89. At most, the Framers may have intended the Commander in Chief clause merely to avoid a repetition of the Continental Congress's excesses in

executive-minded Hamilton stressed Congress's powers would include "the raising and regulating of fleets and armies,"⁹⁰ which bespeaks how much the Framers meant for these provisions to have real significance for imposing controls on war. Nothing could have been further from the Framers' minds than for the powers created under these provisions to expand or to extend making war.

Moreover, Congressional purse-string power over the scope of military action⁹¹ became a crucial justification of the Constitution during the ratification debates.⁹² The anti-federalists complained bitterly that the national government could raise a standing army (especially with no limit on its size set in the Constitution) and also

going beyond mere close oversight of military efforts during the Revolutionary War and certain intrigues against George Washington's role as supreme commanding general. These intrigues ranged from establishing a Board of Review for the military and murmurings against Washington when the war was not going well, to rather extreme attempts by intriguers like General Horatio Gates to divide up command. JACK N. RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS* 121 (1979) (murmurings, Gates); *id.* at 196, 201, 203 (Board of War). Presidential proponents sometimes suggest that the Constitution intended to expand the President's power because of discontent with over-interference by the Continental Congress. Historians do not support this view. Moreover, there is virtually nothing in either the Federalist Papers or the ratification debates to support any notion of a desire for a powerful Commander in Chief freed of purse-string control by Congress. In the eyes of the Constitutional Convention, the problem was that the national government needed more power to raise funds and have a national military. For this, it was essential that the public be reassured that control of the purse strings would vest in the accountable Congress. Had the draft Constitution exalted the much less accountable President, who might turn out to have too much taste for war, it would have turned off public support on this issue.

90. THE FEDERALIST NO. 69, at 357.

91. In other contexts, executive supporters have argued that the Constitutional Convention reacted against the unrestrained state legislatures of the 1780s and took steps intended to curb Congress's powers. However, in this context, there seems no sign that the Convention had a mind to vest power in the President to supersede provisions limiting war spending. On the contrary, the specific language about spending no money from the treasury, except in consequence of appropriations made by law, came as a series of states put similar clauses in their own constitutions. And, the states did so because "at the same time states enhanced executive authority, they reinforced their legislatures' hold on the state fisc, principally by proscribing the expenditure of funds except as directed by legislative enactment." Richard D. Rosen, *Funding "Non-Traditional" Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 MIL. L. REV. 1, 63 (1998). For a discussion of the period from the American Revolution to the Constitution, see Casper, *supra* note 68, at 6–8.

92. JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1996).

that the national government held too much power over the state militias.⁹³ In an answer that won ratification for the Constitution, its defenders stressed heavily the division of national authority. This gave effective control to the Congress, not to the President, so standing armies and control of the militia could not produce excesses of monarchical or dictatorial power.⁹⁴

As Thomas Jefferson memorably wrote in commenting on the Constitutional Convention's work, "we have already given . . . one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay."⁹⁵ Using the prevalent idiom, Jefferson spoke of the President submitting to the Congress about letting loose "the Dog of War," not of Congress goading some cautious or prudent President to step up his wars.

Accordingly, the relatively limited central issues of the Commander in Chief clause came to three.⁹⁶ Two were command and campaigns. Hamilton said in *The Federalist* that the President's authority as Commander in Chief "would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy."⁹⁷ Then, in 1895 the Supreme Court said that the clause "vest[s] in the President the supreme command over all the military forces—such supreme and undivided command as would be necessary to the prosecution of a successful war."⁹⁸ Both these statements concerned the President's power to command.

The Supreme Court stated as to command and campaigning:

Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the

93. MAX M. EDLING, A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE 89–100 (2003).

94. Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander-in-Chief*, 80 VA. L. REV. 833, 895–96 (1994).

95. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 392, 397 (Julian P. Boyd ed., 1958).

96. The tension occurs between, on the one hand, "forces placed by law at his command," and, then, Congressional acts limiting war. Plainly, the Framers put their trust in Congress's using the power of the purse to limit the scope of war, without considering this an intrusion into actual command. Rosen, *supra* note 91, at 72–74.

97. THE FEDERALIST NO. 69, at 357 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

98. *United States v. Sweeny*, 157 U.S. 281, 284 (1895).

prosecution of war with vigor and success, except such as interferes with *the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief.*⁹⁹

Also, the Supreme Court said in 1850: "As commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy."¹⁰⁰ To "employ them" in order "to harass and conquer and subdue" amounts to the President's direction of campaigning.¹⁰¹

The third Commander in Chief power is disposition of forces. The Court commented: "As commander-in-chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy."¹⁰² The President's power to direct the movement of military force encompasses controlling their location in wartime and, to some extent, in peacetime. This presidential capability to base an air force in Uzbekistan across the border from the Afghanistan War, or, to some extent, to create new major national commitments by basing forces in the expanded NATO, shows the potency of the power of disposition of forces.

In these and other terse yet informative descriptions, the Supreme Court sets forth the central components of the Commander in Chief power in a war zone: command, disposition of forces, and campaigning.

B. To the Present

1. Up to 1945

The first century after the Constitution's ratification furnishes some examples of Congress using, or threatening to use, its power to put terms on military wartime appropriations,¹⁰³ usually to

99. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (emphasis added).

100. *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850).

101. *Id.*

102. *Id.*

103. Colonel Rosen makes a useful comparison, as he researched the history, between the congressional power in the 1790s and the congressional power two centuries later: "The position taken by the House of Representatives in April 1796 [about not being obliged to fund the Jay Treaty] has prevailed. This is exemplified today by Congress' continuing refusal to appropriate the money needed to satisfy dues assessed against the United States under the United

restrain the more forceful Presidents.¹⁰⁴ It is worth remembering how often during the 1800s a “hawkish” Congress pushed the President into war. Congress pushed President Madison into the War of 1812, and a similar Congress pushed President McKinley into the Spanish–American War. Although Congress had not convened when President Lincoln dealt with the onset of the Civil War, once it did convene, it showed great vigor in wanting to fight the war, including, sometimes, more of a taste for “hawkish” measures than Lincoln.

Various nuances of Congress’s power to push in “hawkish” directions come out in the undeclared limited naval war with France (sometimes called the “Quasi-War”) starting in 1798.¹⁰⁵ Commentators have traced how ways to step up that very limited naval war—for example, commencing to arm merchant ships or to make offensive reprisals—required action by Congress, not the President.¹⁰⁶ But, Congress was not using appropriation riders to push President Adams to rev up the war. Congress simply increased the authorized activity beyond what it had enacted earlier. President Adams and President Madison, as to the War of 1812, are both considered as less “hawkish” than their Congresses.¹⁰⁷ In later wars, such as the Mexican War,¹⁰⁸ Congress

Nations Charter, although the United States is bound by treaty to pay the dues.” Rosen, *supra* note 91, at 128 (footnote omitted).

104. For some miscellaneous examples, see HENKIN, *supra* note 1, at 389–90 n.61.

105. A complex pattern emerges from that “Quasi-War” with France in the 1790s. This produced several key Supreme Court opinions about Congress limiting the President’s power to conduct hostilities. Lobel, *supra* note 4, at 423–30. Congress decided on limited war, and determined what those limits would be, and the Supreme Court confirmed Congress’s action.

106. Lobel, *supra* note 20, at 1065–69. For more about the Quasi-War, see Michael P. Kelly, *Fixing the War Powers*, 141 MIL. L. REV. 83, 138–39 (1993).

107. Sidak, *supra* note 8.

108. The House twice passed a condition on an appropriation, well known as the “Wilmot Proviso,” to bar slavery in territory to be acquired from Mexico. Kristian D. Whitten, *The Fourteenth Amendment: Justice Bradley’s Twentieth Century Legacy*, 29 CUMB. L. REV. 143, 148 (1999). Although the final appropriation law omitted the proviso, the House passage of that proviso signaled that the free states would block slavery in the territories, while slave states were losing control of Congress. The proviso, and other House pronouncements about the Mexican War, are seen as starting the slave states toward doubting their future in Congress. HENKIN, *supra* note 1, at 381 n.33.

laid down markers about its setting policy for war zones that endure today as legislative high-water marks.¹⁰⁹

Then, the Civil War itself greatly demonstrated Congress's power to set policy in the war zone by legislation or by appropriation riders.¹¹⁰ Notably, Professor Lobel studied the enactment of the Second Confiscation Act, an enactment of high significance and the forerunner of the Emancipation Proclamation.¹¹¹ Congress legislated that the military would confiscate the property and free the slaves of rebels.¹¹² The statute expressed Congress's desire without delay to push further in freeing slaves. It thereby embittered the South and even potentially alienated the border states. President Lincoln opposed what he considered the ill timing of the measure.¹¹³

One of the most important debates on Congress stepping up war zone action against presidential opposition occurred on this bill.¹¹⁴ The debate distinguished between, on the one hand, Congress's ample power to make highly important policy in the war zone and, on the other hand, Congress's hesitancy to interfere with the President's command of battlefield campaigning. President Lincoln signed the final bill.

After the Civil War, by the use of riders on military appropriations, congressional influence predominated in Reconstruction through the directions given by such riders to the occupation armies that controlled the southern states.¹¹⁵ Even after

109. The provisions ultimately, just over a dozen years later, led the southern states to their choice of secession. G. Randal Hornaday, Note, *The Forgotten Empire: Pre-Civil War Southern Imperialism*, 36 CONN. L. REV. 225 (2003).

110. "The great volume of legislation required by the rebellion made this period prolific in riders." Alexander Johnston, *Riders*, in 3 CYCLOPAEDIA OF POLITICAL SCIENCE, POLITICAL ECONOMY, AND OF THE POLITICAL HISTORY OF THE UNITED STATES (John Joseph Lalor ed., 1899), available at <http://oll.libertyfund.org/title/971/63566>.

111. Lobel, *supra* note 4, at 431.

112. *Id.*

113. *Id.* at 437.

114. *Id.* at 433-36.

115. Johnston, *supra* note 110, goes through the whole period, rider by rider. The tone was set during the military occupation of the South immediately after the Civil War. It took the form of a full-scale clash between Congress and the President, with the Republican Congress setting policy through riders. The impeachment of President Andrew Johnson occurred for breaching the Tenure of Office Act, which limited the President's power to remove those under him in the chain of command. When President Johnson challenged this, Congress impeached him, and he barely escaped conviction by one vote. Although long afterward the Supreme Court made clear that the Tenure of Office Act had been unconstitutional, Johnson's impeachment sealed Congress's supremacy for years thereafter. Johnston recites a fascinating account of how, from 1876 on, the

the end of Reconstruction, Congress still had the upper hand effectively at least until the early twentieth century.¹¹⁶ President McKinley, as to the Spanish–American War, was another President considered less “hawkish” than his Congress.¹¹⁷ In that era, Congress, not the President, decided on war issues.

During President Theodore Roosevelt’s administration, Congress and the President wrestled for control of the expanded navy required by the country’s larger global role after the Spanish–American War. In one notable instance, Roosevelt’s attorney general conceded the constitutionality of one controversial appropriation condition.¹¹⁸ He opined sweepingly that “Congress is the sole judge of how the Army or Navy shall be raised and of what it shall be composed” and that Congress could condition validly “that such appropriation [for the marines] shall not be available unless the marine corps be employed in some designated [by Congress] way.”¹¹⁹ Still, this was not wartime.

Congress enacted one of the key war-related conditions of the twentieth century in 1940.¹²⁰ President Franklin Roosevelt had staked his ability to act, at a time when public opinion largely wished to avoid involvement in the European war, on a distinction between steps he would take for preparedness and on military intervention overseas he pledged to avoid. Roosevelt succeeded in getting the nation’s first peacetime draft through Congress by the bare margin of a single vote in the House.¹²¹ However, Roosevelt did so only by accepting a famous condition that no draftees be stationed outside of the Western Hemisphere or the territories and

fierce struggle over various riders for the army appropriation bills marked the end of Reconstruction. Briefer allusions to this occur in HENKIN, *supra* note 1, at 380 n.29, and Michael J. Gerhardt, *Ackermania: The Quest for a Common Law of Higher Lawmaking*, 40 WM. & MARY L. REV. 1731, 1763 (1999).

