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Congressional and Presidential War Powers as a Dialogue: Analysis of the Syrian and ISIS Conflicts

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Congressional and Presidential War Powers as a Dialogue: Analysis of the Syrian and ISIS Conflicts

Charles Tiefer† & Kathleen Clark††

Much of the scholarship on war powers looks back on whether U.S. military interventions were authorized, examining the President's powers under Article II of the Constitution, and congressional enactments. That legal question is important, but it does not capture the interactive nature of the dynamic between Congress and the President. This Article instead focuses on the process of dialogue between Congress and the President prior to the exercise of war powers. We examine in detail how that dialogue operates in two recent episodes: the U.S. response to Syrian President Assad's use of chemical weapons in 2013, and the rise of ISIS since 2014. By examining the specifics of how the political branches interact, we can assess whether the exercise of war powers is democratic and legitimate. We see that Congress and the President take part in substantive consultation and dialogue, and through that dialogue, Congress and the public become more informed about the interests at stake and the available options. The nation benefits from war powers dialogue between the two political branches.

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Introduction: How the War Powers Dialogue Can Work

Two recent major episodes, the United States' response to Syria's use of chemical weapons in 2013, and its war against the Islamic State of Iraq and the Levant ("ISIS") since 2014, illustrate the complicated sequence of actions and reactions by the executive and legislative branches that often occurs in connection with the exercise of our nation's war powers. In response to Syria's use of chemical weapons in 2013, President Obama initially proposed a military strike authorized by unilateral Presidential power. Then he sought Congressional authorization for a military strike. But before any Congressional decision, he agreed to a diplomatic solution with the assistance of Russia.

In the war against ISIS, the President invited Congress to authorize a proposed military mission. But Congress did not vote on an authorization bill. Meanwhile, the executive branch implemented a campaign of air strikes, training the Iraqi military, and Special Forces missions. But President Obama refused to deploy "boots on the ground," or regular combat units. This combat strategy became an issue in the 2016 election. In 2017, the problem is one for President Trump.

1. Charlie Savage, Obama Tests Limits of Power in Syrian Conflict, N.Y. TIMES (Sept. 8, 2013), http://www.nytimes.com/2013/09/09/world/middleeast/obama-tests-limits-of-power-in-syrian-conflict.html ("Kathryn Ruemmler, the White House counsel, said the president believed a strike would be lawful, both in international law and domestic law, even if neither the Security Council nor Congress approved it. But the novel circumstances, she said, led Mr. Obama to seek Congressional concurrence to bolster its legitimacy.").

2. Id.


6. John Kerry, Sec'y of State, U.S. State Dep't, Opening Remarks Before the House Foreign Affairs Comm. (2013) (stating that, "we all agree there will be no American boots on the ground").
An interactive dialogue between the two political branches of government determined the United States' role in both episodes. This dialogue is the constitutional duty, both textually and structurally, of the two branches. Unlike the usual exercise of constitutional powers, the dialogue does not follow a regular, orderly, well-structured pattern. Instead, it is a messy and, sometimes, disorderly process. But it is precisely this dialogue that enables the public to participate in decision-making about the exercise of the nation's war powers.

Through a robust and candid dialogue between the political branches, the nation can calibrate the exercise of its war powers, ensure that a commitment to war is roughly consistent with the views of the sovereign public, and fulfill the Framers' vision of both political branches being involved in decisions to engage in war.

In this Article, we examine the process of inter-branch dialogue rather than focusing only on the endpoint of that dialogue: whether a resulting military action has been authorized by the Constitution. We believe that an overly abstract and formal analyses focused purely on that binary determination fails to consider how the political branches actually interact and influence each other prior to war. We analyze the elected branches' dynamic interactions, their proposals and responses, and how interim and partial steps play a key role in informing Congress and the people. This process has significance even where Congress does not formally enact legislation.

The process is a dialogue, as factions within Congress and the Executive Branch talk back and forth, push competing stances, propose interim actions, and exchange signals while gauging the evolving public reaction. Through this process, the government as a whole makes legitimate and democratic progress. It is "legitimate" because it gives both of the branches the opportunity to play a role as the Framers intended. It is "democratic" because when the broader public and elected representatives have truthful information about the interests at stake and the available options, the dialogue can incorporate the truthfully-informed preferences of the broad population. The process often involves disorganization, miscommunication, and zig-zagging stances and actions, but progresses nonetheless toward a

9. See id.
10. Perhaps another way to view this is the difference between knowing a box score and understanding the strategic decisions that a manager made during the game.
course of action or inaction.

Part I discusses the model of war powers dialogue. Among other things, it discusses how a model focusing on the dynamic interaction between Congress and the President describes and explains so much more than a simple binary question of whether military action was “authorized” or “not authorized.” Part II addresses the U.S. response to President Assad’s use of chemical weapons in Syria in 2013, and notes that the dialogue shifted from a possible unilateral Presidential action to a period when Congress considered whether to deny the requested authorization. Part III addresses the U.S. response to ISIS’s occupation of Iraqi territory from 2014 to 2016. The ultimate decision to use air strikes, military training, and Special Forces missions, but not ground combat units, resulted from both Executive intention and Congressional deliberation.