116. Until President Theodore Roosevelt, Congress, also using the Senate’s so-called treaty veto as well as congressional control of appropriations, set the bounds in military and overseas affairs. See generally Eli M. Nobleman, *Financial Aspects of Congressional Participation in Foreign Relations*, 289 ANNALS AM. ACAD. POL. & SOC. SCI. 145 (1951).

117. Sidak, *supra* note 8, at 86.

118. Congress conditioned appropriations on including marines in detachments aboard naval vessels. 27 Op. Att’y Gen. 259 (1909).

119. *Id.* at 260.

120. This particular condition was not an appropriation rider, but, rather, was upon the authorizing legislation for the draft. Technically, it could be dismissed for that reason as irrelevant to analysis of appropriation riders. History, however, singled out this momentous legislation to serve as the vehicle for a condition restraining the President from making a controversial use of his draftees. It is an illuminating precedent regardless of its not being an appropriation bill.

121. Tiefer, *supra* note 2, at 303 & n.98.

possessions of the United States.¹²² Roosevelt's acceptance of the condition deferred to Congress in its setting the limits on the use of the military.¹²³ Although Congress left disposition of forces in wartime to the Commander in Chief, disposition of forces in peacetime belonged to Congress.¹²⁴

2. Cold War and After

During the Cold War that followed World War II, Presidents Truman, Eisenhower, Kennedy, and Johnson demonstrated to a greater or lesser extent that they would take the military machine raised and funded by Congress and make their own unilateral decisions on commitments abroad and on use of force.¹²⁵ Although Congressional influence diminished vis-à-vis the President, Congress still had a substantial role in military affairs—over military spending in general, and spending on overseas forces and foreign military aid in particular.¹²⁶ Congressional provisions as to foreign military aid had great significance.¹²⁷ By a system of

122. Selective Service and Training Act of 1940, ch. 720, § 3(e), 54 Stat. 885, 886.

123. Charles J. Cooper, *After the Imperial Presidency*, 47 MD. L. REV. 84, 97 n.44 (1987). Former Assistant Attorney General Cooper, in a historically learned essay, notes that President Roosevelt sent troops to Greenland and Iceland despite the latter being outside the Western Hemisphere. *Id.* This was indeed a violation of the letter of the condition, but was not seen at the time as a serious violation of its spirit, as the Iceland occupation kept near the balance of defensive preparations rather than interventionist action. *See generally* Tiefer, *supra* note 2, at 303 (describing the politics surrounding the provision).

124. That is, in peacetime the President could move his forces, such as from domestic to foreign bases, without an express congressional decision to do so. However, Congress itself might enact appropriation riders (or other legislation) about such movement of troops, which, despite protest from the President, had a fair chance of getting implemented.

125. The Korean War, the Cuban Missile Crisis, and the commitments that evolved into the Vietnam War were primarily presidential rather than congressional decisions. Congress did not effectively curb presidential war initiation by resort to any of its powers, including appropriations conditions, until the 1970s.

126. For discussions of the significance of military aid, see, for example, Elizabeth Powers, *Greed, Guns and Grist: U.S. Military Assistance and Arms Transfers to Developing Countries*, 84 N.D. L. REV. 383 (2008); Stephen J. Wiese, Note, *U.S. Foreign Aid Reform: Changing Institutional Problems in Order to Meet Modern Day Needs*, 8 WASH. U. GLOB. STUD. L. REV. 747 (2009).

127. To take one example on a prominent issue, Congress attached provisions against settlements in the West Bank to authorizations of military aid (cash or loan guarantees) to Israel, and disputes brought suspensions of substantial aid. Zaha Hassan, *Building Walls and Burning Bridges: Legal Obligations of the United States with Respect to Israel's Construction of the*

annual defense authorizations drafted by Congress's armed services committees, Congress arranged for an added measure of oversight over military affairs.¹²⁸ The extreme presidential asserted power to impound military spending did manifest itself occasionally, but so rarely as not to be convincing as to the existence of a continuing substantial power. During this time, President Truman, as to the Korean War, was yet another President considered less "hawkish" at times than powerful elements in his Congresses.¹²⁹

After about 30 years of this system of largely executive control, and following on the exceptionally controversial later years of the Vietnam War, a congressional backlash started against the "Imperial Presidency."¹³⁰ Congress demonstrated power to restrain executive-initiated war in many respects, starting with cut-offs of funding for the Indochina conflict,¹³¹ and including the War Powers Resolution¹³² and curbing of so-called war-making treaties.¹³³ In the 1980s, the Boland Amendments and the ensuing Iran-Contra scandal dramatically demonstrated both Congress's capacity to limit the President by appropriation conditions and the folly of the President seeking to evade those limits.¹³⁴

Wall of Separation in Occupied Palestinian Territory, 13 WILLAMETTE J. INT'L L. & DISP. RESOL. 197, 235-36 (2005).

128. BANKS & RAVEN-HANSEN, *supra* note 1, at 48; BARRY M. BLECHMAN, THE POLITICS OF NATIONAL SECURITY: CONGRESS AND U.S. DEFENSE POLICY 30-31 (1990); Louis Fisher, *Annual Authorizations: Durable Roadblocks to Biennial Budgeting*, PUB. BUDGETING & FIN., Mar. 1983, at 23.

129. These were the elements sympathetic to General Douglas MacArthur's strategy. See *infra* Part IV.B.2 (discussing the congressional committee that reviewed the issues).

130. ARTHUR SCHLESINGER, THE IMPERIAL PRESIDENCY (1974).

131. The references to "Vietnam War" and "Indochina conflict" in this Article refer to the same war, with slight nuances as to the geography involved.

132. GLENNON, *supra* note 1, at 87-122.

133. *Id.* at 192-228.

134. Sharp policy disputes often got resolved by votes on appropriation riders. For example, the next area for potential covert armed intervention abroad after the fall of Vietnam turned out to be Angola. Congress enacted the Clark Amendment—a condition on appropriations—to preclude such intervention in Angola. International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, § 404, 90 Stat. 729, 757-58, *amended by* International Security and Development Cooperation Act of 1980, Pub. L. No. 96-533, § 118(a)-(d), 94 Stat. 3131, 3141. For a detailed account of the provision's passage, particularly its roots in the Ford administration's diminished credibility about such interventions, see THOMAS M. FRANCK & EDWARD WEISBAND, FOREIGN POLICY BY CONGRESS 51-55 (1979).

At the start of the 1990s, President George H.W. Bush expressed impressive adherence to constitutional balance.¹³⁵ Namely, President Bush did not seek to start the Gulf War just by assertions of a Commander in Chief power, but rather sought straightforwardly from Congress, and (just barely) obtained from it, Congress's own authorization for the war.¹³⁶ However, the senior Bush did continue and expand President Reagan's use of a hitherto insignificant gesture, the "signing statement."¹³⁷ President Bush used this extensively for sparring with Congress. Among other types of provisions, he used signing statements to oppose defense-spending provisions that "might be construed to impinge on the President's authority as Commander in Chief and as the head of the executive branch."¹³⁸

The Republican Congress in 1994–2000 took some illuminating actions. It waged a struggle against the President's placement of troops under a United Nations (U.N.) flag.¹³⁹ In that respect, President Clinton might be considered less "hawkish" on some issues than his Congress. In 1999, the Congressional debate on whether to authorize President Clinton's air campaign against Yugoslavia included consideration of an important limitation on campaigning by barring the use of ground forces.¹⁴⁰

Ultimately, in the 2000s, the administration of President George W. Bush took a large number of extreme positions on the executive's constitutional powers relating to war, including the global war on terror, commissions, detention and torture, eavesdropping, and signing statements. The most striking defeats for President Bush included the Supreme Court's decision on detention issues in the cases of *Hamdan*, *Rasul*, and *Boumediene*.¹⁴¹ Toward the end of President Bush's tenure,

135. The Gulf War occasioned certain appropriation issues. Tens of billions of dollars to offset the cost of the war came as contributions, principally from Saudi Arabia. Initially, the Bush administration tried to handle this outside of congressional control. However, Congress, led by Senator Byrd, got the Bush administration to treat the funds like Congressional appropriations in terms of congressional control. FISHER, *supra* note 1, at 169.

136. TIEFER, THE SEMI-SOVEREIGN PRESIDENCY, *supra* note 37, at 129–36.

137. *Id.* at 31–59. A signing statement is a message from the President accompanying his signing a bill into law, which purports to have significance akin to a veto message.

138. Presidential Statement on Signing the National Defense Authorization Act for Fiscal Year 1991, 1 PUB. PAPERS 1556, 1557 (Nov. 5, 1990).

139. See Hartzman, *supra* note 39; Tiefer, *supra* note 2, at 321–22.

140. Gerald G. Howard, Comment, *Combat in Kosovo: Ignoring the War Powers Resolution*, 38 Hous. L. Rev. 261 (2001).

141. See *Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Rasul v. Bush*, 542 U.S. 466 (2004).

Congress renewed the defense of its war powers. Notably, the House Judiciary Committee held a scholarly hearing in 2007 on Congress's powers to end a war.¹⁴²

A demonstration of Congress's power to enact limitations on defense authorizations and appropriations came in the McCain amendment forbidding torture.¹⁴³ The amendment's dramatic legislative history showed the capacity of a Congress—even though of the same party as the President—to insist on reaching one of the great questions of national security policy (and human rights) and to resolve it by the venerable method of the defense spending limitation.¹⁴⁴

Finally, the Obama administration brought further reactions to its predecessor. However, as it moved forward with its own national security agenda, it drew its own reactions. An early instance came in Fall 2009, as consideration took place of General McChrystal's proposals to commit large numbers of new troops to Afghanistan. Republican congressional leaders called for McChrystal to come to Congress and testify during the Obama administration's consideration of his proposal.¹⁴⁵ This may suggest that at some point in the tenure of President Obama, he, too, will be considered a President less "hawkish" in some respects than some elements of his Congresses—like Presidents Adams, Madison, Lincoln, McKinley, Truman, and Clinton, among others, before him.

III. CENTRAL ISSUES FOR THE COMMANDER IN CHIEF AND BASIC ANALYSIS

A. *Basic Analysis*

This constitutional history suggests an appropriate mechanism or formula for considering constitutional challenges to provisions for stepping up a war. That history suggests that Congress may use certain kinds of appropriation provisions to impact a war, but that the strongest case by far concerns limitation amendments. The

142. The author's previous article received several mentions and citations. See CONG. REC. S1475–78 (daily ed. Feb. 1, 2007) (statement of Sen. Arlen Specter); JENNIFER K. ELSEA ET AL., CONG. RESEARCH SERV., CONGRESSIONAL AUTHORITY TO LIMIT U.S. MILITARY OPERATIONS IN IRAQ, at CRS-2 n.4 (2008).

143. KOH, *supra* note 37.

144. David Abramowitz, *Taking the Bull by the Horns: Congress and International Humanitarian Law*, 38 GEO. WASH. INT'L L. REV. 599, 610–13 (2006).

145. Tyson, *supra* note 9.

formula treats less deferentially the constitutionality of provisions to step up a war.

This distinction has its roots in two phenomena just treated. The constitutional text and original intent accord enormous power to Congress through the “No Appropriations” clause, but only as used to limit or to constrain military activity. The clause does not empower Congress to push for more military activity. And, the survey of two centuries of United States experience shows that Congress has far more often asserted and vindicated powers to limit or constrain a war than to step up a war. Stepping up is not absolutely and totally unprecedented, but, especially in terms of provisions intruding on the core of the Commander in Chief’s central concerns in the war zone, it does not have a lot of history on its side.

The mechanism or formula resembles somewhat Justice Jackson’s three-zone analysis in *Youngstown*.¹⁴⁶ In one category are the provisions that collide with one of the central issues for the Commander in Chief—command, disposition of forces, or campaigning. Suppose the congressional provision as to a military activity concerns that central issue’s core. As a result, a provision to step up the war starts with a presumption against constitutionality.