The Conclusion highlights the importance of understanding the interactive process that underlies the use of the United States’ war powers.

This Article refers to this process as a “dialogue” because the participants sometimes have a literal dialogue with each other. For example, at Congressional hearings, Executive Branch witnesses confront Senators or Representatives. Sometimes they engage in another kind of dialogue, such as when the President announces executive actions and Congressional leaders propose legislation that would support the action or oppose it. Sometimes the interaction is more of a “dance,” such as when the President takes a series of steps and stances, and Congress takes its own distinct series of steps and stances.

I. The War Powers Dialogue

One can identify two contrasting models regarding the exercise of war powers. Under one model, the “presidency [is] shorn of controls,” and the President has “broad and exclusive executive power in the national

13. See id. at 1295-96 (discussing the process of deliberation between Congress and the President regarding war affairs and how the system may fail to produce quality deliberation).


18. See generally Richard F. Grimmett, Foreign Policy Roles of the President and Congress (June 1, 1999) (illustrating how the President and Congress support or seek to change each other’s policies respectively).

This model can explain or justify the 2011 Libyan air-strikes, and could have been invoked to justify presidentially authorized airstrikes in response to Syria’s use of chemical weapons as well as air strikes in response to ISIS.

The second model focuses on Congress’s ability to constrain or deny required authorization for Presidential action. This model suggests that President Obama should have congressional authorization for any response to ISIS rather than relying on unilateral assertions of executive power. Even so, under this model, President Obama would have been criticized for both his strained interpretation of an outdated Congressional authorization, and, perhaps, for the late-2015 enlargement of the mandated mission by engaging Special Forces against ISIS in Syria.

These two approaches stand in tension with each other. The first (the “pro-Executive approach”) contends that the President has unilateral authority under the Constitution. The second (the “pro-Congressional approach”) contends that Congress can rein in the President’s exercise of war powers. But they are both binary in the sense that they focus on the question of whether or not the exercise of war powers was authorized.

Both approaches start from larger premises about the nature of the acts that authorize war powers. The pro-Executive approach works from precedents built up over two centuries of executive action. It uses these

20. Id. at 5.
24. Barron & Lederman, supra note 23, at 1101 (arguing that Presidents in the past have understood that their wartime powers are constrained by legislatively-imposed restrictions).
25. There is a new analysis that Presidents may well make strained interpretations as a better alternative to battling on constitutional powers and issues. Peter Shane, The Presidential Statutory Stretch, 87 COLO. L. REV. 1231, 1234 (2016) (asserting that “it turns out that legal arguments based on a statutory stretch are more facilitative of the rule of law than would be bolder claims of exclusive executive authority under Article II”).
26. See BRUFF, supra note 19, at 5 (describing the belief that the President is not subject to congressional controls).
precedents to expand upon provisions in the Constitution that were themselves without explicit original war-making significance, such as the clauses for "executive power" and "Commander in Chief." The pro-Congressional approach refers back to the Framers' original consignment of war powers to Congress in the clause about "declaring war," and the uses of legislative and appropriation provisions about war powers.

Whatever one thinks of these approaches, someone applying either approach, upon the initiation of a new war powers action, focuses upon extracting static elements of a formal nature. The goal of each approach is to determine whether or not there is legal authorization, rather than examining the dynamic course of the whole process. From this analysis, one draws a conclusion about whether the military action was authorized or not.

A different model is found in Professor Bruff's recent work, Untrodden Ground: How Presidents Interpret the Constitution. Professor Bruff deals with a variety of subjects, including, importantly, war powers. He traces the lineage of the war powers doctrine from George Washington to Barack Obama. The focus is not on whether particular war powers actions were authorized, although that does get some attention. Rather, the focus is on the dynamic process of war power initiation and conduct, and the variety of factors bearing upon that process. This Article uses an analogous approach.

This approach does not fit the current war powers episodes into the previously elaborated system of thought that focuses on the authority of one branch over the other. By contrast, it pays specific attention to newly emerging, current practices, working up, from an analysis of the steps and stances in the process rather than down, from a historically-framed system.