Still dealing with one of the central issues, but outside of its core, a provision to step up a war would have something less than a presumption against it—rather, a doubt about its constitutionality. For example, Congress might enact provisions for the military to move more forces into countries bordering Afghanistan but that are not part of the conflict, like Uzbekistan.¹⁴⁷ Assume the Commander in Chief disagrees with this disposition of forces. He does not call it an outright interference with the war, but he considers it excessive and unduly expensive.¹⁴⁸ Congress nevertheless passes it to step up the threat of military action on the enemy in Afghanistan.

Such a provision would come with doubt of some weight about constitutionality—less than a presumption against it, but still somewhat. The provision deals with one of the central issues—disposition of forces—and does so in time of war. However, the

146. See *supra* note 59.

147. For the significance of Uzbekistan to the United States, see RASHID, *supra* note 13, at 161–65.

148. Assume that the President does not maintain that a disposition of forces in this way would drain strength from the war zone itself, which raises a different question. Rather, Congress provides additional funding and arranges for compensating expansion of U.S. forces.

provision is outside the core. It does not apply in the zone of combat but rather to other neighboring countries.

At the other extreme, for a shared issue, a provision to step up a war may start without a presumption of unconstitutionality or even a strong doubt of constitutionality. Perhaps, as a provision to step up a war, it would just deserve a searching consideration. On the one hand, such a provision draws on an Article I congressional power and a history of congressional action. On the other, it is still not a provision to limit the war, and hence it warrants some suspicion.

Congress might enact a provision for opium poppy eradication. Also, Congress would appropriate funds to pay contracting firms to perform this task. Oversight would come from the civilian agency that has overseen poppy eradication and other anti-drug efforts in the past, the State Department's Bureau of International Narcotics and Law Enforcement Affairs. Thus, it would primarily be a task for civilians, rather than for the military in its campaigns.

This is a shared issue: it implicates Congress's Article I powers, but it does not collide directly with the President's role in command, disposition of troops, or campaigning. The provision aims to step up the war, not to limit or constrain it. Hence it starts with a clean slate or, at most, a plain doubt—not a presumption or a material doubt, just a doubt. That does not completely resolve the issue. Rather, the specifics of the issue receive scrutiny. After all, in a general sense, the provision takes a more aggressive, albeit controversial, stance toward an outlawed practice harmful to the world and financially valuable to the Taliban.¹⁴⁹ The constitutional analyst looks back for historical examples and constitutional support for Congress ordering this.¹⁵⁰

Overall, this categorizing mechanism or formula is suggestive rather than mandatory. Other ways could draw legitimately on the previous constitutional history. The goal remains weighing the balance of constitutional powers, and the use of important historical precedents, in ways that will present and apply as much factually attuned nuance as possible. Others might imagine a constitutional analysis that employs more abstract notions or emphasizes whatever bits and pieces of court opinions have some relevance. This mechanism mobilizes the history on the basis that

149. As throughout, the author takes no position on policy issues. Hypothetical examples are posed only to illustrate the constitutional analysis. And, of course, the author does not speak for his Commission or any other member thereof.

150. Lobel, *supra* note 20. For an in-depth treatment of this hypothetical, see *infra* Part IV.

the constitutional lines arise out of historical accretion of the interaction of the political branches in each particular focused subject area.

B. Specifics of Commander in Chief Issues

To distill this constitutional history into some functional methods of analysis requires, first, an establishment of the central Commander in Chief issues, and their cores, before applying in a later section, to an analysis of two provisions. One of these two provisions would charter an intrusive committee to influence command; another would direct land action against sanctuaries over the border in Pakistan. Looking at the relation of issues to the Commander in Chief power, one group of issues is central: command, disposition of forces, and campaigning. For this central group, in its core the President can make a stronger case for asserting the Commander in Chief clause against legislative intrusion.

A number of Supreme Court opinions, among other sources of law, have summed up the Commander in Chief power in terms matching the central issues. For each of these, a hypothetical can demonstrate the existence of a core in which, presumptively, Congress may not constitutionally direct the President. However, historically, particular examples and doctrinal treatments show that Congress can enact valid legislation even as to these central areas in their noncore or ambiguous aspects.

1. Command

Congress must respect, at the core of the central issue of command,¹⁵¹ the “superintendence principle,”¹⁵² namely, as Justice Jackson put it, that the Commander in Chief clause “undoubtedly puts the Nation’s armed forces under presidential command.”¹⁵³ So, for example, in the Afghanistan war, the “hawkish” congressional opposition might want to find the most kindred “hawkish” high military figure, say, the head of the Central Command. Congress might desire to enact a provision to make him independent of the chain of command, and thereby to intensify the war. Such a provision would amount to a thrust by Congress

151. The Tenure of Office Act illustrates Congress attempting to tamper with this central issue. See *supra* note 115.

152. Barron & Lederman, *A Constitutional History*, *supra* note 4, at 1102–05.

153. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring).

directly at the very core of this central concern of the Commander in Chief.

As to this central issue but outside its core, Congress has much to say. Congress has legislated the overall structure of the military establishment from George Washington's presidency to today.¹⁵⁴ In the twentieth century, after World War II, Congress finally faced the problem that no military figure coordinated the Army and the Navy. This had become an intolerable problem when the land and sea forces did not coordinate intelligence, leading to the awful surprise of Pearl Harbor, and did not always effectively coordinate their land-sea operations.¹⁵⁵

So, Congress enacted the National Security Act of 1947 and the National Security Act Amendments of 1949, creating the Department of Defense and the Joint Chiefs of Staff, respectively.¹⁵⁶ Of note,¹⁵⁷ Congress provided that the Secretary of Defense, not the President, gave or transmitted commands to the military commanders, a critical aspect of the chain of command.¹⁵⁸ A decade later, Congress enacted the Department of Defense Reorganization Act of 1958, introducing the concept of unified and specified combatant commands that would combine forces from the different services.¹⁵⁹ Finally, in 1986, Congress enacted the Goldwater-Nichols Act, creating joint commands.¹⁶⁰

In the 2010s, the United States fights two wars: a war in Afghanistan and a (diminishing role in) a war in Iraq. For both wars, American forces in-theatre fight under a single unified Central Command coordinating all the services, as Congress prescribed by Goldwater-Nichols.¹⁶¹ As Congress intended, Central Command means the in-theatre fighting forces have achieved vastly improved unity and coordination of action. Presidents could not have achieved this with the pre-statutory arrangement of independent military services. In other words, Congress has conducted 60 years of relatively successful statutory

154. It has altered statutorily the top army command. In the 1800s, this varied between the general with the most seniority and the general chosen by the President. Barron & Lederman, *A Constitutional History*, *supra* note 4, at 957-61.

155. Paul M. Murphy & William M. Koenig, *Whither Goldwater-Nichols?*, 43 NAVAL L. REV. 183, 184 (1996).

156. *Id.* at 185-86.

157. Hartzman, *supra* note 39; Lobel, *supra* note 4, at 412 n.65.

158. Lobel, *supra* note 4, at 412 n.65.

159. *Id.* at 187.

160. *Id.* at 187-93.

161. Congress's strictures in this regard culminated in the Goldwater-Nichols Department of Defense Reorganization Act of 1986, undoubtedly the boldest command reorganizing of the era. Pub. L. No. 99-433, 100 Stat. 992; *see* Murphy & Koenig, *supra* note 155.

structuring of the concept of a central command, without constitutional resistance by the executive. The time for arguing that Congress does not have the power to do so has long passed.

By and large, Presidents must put up with some degree of intrusive oversight treatment. Another issue concerning command may arise from congressional oversight of a war. Faced with a highly intrusive congressional investigation of the conduct of a war, the President might argue that such oversight interferes with his commanders' obedience to commands from him.

Regarding command, the tension about what raises constitutional doubt shows up in one of the major constitutional clashes of the Clinton administration. Congress sought to limit,¹⁶² and President Clinton stood by his power of,¹⁶³ having American troops serve under a U.N. commander.¹⁶⁴ A Justice Department opinion of much interest designated as unconstitutional a law barring the President from making such a U.N. command arrangement.¹⁶⁵

Observers recognized important counterarguments to the Justice Department position on a constitutionally mandated option for the President to have the choice of a U.N. command. The Justice Department "opinion did not cite, let alone discuss, *Youngstown*."¹⁶⁶ Addressing that key opinion would have required dealing with how *Youngstown* puts the President's powers at their lowest ebb, where the President refuses to obey an express statute

162. The Republican Congress tapped into its political base's dislike for the United Nations. That base's blame of AWOL United Nations forces for the trapping of American soldiers during the Somalia intervention was portrayed by the movie *Black Hawk Down*.

163. In practice, President Clinton effectively conceded the practical issue, for purposes of gaining public acceptance. He emphasized that he would put American troops for the Bosnia deployment under an American general and a NATO structure, not under the objected-to U.N. command. The word "NATO" appeared 10 times in President Clinton's address about the commitment (not counting the additional multiple mentions of "European allies"), while the words "United Nations" appeared only once to make a contrast. The only mention of the U.N. was that "American troops will take their orders from the American general who commands NATO. . . . [U]nlike the U.N. forces, they will have the authority to respond immediately." *If We're Not There, NATO Will Not Be . . . Peace Will Collapse*, WASH. POST, Nov. 28, 1995, at A8 (text of President's address). President Clinton twice noted the command structure for American forces: that they were "under the command of an American general" and "will take their orders from the American general." *Id.*

164. Tiefer, *supra* note 2, at 321–22.

165. Placing of United States Armed Forces Under United Nations Operational or Tactical Control, 20 Op. O.L.C. 182 (1996).

166. Barron & Lederman, *A Constitutional History*, *supra* note 4, at 1091–92.

against U.N. command. A learned opinion by the Bar Association of the City of New York extensively canvassed the law and history and came to a more neutral outcome than the Justice Department.¹⁶⁷ Yet, in any event, Congress took only a restraining or limiting position. Consistent with the negative "No Appropriations" clause, it told Presidents that they cannot put forces under U.N. command. Congress did not purport to tell Presidents affirmatively, out of all the possible command arrangements, that they must now implement one particular arrangement for one particular conflict.

2. *Disposition of Forces*

A second central issue consists of the disposition of forces in the field. In the Afghanistan war, taking the extreme example, Congress cannot direct the President to shift additional forces from northern to southern Afghanistan, even though a congressional opposition might want to make him do that to intensify the war further. However, even as to this central issue for the Commander in Chief of the disposition of forces, Congress has had much to say about a range of noncore issues. It has spoken often on the disposition of forces in peacetime and on the eve of war¹⁶⁸ and has cut off funds for the military to go into countries neighboring a war zone.¹⁶⁹

For example, in 1940 President Franklin Roosevelt staked his ability to act in the European war, resolving one of the most important modern constitutional disputes about the disposition of forces.¹⁷⁰ Roosevelt succeeded in getting the nation's first peacetime draft through Congress by the bare margin of a single

167. Hartzman, *supra* note 39 (concluding that although Congress would act most unwisely, nevertheless, Congress would not act unconstitutionally in enacting such a provision because of the concurrent nature of Congress's powers to make rules for the military).

168. Jane E. Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 GEO. L.J. 597, 635-36 (1993) (discussing the "Great Debate" in the Senate over deploying troops to Europe in the creation of NATO).

169. Department of Defense Appropriation Act of 1970, Pub. L. No. 91-171, § 3(e), 83 Stat. 469, 487 (1969) (cutting off funds for land operations in Laos and Cambodia, the neighbors of Vietnam).

170. Roosevelt distinguished between preparedness, with broad public support, and military intervention in the European war, opposed by major parts of the public. Republicans, and kindred Democrats, with an isolationist bent looked for legislative ways not to have the naked stance of opposing preparedness, but rather to support legislative action to keep America out of the war. Tiefer, *supra* note 2, at 303.

vote in the House. He did so only by accepting a famous condition of the opposition in Congress: that no draftees be stationed outside of the Western Hemisphere or the United States.¹⁷¹

In the spring of 1941, Roosevelt determined to send U.S. troops to Iceland, outside the Western Hemisphere.¹⁷² However, he obeyed the letter of the congressional provision about deployments.¹⁷³ This has continued to today as an important precedent about what Congress may do vis-à-vis the Commander in Chief.

3. *Military Campaigning*

A third central issue consists of military campaigning. As the Afghanistan war goes forward, a “hawkish” congressional opposition might want to step up the war’s intensity. As a blunt approach, they might desire to enact a mandate for a full-fledged war throughout the country on a counter-insurgency mission against even local, dispersed, low-level Taliban activity. But, apart from simply making more or different resources available, a Congress attempting to dictate the military campaign mission in particular campaigns would intrude on the very core of this central issue.

However, Congress has much to say about campaigning outside that core of the issue. An example consists of President Clinton’s 1999 campaign against Serbia, to stop its occupation of Kosovo.¹⁷⁴ Congress considered authorizing legislation for a bombing campaign,¹⁷⁵ much as it had for the earlier dispatching of

171. The “United States” included its territory and possessions, so stationing troops in the Philippines was allowed. *See* Selective Service and Training Act of 1940, ch. 720, § 3(e), 54 Stat. 885, 886.

172. Cooper, *supra* note 123 (citing SCHLESINGER, *supra* note 130). He did this as part of an overall effort in which the U.S. took over from Britain parts of the Battle of the Atlantic with Germany. His action was obviously at odds with the spirit of the proviso to keep draftees within the Western Hemisphere and out of the war zone.

173. He deployed only half the number of troops he wanted, and these consisted of a mix of Marines (all volunteers, of course, not draftees) and statutorily eligible Army forces (those who were volunteers, not draftees). *See* Barron & Lederman, *A Constitutional History*, *supra* note 4, at 1049–50.

174. Geoffrey S. Corn, *Clinton, Kosovo, and the Final Destruction of the War Powers Resolution*, 42 WM. & MARY L. REV. 1149 (2001) (discussing the Kosovo bombing campaigns and how they reflect the breakdown of the War Powers Resolution in relation to such controversies).

175. Louis Fisher, *Presidential Independence and the Power of the Purse*, 3 U.C. DAVIS J. INT’L L. & POL’Y 107, 129–37 (1997).

peacekeeping troops to Bosnia after the Dayton Accords.¹⁷⁶ As in the earlier period, the congressional action had considerable significance for war powers.¹⁷⁷

The Kosovo debate notably featured amendments to go beyond simply authorizing an air campaign and to expressly forbid supporting it by ground troops. By most definitions this would constrain the type or scope of campaigning.¹⁷⁸ The debates over the scope of campaigning as to Kosovo echoed longstanding themes in constitutional history. Chief Justice John Marshall's Supreme Court expounded how Congress could and did decide the type of naval campaign authorized in the limited Quasi-War with France of the 1790s. As the Court explained, nations could wage either "perfect" (unlimited) or "imperfect" (limited) wars, and Congress made that decision in authorizing war.¹⁷⁹ Moreover, in the course of the war, Congress could, and did, change the authorized type of naval campaign by changing the statutory authorization.¹⁸⁰

This kind of issue, more or less, even arose three days after the 9/11 terrorist attack. The carefully worded drafting of that September 14, 2001 congressional resolution for the "Authorization of Military Force"¹⁸¹ clearly reflects a compromise in those three days on many points, notably between President Bush's sweepingly empowering initial proposal and the narrower focus of the leadership of the then-Democratic Senate,¹⁸² particularly by not authorizing hostilities with Iraq.¹⁸³

176. This was notwithstanding its failure to produce a bicameral enactment. See Tiefer, *War Decisions*, *supra* note 40, at 16 (describing the *Chadha* requirements of bicameralism and presentment for congressional actions).

177. *Id.*

178. *Id.* Moreover, earlier in the Clinton administration, in response to the ill-fated American intervention in Somalia, Congress adopted the Byrd and Kempthorne Amendments, which required American troops to leave that country by a 1994 deadline and not to return unless Congress approved. For the background of the Byrd and Kempthorne Amendments, see Rosen, *supra* note 91, at 11 n.53.

179. Lobel, *supra* note 4, at 423-30 (discussing the Supreme Court's decision in *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800)).

180. *Id.*

181. Authorization for Use of Military Force, Pub L. No. 107-140, 115 Stat. 224 (2001); see Bradley & Goldsmith, *supra* note 44.

182. The more cautiously drafted compromise version adopted by Congress no longer authorized hostilities with countries having no share in 9/11. TIEFER, *supra* note 42, at 258-59; Abramowitz, *supra* note 44, at 74.

183. The loose original White House proposal was printed in the Congressional Record by Senator Robert Byrd (D-W. Va.). 147 CONG. REC. S9950-52 (daily ed. Oct. 1, 2001).

In sum, constitutional arguments and historic examples present three central issues of Presidential war powers and congressional action. This sets the stage for analyzing concrete provisions that a “hawkish” Congress might enact.

IV. ANALYSIS: EXAMPLES OF WHAT A “HAWKISH” CONGRESS MIGHT DO

This Article now examines a series of fuller analyses of specific hypothetical provisions by which a “hawkish” Congress could push the President to step up the Afghanistan war. Two of these, in this Part, collide with two of the executive’s central issues: a law directing the President to attack border sanctuaries, which collides with the core of the campaigning power; and an intrusive congressional oversight committee focused on war decisions, which collides with the periphery of the power of command. Then this Part discusses issues regarding a war zone policy of poppy eradication, and regarding the assertion of presidential power to impound—to refuse to spend—war appropriations.

*A. The Power of Campaigning, Viewed Through the Example of Directing Presidents to Attack Border “Sanctuaries”*¹⁸⁴

For many years, the Afghanistan Taliban have taken advantage of the border shared with Pakistan as a relatively safe haven or refuge. In 2001–2002, American forces allied with Afghan elements overthrew the Taliban government of Afghanistan and forced the Taliban out of the country. At that time, to escape, the leadership of both the Afghanistan Taliban and Al Qaeda fled across the border into Pakistan. Since then, the Taliban have used their Pakistan refuge as a base to build up strength and to support a move back into Afghanistan.¹⁸⁵

Moreover, the Taliban continue¹⁸⁶ to derive vital support from their relatively secure safe havens or refuges and allied groups over

184. For further discussion on this topic, see, for example, JONES, *supra* note 13; RASHID, *supra* note 13.

185. JONES, *supra* note 13, at 95–108.

186. Even in the years from 2005 on, the Taliban top leadership remained in those areas of Pakistan near the border and under minimal control by the government in Karachi. These areas are the Federally Administered Tribal Areas and the Northwest Frontier Provinces. In these areas of Pakistan, the central government has little control. Effectively, local elements share control of the region, particularly the Pakistani Taliban, who have affinities with the Afghani Taliban.

the border.¹⁸⁷ The United States sufficiently respects the border, and whatever other tactics the Taliban uses, to not conduct a substantial incursion or occupation with regular army forces, nor to treat the area as a target for regular Air Force bombing campaigns like Serbia in 1999.¹⁸⁸

How to think of such an incursion is a policy debate, not a legal one, and this Article does not address the policy issue at all. Rather, this Article posits a plausible hypothetical; someday the changing relationships among Pakistan, the Taliban, and the United States may make an incursion not entirely unthinkable, although still highly debatable. Meanwhile, assume that elections of the 2010s have strengthened in Congress a coalition of “hawkish” Republicans and Democrats. Now Congress contrasts with a “less hawkish” President, who for various policy considerations refrains from various ways of stepping up the war.

The congressional “hawks” find some ways of stepping up the war supported by responsible military and political figures (albeit not by the presidential administration). Moreover, their political base supports them on some of these ways of stepping up the war.¹⁸⁹ Part of the debate—not necessarily as major as the policy issues—would include Congress’s dispute with the President about constitutional justifications, so as to blunt the charge that Congress transgresses the Commander in Chief’s prerogatives. Certain conditions would create the possibility of a proposal for a cross-border incursion to move forward toward enactment, in the face of presidential opposition.¹⁹⁰

187. According to public sources, the United States has used pilotless drones to target Al Qaeda and Taliban leadership in the border areas. Also, the United States obtained some limited cooperation from the government of Pakistan, which aided in the effort against Al Qaeda leadership.

188. JONES, *supra* note 13, at 100–01.

189. Although in this instance the congressional “hawks” push the action, the political situation has some resemblances to when “less hawkish” congressional groups have pushed for provisions that step down a war. These include the Vietnam cut-offs, the Boland Amendments, and the congressional effort in 2007–2008 to enact an Iraq drawdown.

190. As an example of such conditions, suppose that the Pakistani government and public indicate, for diverse reasons, that they would no longer take as dim a view of cross-border incursions in particular areas where the Afghanistan Taliban and its allies have largely taken over and inflicted harm on Pakistan. And, suppose some influential elements of the American military believe that a cross-border incursion would deeply impair the Taliban. For a discussion on the strength of the Pakistani Taliban in the border regions, see generally RASHID, *supra* note 13, at 402–08.

To raise the question squarely, assume Congress rejects all presidential compromises that would dilute the provision.¹⁹¹ Instead, Congress enacts its provision undiluted, aboard the annual defense authorization or appropriation.¹⁹² The provision steps up the war by making mandatory appropriations available. And, it further prescribes that the military “shall” undertake an incursion into Taliban border sanctuaries in Pakistan. To show deference to the Commander in Chief, the provision leaves to him the decisions as to the incursion about who, what, when, how, and how long—almost everything except “whether.”

1. The Cambodia and Laos Analogy

Such a provision to step up the war, by mandating a cross-border incursion, implicates one of the central issues for the Commander in Chief, his control over campaigning. Such a provision implicates that issue at its core. It does not dilute the impact by, for example, laying down some general rules for cross-border operations, the way the Geneva Conventions lay down some general rules for detention or the Goldwater–Nichols Act lays down general rules for unified commands.¹⁹³ This provision lays down no general rule at all but dictates about campaigning in this specific location in this specific theatre of war at this specific time. And, it mandates use of both types of military arms—ground and air forces alike.

A search for a historical analogy leads straight to President Nixon’s incursions into Laos and Cambodia. These occurred without congressional authorization (apart from the general

191. Normally, Presidents seek with some success to deflect congressional attempts to direct their war-fighting activities. In this case, the President might seek to preempt legislation of an unwanted kind by allowing a congressional provision for a cross-border operation in the form of a “sense-of-the-Congress provision.” Or, the President might reduce his opposition by proposing a provision providing that the President could defer operations if he certified that to do so would be against the national interest. Finally, the President might step up the effort in the border areas, without going as far as an incursion. In a classic example, President Kennedy defused a controversy over a mandatory appropriation for a plane procurement he had threatened to impound, by saying he would accept the appropriation so long as it was discretionary rather than mandatory. See Stanton, *supra* note 34, at 13.

192. For the system of annual authorizations and appropriations, see BANKS & RAVEN-HANSEN, *supra* note 1.

193. Another form of dilution is simply to not go up to the limit of what a court has previously struck down. See Mario L. Barnes & F. Greg Bowman, *Entering Unprecedented Terrain: Charting a Method to Reduce Madness in Post-9/11 Power and Rights Conflicts*, 62 U. MIAMI L. REV. 365, 411–12 (2008).

authority cited for the Vietnam War, namely, the Tonkin Gulf Resolution of 1964).¹⁹⁴ Mainly, like the Afghanistan hypothetical, and like examples from wars even further back,¹⁹⁵ those supporting the incursions into Cambodia and Laos appealed to the public by a popular argument: we should not let the enemy kill American and allied soldiers by operating out of "sanctuaries."¹⁹⁶

Then-Assistant Attorney General William H. Rehnquist—later Chief Justice—and Secretary of State William Rogers provided the legal justification for President Nixon's Cambodia incursion without specific congressional authorization.¹⁹⁷ Rehnquist drew on past discussions of the Commander in Chief power, in general, and his responsibility for military campaigns, in particular. Congress responded by cutting off funds for such incursions. These cut-off provisions dramatized Congress's decision in the 1970s to restore its powers in the national security context.¹⁹⁸

Returning to the hypothetical, the Commander in Chief does not seek to widen the Afghanistan war. He protests Congress's intrusion by so much more than a mere negative cut-off appropriation limitation. He protests Congress telling him whether to campaign, in many aspects: whether to spend money and to deploy forces, rather than save the money and not deploy the forces; whether to put his forces into a region or to keep them out; and whether to take on the

194. For a discussion of the Tonkin Gulf Resolution, see Ely, *The American War in Indochina, Part I*, *supra* note 36, at 884–97.