Certain interactions between Congress and the President stand out from the Syria (2013) and ISIS (2014–2016) episodes as making the pro-

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28. The issues are analyzed, unsympathetically to executive positions, in Barron & Lederman, supra note 24, at 1106-07.
29. Id. at 1008, 1108.
31. See Bruff, supra note 19, at 401-55.
32. Id. at 413–45.
33. Ford, supra note 30, at 614, traces the approach that some kinds of law are as much or more about process rather than formal standards back to the “New Haven School” of international law.
34. And, again, the approach does not produce a binary view of the war powers action as authorized or not. Rather, the focus concerns the dynamic interactions of the President and Congress, and the workings of the dialogue process, rather than to characterize and classify a few formal specifics for purposes of deciding authorization.
cess democratic and legitimate, regardless of how pro-executive or pro-congressional analysts would analyze them. For instance, President Obama engaged in genuine consultation with congressional leaders regarding Syria’s use of chemical weapons in 2013, leading him to decide not to proceed unilaterally.\textsuperscript{35} And in 2014, President Obama invited Congress to enact a legislative authorization for a U.S. military response to the conflict with ISIS, which Congress may well have turned into a vehicle for limitations or other expressions of its stance.\textsuperscript{36} Other analytical approaches generally give only lip service to presidential consultation with Congress.\textsuperscript{37} This may be for good reason. Often, genuine consultation does not occur at all, and when it does occur, it may be hard to objectively gauge how robust that consultation is. Informal methods of consultation do not easily fit into the binary analysis of whether or not military action was authorized. But in 2013 and 2014, meaningful consultation definitely occurred.\textsuperscript{38}

This dynamic way of looking at war powers interactions is consistent with the dominant model taken from Justice Jackson’s concurrence in \textit{Youngstown Sheet & Tube v. Sawyer}.\textsuperscript{39} Jackson’s concurrence lays out a model with three zones, with the middle zone a “twilight” in which Congress has neither expressly authorized nor expressly forbidden executive action.\textsuperscript{40} Commentators sometimes skip over the fact that the concurring opinion placed great emphasis on the particular “dialogue” that occurred in that case.\textsuperscript{41} President Franklin Roosevelt had asked Congress for power to seize factories in the event of strikes.\textsuperscript{42} Congress had rejected this, even during World War II, albeit by relatively informal amendment-consideration actions.\textsuperscript{43}

Based on his review of this particular dialogue between Congress and the Executive, Jackson’s concurrence found weakness in the Executive’s position.\textsuperscript{44} What is most interesting about Jackson’s concurrence is its attention to the dynamic nature of the relationship between the executive and legislative branches. Justice Jackson cared little about the history of the “declare war” clause or the precedents of the “Commander in Chief”


\textsuperscript{37} See BRUFF, supra note 19, at 5 (highlighting that those who advocate the “unitary executive” view “slight the important and accepted role of Congress in controlling executive officers by . . . informal practices”).

\textsuperscript{38} Press Release, The White House, supra note 35.

\textsuperscript{39} \textit{Youngstown Sheet & Tube v. Sawyer}, 343 U.S. 579, 635 (1952).

\textsuperscript{40} Robert Bejesky, \textit{War Powers Pursuant to False Perceptions and Asymmetric Information in the “Zone of Twilight,”} 44 St. Mary’s L.J. 1, 13-14 (2012).

\textsuperscript{41} \textit{Youngstown}, 343 U.S. at 657-58.

\textsuperscript{42} \textit{Id.} at 612.

\textsuperscript{43} \textit{Id.} at 601, 613.

\textsuperscript{44} \textit{Id.} at 579, 638-39.
power. He cared much more about the actual interaction between the two political branches. This "zone of twilight" analysis attended closely to a highly significant sequence of steps in which the President sought authorization and Congress vigorously rebuffed those requests (although Congress did not enact a law expressly prohibiting Presidential action).

The "dialogue" model—unlike other models—places great importance on whether the Executive provides truthful information to the public and to Congress, particularly at congressional hearings. After all, once Congress has enacted a law, such as an authorization for war, the enactment is not rendered null just because the Executive misled Congress or engaged in prevarication. Moreover, wars have often taken directions that were completely unexpected at the start, such as when U.S. authorization for entering World War I led to the U.S. army invading Russia to fight the Bolsheviks.

The "dialogue" approach includes a focus on the Executive's provision of information because that is a large part of the interaction between Congress and the President. The act of providing information is less formal than the enactment of war authorization or a formal Presidential order for military action without Congressional authorization. But the nation's exercise of particular war powers is more likely to be viewed as democratic and legitimate if the Executive has first candidly shared information with Congress.

Three war powers actions over the last half-century illustrate the importance of providing such truthful information. The 1964 Gulf of Tonkin Resolution was passed by both Houses and signed by the President, providing broad authority for military action in Vietnam. From the binary frame of whether the Vietnam War was authorized, the Gulf of Tonkin Resolution seems to provide such authority. But the Johnson Administration was deceptive in obtaining that authorization. President Johnson claimed his intent was limited to bombing North Vietnam and failed to disclose that he would use the resolution to justify a huge, bloody ground war. The "dialogue" model includes in its frame consideration of the information that the Executive Branch provides to Congress, including

45. See id. at 635.
46. Id.
47. See id. at 657-58.
49. See id. at 1407.
51. See Damrosch, supra note 48, at 1413.
52. See id. at 1409.
53. Id.
54. See Robert Bejesky, Precedent Supporting the Constitutionality of Section 5(b) of the War Powers Resolution, 49 Willamette L. Rev. 1, 12-13 (2012).
whether that information was accurate.  

In 1987, after the Iran-Contra Affair was disclosed in the press and the congressional investigation ensued, the Reagan Administration put forward formal justifications for its actions.  

Although Congress had enacted the Boland Amendments prohibiting the executive branch from spending appropriations for logistical support of the Nicaraguan Contras, the Reagan Administration nevertheless provided the Contras with logistical support.  

Supporters of President Reagan argued that the arms funding came not from appropriations but from foreign governments’ contributions.  

The model of expansive executive prerogative, focusing on the formal source of the money, would seem to support this view.

But during 1984–1986, the Reagan Administration’s statements to Congress about the contras included multiple falsehoods. Much of the Iran-Contra investigations focused on those falsehoods. The simple binary models, with their limited focus on legal authorization, do not capture a critical aspect of constitutional war-making: whether the executive branch’s communications to Congress and the public are truthful.

For the Iraq War that started in 2003, the Bush Administration had obtained an authorization, passed in 2002 by both Houses and signed by the President. Congress authorized that war more than six months before the U.S. invasion began. Formally, the war had congressional authorization. Yet the Bush Administration presented to Congress and the public a highly misleading case that Iraq had weapons of mass destruction (“WMD”). The “dialogue” model captures the illegitimacy of this war in ways that the binary model does not: the fact that a key predicate for congressional authorization was the executive branch’s inaccurate assertions to Congress and the public that Saddam Hussein had ready-for-action WMD.

Moreover, congressional hearings serve an important function beyond the mere one-way flow of information from the executive branch. At hearings, Congress can proactively probe the intentions of the President, exposing weaknesses in the executive’s plan and enabling members of Congress

56. See, e.g., id. at 888-89 (describing the factually inaccurate information that the Administration gave to Congress about what happened in the Tonkin Gulf).
58. See Bejesky, supra note 54, at 24.
61. Id.; see In re Abrams, 689 A.2d 6, 6–7 (D.C. 1997) (censuring former Assistant Secretary of State Elliott Abrams for deceiving Congress).
62. A vigorous argument was made that Congress had only authorized a limited war, and that President Bush had improperly escalated it beyond the Congressional mandate. Bruce Ackerman & Oona Hathaway, Limited War and the Constitution: Iraq and the Crisis of Presidential Legality, 109 MICH. L. REV. 447, 459, 464 (2011).
63. See James P. Pfiffner, Did President Bush Mislead the Country in His Arguments for War with Iraq?, 34 PRESIDENTIAL STUD. Q. 25, 28 (2004).
A binary model, focused only on authorization, does not take hearings seriously, denigrating them as mere talk rather than formal legislative action.

Yet hearings may serve as a step or stance of limitation or, less often, expansion of authority. Hearings have taken on great importance in recent war powers debates to resolve—among other key questions—whether the President intends solely to conduct limited airstrikes (as against Serbia in 2000), or also intends to engage regular ground combat units in the fight.\(^{65}\) At hearings, members of Congress draw out from executive witnesses just what level of force is intended, and have an opportunity to react to what they say.

II. Syria 2013: The Dialogue in Action

In August 2013, Syria engaged in a major chemical weapons attack on its own citizens.\(^ {66}\) This immediately triggered White House consideration of military action because President Obama had earlier stated that if the Assad regime used chemical weapons, it would cross a “red line.”\(^ {67}\)

A. Air Strikes Considered

For the first few days, President Obama did not speak publicly.\(^ {68}\) Rather, unnamed administration sources indicated that air strikes were under consideration.\(^ {69}\) The administration did not indicate whether it would seek congressional authorization, and it appeared that the President would act unilaterally.\(^ {70}\) Congress was not even in session.\(^ {71}\)

President Obama took seriously the need to consult Congress. There

\(^{64}\) For example, a hearing with testimony by Secretary of State John Kerry, right at the point in 2013 when President Obama was weighing a unilateral air strike on Syria, provided a key forum. See, e.g., Peter Baker & Michel R. Gordon, Kerry Becomes Chief Advocate for U.S. Attack, N.Y. TIMES (Aug. 31, 2013), http://www.nytimes.com/2013/08/31/world/middleeast/john-kerry-syria.html.

\(^{65}\) See Steven B. Redd, The Influence of Advisers and Decision Strategies on Foreign Policy Choices: President Clinton’s Decision to Use Force in Kosovo, 6 INT’L STUD. PERSP. 129, 139 (2005).


\(^{68}\) See Press Release, The White House, supra note 35 (President Obama first made a statement about the Syrian chemical weapons attack ten days after it occurred).


were rapid developments in the last week of August. Speaker of the House John Boehner sent the President a letter asking for a legal justification for use of force. Obama spoke directly and substantively twice with Speaker Boehner, and kept in touch with Boehner through his national security officials. He also spoke with House Minority Leader Nancy Pelosi, and the Senate majority and minority leaders. All of the leaders apparently wanted a congressional vote instead of unilateral executive action.