195. During the Korean War, proponents of a more vigorous military effort complained that the Communist side's military benefitted from "sanctuaries" in Manchuria, and that their aircraft used bases across the Korean border as "sanctuaries." MacArthur discussed this view in his famous speech before a joint session of Congress: "The tragedy of Korea is further heightened by the fact that its military action was confined to its territorial limits. It condemns that nation, which it is our purpose to save, to suffer the devastating impact of full naval and air bombardment while the enemy's *sanctuaries* are fully protected from such attack and devastation." *MacArthur's Speeches: "Old Soldiers Never Die,"* PBS.ORG, <http://www.pbs.org/wgbh/amex/macarthur/filmmore/reference/primary/macspeech05.html> (last visited Oct. 18, 2010) (emphasis added).

196. The Cambodian incursion had ulterior reasons hidden from the public. Similarly, some of those allied with congressional hawks might have a national security justification for a cross-border incursion, such as a need to prop up the Pakistani government.

197. Memorandum from William H. Rehnquist, Assistant Attorney Gen., Office of Legal Counsel, to the Honorable Charles W. Colson, Special Counsel to the President, Re: The President and the War Power: South Vietnam and the Cambodian Sanctuaries (May 22, 1970), *reprinted in* William H. Rehnquist, *The Constitutional Issues—Administration Position*, 45 N.Y.U. L. REV. 628 (1970); *see* William Rogers, *The Constitutionality of the Cambodian Incursion*, in 3 THE VIETNAM WAR AND INTERNATIONAL LAW: THE WIDENING CONTEXT 175, 176 (R. Falk ed., 1972).

198. FRANCK & WEISBAND, *supra* note 134, at 13–33.

enemy in that region besides others. More broadly, Congress has dictated to him regardless of whether this particular incursion fits with his overall strategy for the war. Especially, Congress has forced his hand irrespective of whether it fits the overall war strategy to be going deeper into the war by an incursion that expands the war, rather than stabilizing or drawing down.¹⁹⁹

2. *Other Analysis*

Nor does the congressional action in ordering a cross-border operation correspond to one of the established "Declare War" categories of Congress authorizing, but not controlling, the use of force.²⁰⁰ When Congress declares or authorizes war, Congress creates the legal authority for the war to proceed, but leaves to the Commander in Chief, within limitations, the decision of the strategy for the war.²⁰¹ To put it differently, Congress could merely provide discretionary appropriations and a discretionary authorization, without directing a cross-border incursion. Congress could let the Commander in Chief decide whether the incursion fits the overall strategy for the war. Each branch would have its separate role.

On the other hand, a mandated stepping-up of the war to go after border sanctuaries differs greatly from Congress declaring or authorizing war pursuant to the "Declare War" clause.²⁰² For Congress to order an operation such as an incursion, in the midst of a previously authorized war, intrudes deep into the Commander in Chief's command role. To be sure, some in-between or hybrid examples would challenge this neat dichotomy between what Congress can and cannot do in terms of indicating to the President

199. Congress might well make the argument that it chooses to go after sanctuaries in order to shorten the war, reduce casualties, and facilitate a drawdown. For example, President Nixon justified the Laos and Cambodia incursions that way. To be sure, anyone urging an incursion, whether Congress or the President, will make that kind of argument, and different segments of the public may be more or less responsive to it. In simple terms of legal analysis, though, the difference between a restrictive appropriation rider, like a cut-off after a deadline, and a "step-up" rider, like a mandated incursion, is in how the provision operates, not in debatable calculations of its ultimate strategic impact. A restrictive appropriation rider triggers the potent "No Appropriations" clause, because it stops the President from obtaining funding from the Treasury for an action. A mandated incursion rider directs the President to obtain such funding. However, their debatable strategic implications do not enter into this distinction.

200. U.S. CONST. art. I, § 8, cl. 11.

201. The President's situation in this hypothetical is a little like Franklin Roosevelt's in 1942, when deciding how much to push against Germany and how much to push against Japan. In either situation, the Commander in Chief retains complete authority to decide how to conduct campaigns during wartime.

202. U.S. CONST. art. I, § 8, cl. 11.

that he should deal with a cross-border enemy sanctuary.²⁰³ Even so, a vital distinction would still apply in congressional provisions between restrictive versus expansive, and discretionary versus mandatory provisions.

In terms of campaigning, Congress would be ordering that the military conduct a specific campaign. Congress would establish a kind of unfiltered relationship with the military of giving them campaign direction, regardless of presidential views.

To be sure, as noted, Congress could leave much discretion to the President about the who, what, when, how, and how long of the incursion. Some in-between or hybrid examples would challenge this neat dichotomy. Still, the significance of this position shows in applying it to historic "less hawkish" Presidents and "more hawkish" Congresses. By this formulation, a more powerful group of "War Hawks" in Congress could not have directed a more reluctant President Madison to invade Canada; a powerful group of imperialist-minded congressmen could not have directed a more reluctant President McKinley to take the Philippines; and a rabidly hawkish group of congressmen during the Korean War could not have directed a reluctant President Truman to bomb Manchuria.

B. Example: Intrusive Oversight of Command

1. Specific Mechanism

Ordinarily, Congress uses its standing committees to conduct oversight of the subjects within their jurisdiction.²⁰⁴ As to military

203. In light of the Quasi-War of 1798, Congress has flexibility in declaring or authorizing a war, and in giving directions about its scope. Arguably, Congress could declare war on a dominant, if non-state, element across the border in Pakistan, and thereby oblige the President to go wage a war with that element. Certainly the authorization of war by Congress could restrict the President to waging only an air war or only a ground war, but Congress would go much farther in trying to mandate that the President wage only a ground war. Congress could authorize the President to fight those cross-border elements, and a President who disregarded that authorization would be on thin ice. However, a President could conscientiously wage a different war than Congress had in mind—by not sending regular troops in an incursion, for example. The President would couple stepped-up air operations with stepped-up Special Forces raids. Although Congress would want more, the President could claim, with some justice, that he had carried out the authorization of war within his own discretionary control over the scale and nature of campaigning.

204. For military matters, the armed services committees, and perhaps the defense appropriations subcommittees, would have the main oversight responsibility. Other committees might help. The government operations committees, for example, have government-wide jurisdiction and may conduct

operations, since World War II Congress has established the annual defense authorization bill as a means to empower its armed services committees to conduct military oversight.²⁰⁵ In wartime, these armed services committees will call on the top civilian defense figures, and sometimes also the highest military figures, to discuss issues related to the war. The committees are supposed to devote themselves to policy issues, not to the review of purely military decisions. As part of this limitation, only very rarely do the committees call upon the subordinate military officers closer to field units in the theatre of war. In particular, committees rarely call on such field commanders to take part in a public hearing process of criticism or advice on their conduct of purely military operations.²⁰⁶ Such a process would have the potential to push alternatives to presidential direction.

However, a “hawkish” majority in Congress could make the strategic decision to step up the war by means of a powerful forum to give criticism or advice directly to the military commanders in the field about just such stepping up. Because the majority party has the greater influence over committee establishment and appointment, this heightened influence would matter most if the opposition party held the majority. Still, it would matter some, particularly in the Senate,²⁰⁷ even if the President’s party held the majority, assuming those of “hawkish” views had a majority counting supporters in both parties. The committees would take special advantage of latent “hawkish” views of the military that would be common among the majority. The “hawks” could pursue several special goals. First, they could set up a Select Committee on the War in Afghanistan, with membership coming from the top

oversight of a war. These oversight committees obey certain measures of restraint.

205. See generally BANKS & RAVEN-HANSEN, *supra* note 1.

206. For example, Congress did not hold hearings about the single greatest disappointment in the otherwise strikingly successful 2001–2002 military campaign in Afghanistan: the failure to capture or kill Osama bin Laden at Tora Bora. A search of the LexisNexis database for Committee Hearing Transcripts for “Tora Bora w/100 hearing” found many mentions in Administration press briefings but not any hearings with questions for generals.

207. In the Senate, when the parties have a close balance, the majority leadership, even if they are of the President’s party, must bend to powerful bipartisan sentiment in such matters. In a recent example, the Republican Congress of the 2000s created a 9/11 commission, even though it might have criticized some of the Bush administration’s inadequacies prior to 9/11. Public sentiment demonstrating a strong desire for such a commission led to its creation, notwithstanding some opposing sentiment from the majority party in Congress.

"hawkish" figures on and off the armed services committee.²⁰⁸ This would give the "hawks" a star role. The Select Committee could have power to subpoena military figures for hearings, with a congressional expectation that they will do so regardless of the President's displeasure with that approach.

Furthermore, the committee would schedule non-public meetings (in Washington and on in-theatre trips) with key figures regardless of their amenability to public hearings.²⁰⁹ Also, the armed services and defense appropriation committees could break the large lump-sum appropriations usually used to pay for wars into smaller pieces that make it easier for Congress to manipulate the purse strings.²¹⁰ The "hawks" in the House and Senate would assure that the Select Committee's reports would influence or shape the appropriations for the war.²¹¹ In effect, the fight for congressional influence over the war would go up, from the consensus-oriented armed services committees, to more "hawkish" and radical bodies.

The purpose of the Special Committee would include direction of the maximum adverse attention to every aspect of the President's war efforts criticized by the "hawkish" parts of Congress and the public.²¹² Such oversight would make it more difficult for the administration to pursue its course. Beyond directing the public's attention, such an effort might aim at persuading or obliging the administration to change course in the desired direction to some degree. It would direct a stream of proposals, some in public hearings, some in private meetings, expecting that to the extent the administration could not defend its course of action, it must adopt some of the most popular measures.

208. The House and Senate could set these up in each chamber or have a joint committee. For simplicity in description, it will be assumed that just one chamber sets one up.

209. Those seen in meetings might include the National Security Adviser, generals with assignments in the field rather than their superiors, ambassadors to Afghanistan and Pakistan, and those on field trips to Afghanistan (high officials in that government).

210. BANKS & RAVEN-HANSEN, *supra* note 1, at 69-70.

211. The nominations for defense posts that supervise aspects of the war, such as the Secretary of the Army, require the Senate to decide upon confirmation. Prior to Senate vote, the Senate Committee on Armed Services must vote on reporting the nomination favorably. The Senate could signal, by a resolution saying so, that it will give weight, in deciding on such confirmation, on the views of the committee on the war.

212. Had such an effort occurred during the Vietnam War—say, by war-skeptics in 1967-68—it would have gone into the poor strategy, the unreliable and corrupt local government, the concealed-cost projects, the ineffectiveness of the bombing campaign, the intelligence failures, the devastating impact of the Tet Offensive, and so on.

2. MacArthur and Civil War Inquiries

No matter what Congress does in this context, it draws on the strong support in the Framers' original intent for Congress to conduct oversight. A powerful series of precedents includes review of problematic issues in wars.²¹³ Of course, Congress throughout the nation's history has contributed invaluable by oversight, in wartime as well as peacetime, of waste, fraud, and abuse. The classic example of such inquiry was the Truman Committee during World War II.²¹⁴

Of the great modern examples of high-level congressional oversight of the conduct of military action itself, the MacArthur Inquiry of 1951 stands out as involving an unrivaled review of war-fighting strategy,²¹⁵ although there are other fabled examples such as the Fulbright hearings²¹⁶ and the "national commitments" report reacting to the Vietnam War.²¹⁷ In the 1951 example, President Truman had relieved General Douglas MacArthur as commander in the Korean War.²¹⁸ The Senate arranged lengthy hearings about MacArthur's strategic views. Committee witnesses included the secretaries of the State and Defense departments, the chairman of the Joint Chiefs of Staff and the service chiefs, and an array of other top military and other officials.²¹⁹

That inquiry probed deeply into the highest levels of military strategy. These included MacArthur's desires, as a historian summarizes, of "lifting restrictions on bombing Chinese territory, imposing a naval blockade against the China coast, and putting the troops of Chiang Kai-shek in the battle against the 'Red Chinese.'"²²⁰

213. The very first congressional investigation consisted of a select House committee looking into a disastrous battle with Indians of the Ohio Valley. George C. Chalou, *St. Clair's Defeat, 1792*, in CONGRESS INVESTIGATES, 1792–1974, at 1 (Arthur M. Schlesinger, Jr. & Roger Bruns eds., 1975).

214. Theodore Wilson, *The Truman Committee, 1941*, in CONGRESS INVESTIGATES, 1792–1974, *supra* note 213, at 327.

215. John Edward Wiltz, *The MacArthur Inquiry, 1951*, in CONGRESS INVESTIGATES, 1792–1974, *supra* note 213, at 385.

216. Louis Fisher, *War and Spending Prerogatives: Stages of Congressional Abdication*, 19 ST. LOUIS U. PUB. L. REV. 7, 24–25 (2000); Reinstein & Silverglate, *supra* note 14. For Senator Fulbright's own insightful reflections on his historic hearings, see generally J. William Fulbright, *Foreword* to GLENNON, *supra* note 1, at xiii n.2.

217. GLENNON, *supra* note 1, at 88, 180.

218. He did so after MacArthur publicly espoused a very different and far more militant strategy than the administration's as to how the United States should conduct the Korean War and other contemporary efforts.

219. Tiefer, *supra* note 2, at 339.

220. Wilson, *supra* note 214, at 397.

History has viewed the MacArthur Inquiry benignly, not questioning its constitutionality. The leading historian, asking rhetorically "whether the MacArthur inquiry served any useful purpose," declared, "[t]he answer is an unqualified yes . . . the inquiry defused the MacArthur controversy," including largely laying to rest MacArthur's proposals for escalating the Korean War.²²¹

In contrast, a President opposing the most intrusive congressional oversight of the Afghanistan war may cite the most criticized instance of intrusive wartime oversight in all of U.S. history, namely, the Joint Committee on the Conduct of the War, during the Civil War.²²² The Joint Committee constantly brought before it commanders in the field and grilled them on their recent military efforts, from commanders at particular battles all the way up to Ulysses S. Grant.²²³ At one point it met with the President and his whole Cabinet as part of a general pattern in which no one, not President Lincoln and certainly not Secretary of War Stanton, said "no" to them. This suggests the possible acquisition by the Joint Committee of influence in the chain of command.²²⁴ Moreover, the Joint Committee kept up an extensive stream of military advice to Lincoln.

Even so, Lincoln's response to advice with "typical light irony" showed that "Lincoln was not going to take seriously the advice they kept urging on him."²²⁵ While critics attributed to Lincoln some very negative views of the Joint Committee, "Lincoln never committed such thoughts to paper himself, nor does he ever seem to have allowed the committee to usurp his constitutional powers as Commander in Chief."²²⁶ Further limiting its influence, although a few generals supported the committee, was the fact that "[m]ost of the military, however, bitterly resented the committee's investigations as unwarranted and totally undeserved interference."²²⁷ So this committee did not find military support for what it wanted to do, and thereby lacked what would potentially be the main tool to shape a strategy deviating from the President's.

221. *Id.* at 423.

222. See TAP, *supra* note 62; Elisabeth Joan Doyle, *The Conduct of the War, 1861, in CONGRESS INVESTIGATES, 1792-1974*, *supra* note 213, at 63.

223. Doyle, *supra* note 222, at 91.

224. *Id.* at 79 ("Secretary of War Stanton, especially . . . was so amiable in his relations with them as to lay himself open to charges of being the Radicals' representative in meetings of the Cabinet.").

225. *Id.* at 76.

226. *Id.*

227. *Id.* at 95.

The committee got very bad press in the first century after it, but has gotten better treatment by historians in recent decades.²²⁸

Thus, as a crude yardstick, one might compare a congressional oversight inquiry tasked with very “hawkish” review of the conduct of the Afghanistan war with two predecessors that cast large but different shadows: the criticized Civil War Joint Committee and the benign MacArthur Inquiry. Using these as rough markers, an inquiry may legitimately bring top officials before it, including top generals (albeit without interfering with their involvement in campaigning); pose questions about strategy; and even signal congressional preferences for one view over another. And, that committee’s reports may influence appropriations and nominee confirmations.

The President may legitimately object that the inquiry crosses the constitutional line when it substantially undermines the obedience of military commanders to orders. That could happen if the committee repeatedly took more commanders from the field, criticized them for not pushing harder than what came through the chain of command, and achieved substantial success in doing so. An important factor consists of whether the field commanders themselves develop pent-up resentment of what they consider insufficiently “hawkish” leadership coming down from the President. The field commanders could begin to take into account the committee’s advice, public support, and influence on congressional appropriations. Such commanders would feel enabled to deviate from the “less hawkish” line of the Commander in Chief. Even then, the committee would not necessarily succeed in wooing commanders far from their normally extremely powerful allegiance to the President and his high command. And, only then would a congressional committee intrude so far and so deeply into command as to raise a material doubt about its constitutionality.

C. Shared Powers: The Example of Poppy Eradication

This Part moves on from the central Commander in Chief issues to those “shared” with Congress. A “shared issue,” for this Article’s purposes, occurs in a war zone and, by making policy, may affect the conduct of the war by the Commander in Chief.

228. This better treatment may owe to both the more objective and deeper inquiries of recent historians, and perhaps greater understanding of the viewpoint of the Radical Republicans in Congress. Improved treatment by historians may also owe to the very good record of modern investigations like the Truman Committee and the MacArthur Inquiry, which restored confidence in congressional wartime oversight.

However, it does so without specifically interfering with the Commander in Chief's central issues of command, disposition of forces, or campaigning.

Broadly speaking, many aspects of context shape the constitutional analysis of a shared issue.²²⁹ Considering these contextual aspects, and their relationship with constitutional text or tradition, Congress may have a large valid role. Congress may draw support from direct application of one of Congress's specifically enumerated Article I powers relating to war. That is, the issue of shared war-related authority has substantially more of an Article I connection to Congress than merely its involving, like all government operations, congressional appropriations.

For example, the issue may arise of what to do with captured property. This does arise in the war zone, but it does not involve command, disposition of forces, or even campaigning. Moreover, it does involve express Article I congressional powers over the making of policy.²³⁰ This mix of factors makes it a shared issue.

Furthermore, a shared issue may have some kind of history or precedents. This may or may not favor Presidents. For example, Presidents have a history of providing for the administration of occupied territory until Congress does. This means that Congress has not only the potential, but also the record, for sharing in the power. Congress may have even let its role lapse for a while and then reclaimed it. By doing so, Congress clarifies that it shares these areas.²³¹

Three areas illustrate concretely how Article I, and the history of Congress's activity, shape the constitutional analysis of shared issues. First, an issue of international law that has had a dramatic role in the 2000s, the Bush administration believed it had extreme wartime powers of not being constrained by the Geneva Conventions in handling Guantanamo detainees.²³² The Framers shaped Article I so that primarily Congress, not the President, would authorize exceptions to international law.²³³ And, Congress has compiled an impressive history of relevant action.

229. See Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109 (1984).

230. See Kent, *supra* note 63.

231. During the reform era of the 1970s after Vietnam and Watergate, Congress reclaimed its role in a number of areas it had let lapse to some degree. Congress revisited issues of initiating war, making international agreements, making policy for foreign and military aid, overseeing intelligence and covert actions, overcoming executive privilege in national security matters, and curbing impoundments, among other issues. FRANCK & WEISBAND, *supra* note 134.

232. See Lobel, *supra* note 4.

233. See Kent, *supra* note 63.

Second, take the issue of oversight of intelligence or covert actions. The issue had a dramatic role in the 2000s as President Bush asserted extreme wartime powers such as warrantless eavesdropping on phone conversations.²³⁴ Prior to this, in the 1970s, Congress revived its role by the creation of congressional intelligence committees, establishment of the system of annual intelligence authorization laws, and enactment of specific major legislation.²³⁵ Observers analyzing the making of policy for the new eavesdropping could, and some did, find solid footing for Congress's role in that history.

Furthermore, take the issue of rules for the conduct of warfare.²³⁶ Article I charges Congress to "make Rules for the Government and Regulation of the land and naval Forces."²³⁷ Moreover, Article I also charges Congress to "make Rules concerning Captures on Land and Water,"²³⁸ a provision of renewed importance when the issues of detainees became prominent in the 2000s.²³⁹ From these grants of power to make rules and regulations has come far more than merely manuals of court-martial procedures.²⁴⁰

Third, a last large area of shared powers concerns military spending. The holding back of appropriated spending is termed an "impoundment." An extensive history concerns the congressional handling of appropriations, including military appropriations. In the last century, Congress has mainly gone from more specific line items that constrained the executive to lump-sum appropriations that gave the executive great spending discretion.

Sometimes Presidents have impounded appropriations rather than spent them. The issue came to a climax in the Nixon administration, with President Nixon apparently asserting a vast power to make impoundments. The Nixon administration impounded more domestically, where the administration wanted to

234. See Ford, *supra* note 47; Kitrosser, *supra* note 47.

235. FRANK J. SMIST, JR., CONGRESS OVERSEES THE UNITED STATES INTELLIGENCE COMMUNITY, 1947–1989 (1990). In the era from World War II to the 1970s, Congress had somewhat slept on its duties of authorization and oversight of the activities of the intelligence agencies generally. *Id.*

236. See Lobel, *supra* note 4.

237. U.S. CONST. art. I, § 8, cl. 14; see also Diane H. Mazur, *Rehnquist's Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law*, 77 IND. L.J. 701, 707 (2002).

238. U.S. CONST. art. I, § 8, cl. 14.

239. Stephen I. Vladeck, *Congress, the Commander-in-Chief, and the Separation of Powers After Hamdan*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 933, 963 (2007).

240. For example, these powers of Congress encompass directions for the treatment of detainees, a very big issue in the Iraq and Afghanistan conflicts.

save money, than it impounded military expenditures with which it was not so unhappy. The Nixon position collapsed, mainly by the enactment of the Impoundment Control Act of 1974, which closed the prior loopholes used to justify impoundments.²⁴¹

As to military spending, the modern system of mainly lump-sum military appropriations has given the Defense Department considerable scope. The Department must respect the committee reports that loosely structure those lump sums and must consult sufficiently with the committees to make limited funding redirections during the fiscal year. Beyond these requirements, it has discretion. When Presidents want to bring a weapons program or the like to an end, they enter the lists for the annual appropriations used for combat and accept the result. Should they not succeed, they have no beef with the constitutional system and no right to impound, just as they have no right to make a line item veto. They simply did not have the votes.

Still, the issue of whether Congress can step up a war by appropriations provisions may bring back the issue of military impoundments. A President not wanting to obey appropriation provisions to go after Taliban border sanctuaries or to launch a poppy eradication program may cast his military spending impoundment as somehow different from defiance of laws.²⁴² In that way, the President would go looking for precedents in which other Presidents have justified—very rarely—sizeable military impoundments (extremely rarely, if ever, in a war zone).

1. Analysis

The hypothetical for analysis concerns a program of poppy eradication in Taliban-dominated areas, which exemplifies how congressional policymaking may influence the war zone. Afghan opium poppy growing constitutes a double menace. Afghanistan provides the lion's share of the raw material for the deadly world heroin trade. In addition, the Taliban obtain substantial revenue from opium poppies.