The consultation was not, as had happened so often in the past, mere notification. Boehner apparently had strong misgivings about proceeding with military action without a vote, and promised to provide a vote if the President sought one. Moreover, the procedure for the vote would not be manipulated in a partisan way; instead, it would be what is known as an "up or down" vote in which the President's proposition would be put before the representatives and they would have a simple, clear, straightforward vote on it. Normally the Speaker has no obligation to provide this, and his own majority party members may well prefer some ingeniously arranged vote to give the President little chance.

The President could have claimed unilateral executive authority for a military strike against Syria on one of two grounds. One would be the less likely—but honest—ground of humanitarian intervention. Recent precedents for humanitarian intervention include the 2000 air campaign against Serbia (regarding Kosovo) and the 2011 air campaign against Qaddafi's government in Libya. But both of those air campaigns had additional

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72. See, e.g., Edelson & Starr-Deelen, supra note 70, at 595.
78. See Parker, supra note 73.
81. See Bresnahan, supra note 74 (discussing the difficulty Boehner will have convincing his fellow Republicans to follow suit).
82. RICHARD F. GRIIMMETT, CONG. RESEARCH SERV., RL33532, WAR POWERS RESOLUTION: PRESIDENTIAL COMPLIANCE 4-5, 11-12 (2012).
justification, including NATO’s support for both campaigns.\textsuperscript{83} The Obama Administration may have wanted to engage in unilateral humanitarian intervention in support of the “Arab Spring.”\textsuperscript{84} But the Republicans who controlled the House opposed this, and the public was skeptical.\textsuperscript{85} The Executive recognized that it faced political resistance to its claim that it had broad power to use the military for humanitarian intervention.\textsuperscript{86} Humanitarian problems occur all over the globe, including in places without strong American security interests. A worldwide program of presidential unilateral military interventions solely for humanitarian reasons would arouse congressional and public backlash.

Alternatively, the President could justify this particular unilateral campaign on the theory that Syria’s use of chemical weapons threatened American interests.\textsuperscript{87} A breakdown of the taboo against the use of chemical weapons undermines tangible (non-humanitarian) American security interests, particularly when their use may cause them to fall into the hands of terrorist groups who could use them, directly or indirectly, against U.S. targets.\textsuperscript{88} But a government’s use of chemical weapons in a civil war within its own territory is less cognizable as a security threat to the United States than the use of chemical weapons against other nations or its imminent diversion to terrorists.\textsuperscript{89}

Besides justification, another important issue regarding unilateral presidential authorization for action against Syria concerned the scope of the military engagement. Two years earlier, in 2011, President Obama, without seeking authorization by Congress, ordered an air campaign by NATO in an effort to impose a no-fly zone over Libya.\textsuperscript{90} The Justice Department’s Office of Legal Counsel issued a war powers opinion purporting to justify that unilateral Presidential action.\textsuperscript{91} That opinion cited many precedents from the preceding decades, including an airstrike against Libya in the 1980s, and the air campaign against Serbia (about

\textsuperscript{83} Id. at 4, 12-13 (noting NATO’s support for both the Serbia and Libya campaigns).


\textsuperscript{86} Alton & Struble, supra note 84, at 14.

\textsuperscript{87} See Chemical Weapons in Syria, FED’N AM. SCIENTISTS, https://fas.org/issues/biological-chemical-and-other-non-nuclear-threats/chemical-weapons-syria/ (last visited Oct. 6, 2016) (noting that there were rising concerns that terrorist organization could acquire these chemical weapons in the event of state collapse).

\textsuperscript{88} S. REP. No. 104-33, at 241 (1993).


\textsuperscript{91} Office of Legal Counsel, Authority to Use Military Force in Libya, 35 OPINIONS OFF. LEGAL COUNS. 1, 1, 4-6 (2001), https://fas.org/irp/agency/doj/olc/libya.pdf.
The Libya opinion, in turn, served as an important precedent for military action against Syria.\(^\text{93}\)

The precedents suggest that the viability of a unilateral presidential stance depends on the risks that American military forces face and the likelihood of military success.\(^\text{94}\) An air strike against Syrian military targets might appear, at first glance, to involve no U.S. combat troops on the ground and limited risk of casualties for U.S. armed forces or Syrian civilians.\(^\text{95}\)

However the Administration did not initially limit itself to a single-episode air strike, and did not explain how it would respond as the situation developed.\(^\text{96}\) Such vagueness left open a variety of options, depending on how Syria reacted and whether other nations supported the United States.\(^\text{97}\) It also avoided the negative congressional and public reaction that would result from a commitment to a wider war.\(^\text{98}\)

Analyzing the situation under a binary war powers model of unilateral action would be indeterminate.\(^\text{99}\) On the one hand, the Presidential side could cite precedents for unilateral air strikes: Libya (1986), Sudan and Afghanistan (1998), Serbia (2000), and Libya (2011).\(^\text{100}\) As in these earlier conflicts, air strikes would not risk American interests or significant numbers of American casualties.\(^\text{101}\) Military action would reinforce the global taboo against use of chemical weapons, and Congress was adjourned.

On the other hand, the interests at stake were at least as much human-
itarian as security-related.\textsuperscript{102} There was time to ask Congress.\textsuperscript{103} As a practical matter, the country was war-weary and more skeptical of the use of force than during the earlier conflicts.\textsuperscript{104}

In a dynamic interaction, it matters greatly whether the situation allows time for consultation. Given a little time, Congress may, on the public’s behalf, probe the Administration’s intent and facts supporting military action.\textsuperscript{105} Moreover, a congressional debate could occur, and the public, watching Congress and the press, could develop its own view.

The military apparently advised President Obama that he did not have to engage in an immediate strike.\textsuperscript{106} A delay would not prevent successful strikes.\textsuperscript{107} That allowed time for congressional probing.\textsuperscript{108}

This scenario highlights the enormous difference between treating the analysis as a static binary assessment of whether the ultimate military action was authorized, or as a description of the sequence of stances and actions taken by the executive and legislative branches with varying claims to justification. In a dynamic interaction, it matters greatly that a quick unilateral strike prevents Congress from having the time to gauge the military and political risks of an Administration initiative.\textsuperscript{109} In 2013, the fact that a unilateral air strike on Syria did not happen immediately enabled congressional probing.\textsuperscript{110}

**B. President Obama Invites Congress to Decide**

On August 31, 2013, President Obama announced that he would seek congressional authorization for air strikes on Syria.\textsuperscript{111} What was the President’s reasoning for doing this? Although much had to do with the specif-

\textsuperscript{102} James Uthmeier, Note, Redrawing the Red Line: The Constitution’s Limitation on President Obama’s Ability to Use Military Force in Syria, 12 GEO. J.L. & PUB. POL’Y 875, 876-77, 886 (2014) (noting that President Obama’s arguments were “shaky at best”).

\textsuperscript{103} See id. at 877 (noting that the President planned to seek authorization from Congress for the use of force in Syria).


\textsuperscript{106} See Michael R. Gordon & Jackie Calmes, President Seeks to Rally Support for Syria Strike, N.Y. TIMES (Sept. 1, 2013), http://nyti.ms/1dy0c1h.

\textsuperscript{107} See id.

\textsuperscript{108} See id.

\textsuperscript{109} See Bush, supra note 105, at 1738 (explaining the importance of congressional support for war).

\textsuperscript{110} See Gordon & Calmes, supra note 106.

ics of Syria, some of it related to President Obama's views of war powers more broadly.112 Segments of the public and Congress expressed opposition to even the preliminary statements of Administration intentions.113 Early public polls show an even division, and that division was mirrored in Congress.114 Most of this opposition grew out of concern about the merits of conducting air strikes in the midst of a civil war, but some of it grew out of concern that the President was proceeding unilaterally instead of seeking Congressional authorization.115

There is currently considerable domestic skepticism about unilateral presidential war actions. Some look back at the 1950s and 1960s as a period in which Presidents had great power to act unilaterally and Congress took a back seat.116 In the early 1970s, near the end of the Vietnam War, skepticism toward presidential leadership came to the fore and was codified by the 1973 War Powers Resolution.117 In the 1980s, Presidents Reagan and George H.W. Bush built greater public support for limited unilateral actions in Lebanon, Grenada, and Panama.118

The Clinton Administration presents a more complex picture: compare the public's anger when the deployment of Special Forces in Somalia (1992–1993) resulted in American casualties, with the public's acquiescence to the bombing of Serbia regarding Kosovo (in 2000).119 During George W. Bush's 43rd Administration, the disenchantment with the Iraq War so alienated the public that there was again, as after the Vietnam War, a reaction against participation in another large-scale ground war.120

And for President Obama, members of two different political parties

112. See Jeffrey Goldberg, The Obama Doctrine: The President Explains his Hardest Decisions about America's Role in the World, ATLANTIC, Apr. 2016, at 75 (listing four factors that contributed to Obama's decision to seek Congressional authorization, three of which were specific to the situation in Syria).


114. Blake, supra note 104; Blow, War-Weariness, supra note 104.

115. Baker & Weisman, supra note 111.

116. See, e.g., Bush, supra note 105, at 1723–24 (detailing the attitudes of the country toward unilateral Presidential power after World War II and before the Vietnam War).

117. Id. at 1724.

118. In Lebanon in 1983, President Reagan had unilaterally sent in Marines, but Congress afterwards enacted an authorization limited in time. Id. at 1748; see Lori Fisler Damrosch, The Clinton Administration and War Powers, 63 L. & CONTEMP. PROBS. 125, 130 (2000).


combined to oppose presidential unilateralism. Republicans suspicious in general of President Obama, intensified by a degree of neo-isolationist attitude against getting involved based on humanitarian (rather than security) interests and anti-war Democrats who looked at all U.S.-initiated wars through the skeptical perspective left by the Iraq War (and the earlier Vietnam War).