The United States could launch a program against opium poppies by large-scale aerial defoliation. However, the Bush and Obama administrations have not carried out such a program.²⁴³

241. See Seema Mittal, Note, *The Constitutionality of an Expedited Rescission Act: The New Line Item Veto or a New Constitutional Method of Achieving Deficit Reduction*, 76 GEO. WASH. L. REV. 125 (2007).

242. See Timothy R. Harner, *Presidential Power to Impound Appropriations for Defense and Foreign Relations*, 5 HARV. J.L. & PUB. POL'Y 131 (1982).

243. See generally, e.g., Associated Press, *U.S. to Shift Approach to Afghanistan's Drug Trade*, L.A. TIMES, Jun. 28, 2009, at A26.

Partly, these administrations have feared the alienation of poppy-growing farmers.²⁴⁴ The U.S. would prefer to wean Afghan growers off poppies onto substitute crops. Crop substitution, unlike the blunt step of destroying their livelihood by defoliation, would avoid their taking up arms on the side of the Taliban. Partly, both administrations appear to have been held back by the Afghan government's reluctance to support such a program.²⁴⁵

Such a self-imposed policy limitation offers the type of issue that might bring out differences in "hawkishness" and, in turn, the constitutional clash. The President starts out refusing to implement in the war zone a particular policy that is aggressive but considered risky. In Congress, a "hawkish" opposition may have the votes for an appropriation provision that mandates the expenditure of a half-billion dollars for eradication. May the Commander in Chief refuse to proceed with the mandated spending program?

On such an issue, the analysis no longer concerns the central issues of the Commander in Chief on which the President's position starts out at maximum strength: command, disposition of forces, and campaigning.²⁴⁶ Rather, this issue involves the more level playing field of "shared" issues—issues only incidental to the Commander in Chief's power. Congress still must share these issues with the President because they occur in the war zone and may affect the locals or the enemy.

2. *The Confiscation Act of 1862*

One of history's most striking warzone congressional programs that the President opposed has received scholarly attention lately.²⁴⁷ During the first half of the Civil War, a major evolving issue consisted of what the Union armies would do with

244. JONES, *supra* note 13, at 196–97.

245. The Afghan government's reluctance to have such a program may stem from concerns about alienating its farming population, corruption in the government, or both.

246. Assume that contractors hired by the State Department's Bureau of International Narcotics and Law Enforcement Affairs could perform almost all the work so that it would hardly affect the disposition of forces. Contractor defoliation would not significantly affect the command of regular military forces and the campaign of those forces. Eradication would have an impact on the locals and on the enemy, and thus, incidentally, on campaigning. That it has an incidental impact neither rules in nor rules out presidential arguments, but merely distinguishes the issue from those, like a mandate for cross-border incursions, in which congressional action concerns central issues directly, not merely incidentally.

247. See Barron & Lederman, *A Constitutional History*, *supra* note 4; Lobel, *supra* note 4.

Confederate slaves encountered during military campaigns.²⁴⁸ This issue came to a head in the congressional debate on the Confiscation Act of 1862. This historical example has some parallels to today's issues. Slaves, like opium poppies, were contraband of war—treated by the other side in each conflict as its property and by the United States side as subject to, respectively, liberation (of slaves) or eradication (of poppies) in a way that voided those property rights without due process or compensation. On the other hand, Presidents were concerned about antagonizing neutrals in the conflict by overly aggressive action.²⁴⁹

As to the contraband of 1862, on one hand were the Radical Republicans in Congress, who sought from slave owners maximum confiscation of, and freedom for, the slaves. This appealed to the Radical Republicans both from abolitionist sympathies and from a desire to take harsh (“hawkish”) measures toward the enemy.

On the other hand, objections included President Lincoln's that the timing was not yet ripe for such a measure. Lincoln reversed the orders (prior to legislation) of officers—orders that could be called “hawkish”—to free such slaves.²⁵⁰ As he said about a similar step, it would “alarm our Southern Union friends, and turn them against us—perhaps ruin our rather fair prospect for Kentucky.”²⁵¹

Of note, some opponents of the measure raised Commander in Chief arguments.²⁵² As one Senator discussed,

If Congress could not regulate such “active operations in the field”—could not “direct the movements of the Army”—[he] reasoned, it necessarily followed that neither could Congress require the President to confiscate enemy property, or to perform any of the other wartime functions traditionally determined by the Commander in Chief.²⁵³

Another Senator reasoned that

the Constitution declares that the President is Commander in Chief of the Army and Navy, “investing him with the

248. Lobel, *supra* note 4, at 431.

249. The border states that Lincoln wanted to keep in the Union had slave owners who did not necessarily actively support the Confederacy. The Afghan poppy farmers similarly do not necessarily actively support the Taliban.

250. Lobel, *supra* note 4, at 431.

251. Barron & Lederman, *A Constitutional History*, *supra* note 4, at 1010.

252. Some opponents pressed other issues: that it violated the laws of war; that it was an uncompensated taking of property; and that the Constitution might not permit Congress to do this. *Id.* at 1011–12.

253. *Id.* at 1014 (quoting Senator Browning).

war-making power,” and “[h]e is the commander . . . only restrained in so far by Congress in that he must depend upon them to foot his bill and authorize his levies.”²⁵⁴

This argument lost out. President Lincoln objected to the bill but never joined in a Commander in Chief argument.²⁵⁵ Congress enacted it in a slightly moderated form, giving some respect to Lincoln’s objections.²⁵⁶

These political stances of Congress and the President, although rooted in their own time and circumstances, contain some suggestions for a debate today about a shared policy issue in a war zone, like poppy eradication. Both policy issues have as their driving engine a wartime, war zone program that the Commander in Chief opposes as too “hawkish.” This opposition consists of that program’s visiting harm on those on the enemy’s side, loosely speaking—Confederate slaveholders then and Taliban obtaining funding from Afghan poppies today—who anger the public and the members of Congress into calling for harsh measures. Meanwhile, the Commander in Chief does not want to burn his country’s bridges to those not really on the enemy’s side and susceptible of being won over or at least staying neutral.

So, the Commander in Chief and those who support him may argue that Congress’s pushing the President amounts to intruding into campaigning. But, it does not directly concern this. The legislation does not instruct the President about whether or how to employ the military in the field. The constitutional dispute occurs on a level playing field, not with a presumption or strong doubt as to its constitutionality.

3. Contemporary War Policy Provisions

The Iraq insurgency provides further insight about Congress’s power to legislate shared policy aspects even in the war zone. A portentous change occurred in the election of 2006, which brought a change in both the House and the Senate from a Republican to a Democratic majority. The issue of Iraq was at the forefront in the Congress of 2007–2008. President Bush fought off legislative proposals for a drawdown or for setting a deadline for withdrawal. When Congress enacted a supplemental appropriation in 2007, it included a provision for timetables for phased redeployment of the troops.²⁵⁷ President Bush vetoed this, saying that “the measure

254. Lobel, *supra* note 4, at 431 (quoting Senator Cowan).

255. Barron & Lederman, *A Constitutional History*, *supra* note 4, at 1015.

256. *Id.*

257. 63 CQ ALMANAC 2-57 (2007).

‘infringes upon the powers vested in the presidency by the Constitution.’”²⁵⁸ In the attempted, but unsuccessful, veto override, “Democrats used the floor debate to dispute the president’s assertion that they were infringing on his rights as commander in chief and his criticism that they were trying to micromanage the war by substituting their judgment for that of military commanders.”²⁵⁹

Apart from the legislated drawdown attempt, a few important proposals did win passage as appropriation bills in this Congress, reflecting the limits of what the Commander in Chief’s argument could defeat.²⁶⁰ In 2008, Congress enacted a striking provision that included a “ban on using funds authorized by the bill to establish permanent military bases in Iraq.”²⁶¹ Congress had traditionally exercised the power in peacetime to decide when to use funds to establish permanent bases. This provision went further and exercised that power in the war zone. Congress had debated a number of such provisions, eliminating or rewriting some that the White House threatened to veto. Congress retained others, particularly “language aimed at continuing congressional oversight of the wars.”²⁶²

The outcome of the Confiscation Act, like that of contemporary defense authorization provisions, indicates that such a program as a mandated poppy eradication program would not necessarily fall prey of constitutional doubts. In fact, the Confiscation Act in 1862 did make a leap forward in its aspect of the Civil War—the freeing of slaves—and in this respect it anticipated the further step forward in the Emancipation Proclamation.

Accordingly, the “shared” issues remain openly debatable between Congress and the President, focusing on their particular subject, drafting, purposes, and so on. Unlike the “central” issues of the Commander in Chief, these do not start with a presumption or doubt against them, even when they step up a war.

D. Impounded Funding for Programs to Step Up a War

258. *Id.* at 2-58.

259. *Id.*

260. An important proposal concerned the aftermath of the Nisur Square incident, in which a shooting by Blackwater private security contractors killed many civilians. The defense authorization law carried a provision for the Defense Secretary to set regulations for the selection, training, and conduct of private security personnel in combat zones. *Id.* at 6-10.

261. 64 CQ ALMANAC 6-7 (2008). Admittedly, this is a classic restrictive and limiting appropriation rider. The views of the Congress of 2007–2008 were no more “hawkish” about Iraq than those of President Bush.

262. *Id.*

A “hawkish” opposition in Congress may enact large appropriations for a favored “hawkish” program like poppy eradication. The President may oppose funding for programs not in his budget request. Does the President, as Commander in Chief, have the power to refuse to spend—i.e., to impound—the unsought funding? For all the extreme claims of constitutional authority by President George W. Bush and, to a lesser extent, some of his predecessors, none have revived the lapsed and discredited impoundment claim. However, enactment of a program opposed by the President might well spark at least renewed executive consideration of whether to assert a power not to spend the funds for the program. That power is impoundment.

*1. Impoundment Background*²⁶³

The supporters of military impoundments try to show a long and distinguished history. However, they have only limited support in trying to isolate attempted military impoundments from attempted civilian impoundments. Impoundments of defense funds have occurred more or less together with those of other funds. Presidents did not generally perform peculiarly military impoundments, with special invocations of the Commander in Chief clause for some special category of defense spending. Underlining this point, the military impoundments that did take place mostly occurred in peacetime, not wartime. In other words, Presidents did not try to establish a strong Commander in Chief impoundment function in the war zone.²⁶⁴ They simply sought economy, almost always at home, not staking their claim to impoundment power on a difference between military and civilian impoundments.

To briefly review, early instances of recognizable military impoundment were few until the modern era after World War II.²⁶⁵

263. See generally Ralph S. Abascal & John R. Kramer, *Presidential Impoundment Part I: Historical Genesis and Constitutional Framework*, 62 GEO. L.J. 1549 (1974) [hereinafter Abascal & Kramer, *Presidential Impoundment Part I*]; Ralph S. Abascal & John R. Kramer, *Presidential Impoundment Part II: Judicial and Legislative Responses*, 63 GEO. L.J. 149 (1974).

264. For example, President Nixon, the leading presidential impounder, had a live war in Indochina. But, he did not make his impoundment claims with regard to spending there.

265. Brownell, *supra* note 65, at 35. President Jefferson impounded funding for some gunboats. *Id.* at 31. No substantially recognizable impoundments occurred until Grant. See *id.* at 33. Even then, although the funds were for the Army Corps of Engineers, they served domestic non-military purposes of river

President Truman impounded a portion of the funds for air force squadrons beyond what he had requested, plus funding for two carriers,²⁶⁶ on grounds of his Commander in Chief powers.²⁶⁷ President Kennedy impounded funds for a long-range bomber,²⁶⁸ fighting the issue to a draw.²⁶⁹ President Johnson slowed down billions for domestic funding, such as for large highway programs,²⁷⁰ but did not completely cancel projects.²⁷¹ More important, President Johnson did not impound defense funding.