Interestingly, the relatively recent 2011 air campaign against Qaddafi’s regime in Libya might have seemed a firm recent precedent for President Obama. Although that action contributed to bringing down Qaddafi, the precedent did not seem to support Obama in forging ahead without congressional authorization in Syria because Syria involved an ongoing civil war that had already caused hundreds of thousands of deaths.

Another aspect concerns the personal war powers philosophy of the President himself. Presidents Reagan and George H.W. Bush may have preferred presidential unilateralism as a basic belief. In contrast, President Obama acknowledged Congress’s role in authorizing war as part of the constitutional order. The Syrian episode demonstrates dramatically that a President may sometimes invite a congressional role.

During this same time frame, the British House of Commons defeated Prime Minister Cameron in a vote on the question of taking action against Syria. In the British parliamentary government, it is unheard of for the party in power to repudiate its own party head, the Prime Minister. No

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123. See Shear, supra note 121 (noting that Obama faced some opposition from liberal Democrats who were skeptical of war).


125. In addition, in Libya, a U.N. Security Council resolution supported military action, NATO allies, especially Britain and France, were willing to take over most of the aircraft sorties once the United States initially degraded Libya’s air defenses, and Qaddafi had been an American enemy for decades. See S.C. Res. 1973 ¶ 4 (Mar. 17, 2011).


127. See Goldberg, supra note 112 (indicating that the fourth factor leading Obama to seek Congressional authorization was the fact that Obama “had come into office with the strong belief that the scope of executive power in national-security issues is very broad, but not limitless”).

128. See Savage, supra note 1 (quoting President Obama: “Mr. Obama argued that the United States should ‘get out of the habit’ of having the president ‘stretch the boundaries of his authority as far as he can’ while lawmakers ‘snipe’ from the sidelines.”).

129. See Koh, Syria and the Law of Humanitarian Intervention, supra note 93.

130. See id.
static approach to formal American war powers authority could account for the effect of this U.K. development on presidential-congressional relations.

In considering dynamic democratic processes, however, it is not surprising that the U.K. Parliament's vote against Syrian bombing would resonate in the United States. Parliament's vote against bombing reflected a powerful war-weariness after the Iraq War that the British shared with Americans. And the parliamentary vote also indicated that the normally strong loyalty to a party leader—a Prime Minister or a President—could be outweighed by war-weariness.

Critics of a dynamic approach may contend that war powers law does not depend on "soft" informal aspects as public attitudes like the "Vietnam War syndrome," the actions of U.K.'s Parliament, or the differences in the personal attitudes of Presidents Reagan and Obama. In that view, any analysis should focus on "hard" formal aspects, such as congressional enactments, judicial precedents, and executive branch legal opinions. But the "soft" aspects are part of the interactive picture—the fuller picture—of the war powers dialogue.

Once President Obama called for congressional authorization, the congressional process came to the forefront. Congressional process does not play a role when a President undertakes a sudden and purely unilateral action, such as President Reagan's invasion of Grenada and bombing of Libya and George H.W. Bush's invasion of Panama. But in the Syrian chemical weapons matter, the engine of the democratic process for war powers fully cranked up.

Hearings are key to the democratic and legitimate exercise of war powers. This Article departs from most war powers scholarship, which usually ignore hearings. Compared to presidential orders or congressional enactments, hearings may seem to be no more than just talk. Hearings are not conclusive in the rigid formal binary analysis of whether or not military action is authorized.

The relevant congressional committees conducted hearings on the

132. See Baker & Weisman, supra note 111.
134. Baker & Weisman, supra note 111.
issue—most important of which were the Senate Foreign Relations Committee’s questioning of Secretary of State John Kerry. These hearings performed several important functions: they clarified the Administration’s position regarding what military actions it would take; they unearthed the Administration’s knowledge of, and the others’ insights about, conditions in the sphere of fighting; and they engendered a public dialogue between Congress and the electorate, allowing them to jointly formulate their views.

In these hearings, the Obama Administration was questioned about whether it wanted the option to go beyond initial air strikes. This inevitably engendered a negative reaction from a war-weary Congress and public. These hearings unearthed the fact that even with air strikes suppressing Syrian resistance, ground intervention would be required to make sure that chemical weapons did not fall into dangerous hands. This led Congress and the public to look skeptically upon potential military intervention.

Through hearings and broader public debates over various military options, it quickly became apparent that the only proposals with a chance of passage would have a limited duration, would explicitly rule out ground combat units, and would focus the military response on Syria’s use of chemical weapons.