Impoundment first really burst onto the legal consciousness under President Nixon. President Nixon made billions of dollars of impoundments to cut back on what he saw as excessive congressional spending. Those Nixon impoundments overwhelmingly concerned domestic spending, not military spending. Nixon's impoundments suffered a landmark defeat in the Supreme Court, completing the picture of impoundment far more concerning civilian than military spending.²⁷²

Congress responded vigorously to impoundments by enacting funding again with stronger provisions. Courts ruled against the validity of impoundments, including the Supreme Court in a statutory (not constitutional) case.²⁷³ And, Congress enacted the Impoundment Control Act of 1974, which closed all the statutory loopholes cited as allowing impoundment.²⁷⁴ Also, in the Impoundment Control Act, Congress gave the President an alternative channel of making rescission requests that would receive expedited congressional treatment.²⁷⁵ As a result of the

and harbor work. Roosevelt impounded relatively large sums, but typically from domestic activities like public works.

266. Stanton, *supra* note 34, at 12.

267. See Stassen, *supra* note 33, at 1185 n.133.

268. See *id.* at 1163-68. President Eisenhower made some relatively small impoundments of funds for aircraft and missiles. See Stanton, *supra* note 34, at 12.

269. In a dramatic interchange, President Kennedy worked out with the angry House Armed Services Committee Chair, Carl Vinson, a compromise that the language for the funds be made permissive, rather than mandatory. Stanton, *supra* note 34, at 13.

270. One major struggle concerned nuclear powered surface ships. Stassen, *supra* note 33, at 1168-76.

271. Stanton, *supra* note 34, at 13-14.

272. *Train v. City of New York*, 420 U.S. 35 (1975). The ruling only concerned statutory grounds. The administration deliberately chose not to make a constitutional argument, presumably for the unacknowledged but generally recognized reason that it would lose dramatically.

273. Stanton, *supra* note 34.

274. See Robert C. Byrd, *The Control of the Purse and the Line Item Veto Act*, 35 HARV. J. ON LEGIS. 297, 309 (1998).

275. Stanton, *supra* note 34.

Impoundment Control Act, the President must admit that his proposed impoundments represented merely the lack of congressional support for his budgetary preferences. There has not been extensive discussion about impoundments after the political and legal defeats of President Nixon's efforts to impound.

Since Nixon's time, there have been just a very few suggestions that a President might revive the all-but-obliterated claim of power.²⁷⁶ The kind of credence and support for a presidential tool to cut spending that had previously gone into the impoundment claim instead went into the push for a statutory line item veto.²⁷⁷ That effort died when the Supreme Court struck down the line item veto during the Clinton administration.²⁷⁸ Although the administration of George W. Bush made some exaggerated constitutional claims, it does not appear to have invoked visibly a power to make impoundments, whether across the board or just about military impoundments.²⁷⁹

2. Lack of Viability of Specifically Military Impoundment

At first glance, the claim of national security impoundment power may look distinctive and viable. During the heart of the impoundment controversy in the early 1970s, some commentators thought so, pointing to precedents of Presidents like Truman and Kennedy who had asserted the claimed power on specifically military expenditures.²⁸⁰

However, today the claim of national security impoundment power looks outdated as well as unsupported. First and foremost, Presidents hardly employed it after the Nixon era, when it had its

276. See Brownell, *supra* note 65, at 53–55.

277. See generally Peter E. Quint, *The Separation of Powers Under Nixon: Reflections on Constitutional Liberties and the Rule of Law*, 1981 DUKE L.J. 1.

278. Roy E. Brownell, II, Comment, *The Unnecessary Demise of the Line Item Veto Act: The Clinton Administration's Costly Failure to Seek Acknowledgment of "National Security Rescission"*, 47 AM. U. L. REV. 1273, 1277 (1998).

279. Articles about the Bush administration's claims of executive power reflect that the impoundment controversy involved the distant past. See generally Saikrishna B. Prakash, *Imperial and Imperiled: The Curious State of the Executive*, 50 WM. & MARY L. REV. 1021 (2008). There were so many cryptic signing statements on defense appropriations that some statements could have meant to signify the reservation of a right to impound, but no visible impoundment controversies ensued.

280. Abascal & Kramer, *Presidential Impoundment Part I*, *supra* note 263; Stassen, *supra* note 33. The congressional side of the issue did not have great dignity. Rather, the classic use of the power seemed to have been aiming at the vulnerable target of congressional pork-barrel spending or bloated weapons programs.

rise and fall. It did not survive the triple impact of the Supreme Court's *Train v. City of New York*²⁸¹ case invalidating impoundments, the Impoundment Control Act, and the general lapse of far-out executive assertions during Vietnam and Watergate.

Any number of times during the period from the Nixon administration to the present, Congress appropriated more for various military items than Presidents wanted, like unsought or excess spending on weapons systems. This spending did not get impounded.²⁸² The 35-year abandonment of this kind of claim eloquently speaks of the White House's having lost hope in such a claim.²⁸³ And, a "hawkish" Congress might take up this controversy with zeal, having picked the program to push from a strong sense of its political viability. This contrasts with the kind of impoundments that Presidents have found easier to fight against, namely, impoundments for pork-barrel, bloated, hard-to-defend spending.

Furthermore, the President would face the same effectively unanswerable argument he had always faced in both the impeachment and the line item veto contexts. Constitutionally, the President had an array of other tools to deal with disapproved congressional spending items, above all, the presidential power to threaten to veto bills unless offending items came out. That had sufficed for so long that it seemed an unconstitutional and drastic alteration of the system to supplement it with a novel power to take offending items out.

This argument has special force after the Bush presidency. President Bush used veto threats to eliminate or to get redrafted many items in defense authorization and appropriation bills, especially in 2007–2008.²⁸⁴ He dramatically demonstrated the viability of the veto as a tool to maintain the prerogatives of a Commander in Chief in a war. As with cut-off provisions, Congress could only make mandatory spending items go through if

281. 420 U.S. 35 (1975).

282. For example, President Clinton did not want all the funds that the Republican Congress of 1995–2000 appropriated for missile defense systems.

283. Moreover, a President who impounds the funds for a specific item Congress created to step up a war might thereby choose a greater and more difficult controversy than he wants. In the impoundment battles of the past, Presidents like Nixon and Johnson could argue they saved billions of dollars and thereby had a real impact on budget deficits. The focused challenge to one controversial wartime item, like poppy eradication spending, depends on the item's effect on war zone campaigning, and does not involve the vastly larger, budget-affecting weapon systems for future wars.

284. See discussion *supra* Part IV.C.3 (concerning the limited items that got through, like a ban on spending for permanent military bases).

it felt able to win a difficult kind of public contest with the President.²⁸⁵

Given that the presidential claim of impoundment power has been abandoned with good reason, congressional spending programs as to a shared power in the war zone do not start out with a presumption or even an automatic material doubt against them. For a President to revive the claims of a military impoundment power for just this occasion would revive an enormous controversy that even President Bush let lie. The situation resembles how Presidents have not asserted an inherent power to make a line item veto even of an item in an unwieldy omnibus continuing resolution. Presidents have trouble explaining why they should have, as a constitutional matter, this major power when they already have the veto power.

V. CONCLUSION

This survey and analysis suggests several conclusions. First and foremost, it invites the viewing of the wartime constitutional relationship of the President and Congress in a new way. Hitherto, constitutional analysis viewed the President as always more “hawkish,” more aggressive, and more lusting to expand war than Congress. Congress only chose between the roles of passive partner or, if active at all, striving to limit or restrain war.

Now, however, the discussion in this Article suggests a way to analyze the possibility of a very different Congress, one more “hawkish” and aggressive than the President. More “hawkish” may have occurred in the past less often than the Congresses that are either passive or restraining. But, however often the “hawkish” Congress occurs, it tests the Constitution in new ways.

Moreover, strategically, the United States faces a new defense situation after 9/11. The United States faces conflicts, large and small, in any number of nations that may host enemies. In each such conflict, the United States may well face choices among greater or lesser degrees of aggressiveness, variations about which reasonable national security may disagree in the extent to which the President and Congress might go different ways.

285. Congress and the President would accuse each other of not making funding available to American troops who are engaged in the field in fighting a dangerous foe. The 1990s taught that the public trusted the President more in such a dispute. Looking back, it was only after a President had undermined the public trust that Congress could put through Indochina cut-offs in the early 1970s and Boland Amendment cut-offs in the mid-1980s. *See generally* Fisher, *supra* note 19 (discussing several of the President–Congress disputes).

On the one hand, a crusading President may elicit the traditional congressional provisions of limitation and restraint. However, on the other hand, a "less hawkish" President may elicit provisions from Congress that take an aggressive stance and go past previous policy lines. These are not wars like World War I and II, or the Gulf War, as to which, once underway, Congress does not scrap with Presidents about the scope. It may be a whole new world.

Furthermore, in shaking up the old ways of thinking, these different situations play mix and match with the previously clear correlations of the policy toward war and the support for branches of government. Traditionally, pro-executive observers felt comfortable on multiple grounds to challenge congressional provisions as dovish. Such pro-executive observers would oppose the cut-off provisions for the Vietnam War, the restraining Boland Amendments for the Contra war, or the provisions of the Detainee Treatment Act against extreme treatment. Conversely, pro-congressional observers supported these provisions, also feeling comfortable on multiple grounds. However, once the focus of analysis turns to "hawkish" provisions, such views line up differently. Those favoring the validity of "hawkish" steps in wartime must learn sometimes to defend congressional power, and those opposing such validity must learn to argue the pro-executive position.

This new kind of thinking may produce a more nuanced, three-dimensional way of addressing this subject. An observer must take each constitutional issue on its individual merits rather than take an ideological line that the executive, or the Congress, must always prove right; or that the "hawkish," or non-"hawkish," view must always prove right. Certainly, the author experienced a need in analyzing this Article's hypotheticals to think more flexibly.

Additionally, this fresh perspective teases apart the separate significance of the differences among Congress's Article I powers and among the Commander in Chief's powers. This Article's analysis builds, as noted, on recent scholarly work responding to the formalistic doctrinal theories put forth for President Bush's actions—recent work that develops the many specific instances in American history of meaningful constitutional interaction.

Hitherto, observers tended, when discussing appropriation provisions, to lump all provisions together as one always-applicable "Congressional Power." And, observers defending the executive tended, when analyzing constitutional issues, to lump the different aspects of the Commander in Chief power, and other powers, together. However, it appears that the "No Appropriation" clause has a one-way effect, supporting restrictions or limitations

but not mandatory appropriations. Moreover, it accomplishes little to try to lump all the different aspects of the theatre of war together under one sprawling “Commander in Chief” power. The mention of that power provides no magic incantation to shoo away all congressional action. Each provision warrants analysis on its own. This view suggests greater precision than in the past about the particular congressional authority at issue and the particular complaint of intrusion upon the Commander in Chief.

Moreover, currently a substantial fraction of the provisions at issue, or their most relevant immediate precedents, comes aboard one of the defense authorization or appropriation provisions. The defense authorization system, and the rest of the work of the armed services (and sometimes foreign affairs and intelligence) committees, took on extraordinary importance after World War II.²⁸⁶ These take on even greater importance after 9/11. Often, examination of the record of similar provisions considered by these committees puts a concrete and persuasive context around the proposal of particular challenged provisions.

Oliver Wendell Holmes said, famously, that “a page of history [was] worth a volume of logic.”²⁸⁷ Today, that page of history often comes from the run-up in past authorization and appropriation bills. For example, when the system of joint combatant commands has strong statutory roots, it makes little sense to conjure up some executive genie, some unique Commander in Chief power to decide military structures, that can blow the latest provision away. When the impoundment power has lapsed for almost 40 years of military appropriations, it makes little sense to drag that genie out for impounding some recent spending provision.

Thus, the provisions and hypotheticals discussed in this Article may provide, hopefully, a new frontier for study of the war power. In these and other respects, it is hoped the Article may enable those looking for the fresh challenges in analysis of war powers to awaken out of their “dogmatic slumber.”²⁸⁸

286. See generally BLECHMAN, *supra* note 128.

287. N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

288. IMMANUEL KANT, *Introduction* to PROLEGOMENA TO ANY FUTURE METAPHYSICS (Paul Carus trans., 1902) (1783), available at http://www.mnstate.edu/gracyk/courses/phil%20306/kant_materials/prolegomena2.htm (Kant’s famous self-description of what occurred when he read Hume).