In recent decades, political debates over war powers authorization have drawn sharp distinctions between air strikes and deployment of...
The need for congressional authorization is clearer with respect to ground combat than with air strikes. Ground combat may result in more American casualties, the danger of deepening involvement, greater need for supporting arms and logistics supply, less short-term flexibility, and a greater risk of long-term entanglement. The differences between air strikes and ground combat puts a greater burden on the President to justify proceeding unilaterally with ground combat troops. Additionally, congressional proposals may draw a line authorizing air strikes but not ground combat.

The Senate Foreign Relations Committee reported out by a slim ten to seven margin a bipartisan authorization for action against Syria. In the House, the leadership of both parties supported the authorization. But both the House, measured in informal counts, and the public, measured in polls, were skeptical of or opposed the Administration position. The Washington Post found Congress to be split into five groups: the “happy to debate the issue, reserving judgment' caucus”; the “skeptical caucus”; the “anti-military action caucus”; the “‘do it now, already’ caucus”; and the “‘bigger military action’ caucus.”

Support seemed likely in the Senate. In the House, it could not be predicted. The key seemed to be which way liberal Democrats would vote. Their constituents were torn between their continuing anger and
wariness from the Iraq War, and their general support for President Obama. These representatives did not want to tip their hand until the last minute to avoid alienating part of their base.

Then an international solution emerged. Because it became public on September 9, 2013, a relatively late date, and because of the way it was arranged, there was a public misimpression that it was a wildly surprising and unexpected development. Later, however, it emerged that there had been many discussions on the subject between Secretary Kerry and his Russian counterpart, Sergei Lavrov. Vladimir Putin raised it directly with Obama two days before (September 7th) Kerry took it to the public on September 9th.

Kerry made it public in the form of a seemingly offhand comment: "Sure, [Assad] could turn over every single bit of his chemical weapons to the international community in the next week. But he isn’t about to do it, and it can’t be done." But his comment was well calculated. His comment was a nuanced signal to the Russians that the United States would welcome Russian action as an alternative to American air strikes in Syria. Immediately afterward, Kerry had a scheduled conversation with Lavrov, in which Lavrov said Russia planned to make a public proposal along Kerry’s lines. Russia could prevent American military involvement in the Syrian civil war if Assad, on a Russian leash to assure his keeping his word, “agreed to have his poison gas placed under international control and ultimately destroyed.”

Then Vladimir Putin, who had made his eagerness to stake a high-profile position on Syria clear, vocally made the Kerry/Lavrov proposal his own. He obtained Assad’s assent. With Kerry having negotiated, in

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154. Id.
155. Id.
157. Id.
159. Baker & Gordon, supra note 64.
161. Observers give Lavrov much credit. See id.
effect on two tracks—with the Senate Foreign Relations Committee and with the Russians—President Obama could demonstrate a cautious embrace of the solution. Although a great deal of negotiation and implementation remained, the deal was struck right then.

With this background unveiled, it is evident that the international agreement evolved parallel to, and simultaneously with, the evolution of the dialogue between the Obama Administration and Congress. Putin and Lavrov probably saw, from the time being taken for the process, that there was still a window for Russia to play a major role. Obama and Kerry were making use of the painful lesson about how unwelcome military actions against Syria were in the eyes of the public and Congress.

C. Does the Dialogue Process Work?

In 2013, when President Obama called for Congress to vote on war authorization, reluctant members may have defeated him on that vote. Some commentators have maintained that the President hardly ever loses in war powers controversies. In this view, the President has powers that overwhelm or outmaneuver the Congress. The President has the initiative on whether, where, when, and how to take military action. He has the ability to alarm the public and a monopoly on intelligence resources—including the ability to deceptively manipulate the content of intelligence and conceal covert action, thereby shaping public knowledge. In addition, he has the loyal support of his own party, and the opposing party is usually unwilling to attack the Commander in Chief.

Yet this time, President Obama may well have lost such a vote. The observation that the President hardly ever loses in war powers controversies may apply to some historic periods more than others. Presidents in some eras hit more resistance in their foreign initiatives, from the aftermath of World War I to the end of the Vietnam War. The Iran-Contra affair from 1984 to 1986 reflected the Reagan Administration’s resort to misconduct so that it could provide aid to the Contras in Nicaragua even

164. See id.
166. See id.
168. See id. at 1292-93 n.169 (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936)).
169. See id. at 1289 (describing, as an example, the conduct of the Reagan administration during the Iran-Contra Affair).
170. See id. at 1311.
171. The Senate that defeated the Treaty of Versailles in 1919, the isolationist Congresses that limited American involvement in the first two years of World War II, and the Congress barring further involvement in Indochina and enacting the War Powers Resolution in 1974, suggest that the President does sometimes lose. See id. at 1293.
though Congress barred such aid.\textsuperscript{172}

In 2013, after the long wars in Iraq and Afghanistan, the public and Congress were suffering from severe war fatigue.\textsuperscript{173} While the opposition party in Congress may ordinarily trust a President’s description of Middle Eastern threats, that willingness to trust was reduced by President Bush’s action in 2002 and 2003.\textsuperscript{174} Having been gulled into fearing Saddam Hussein’s non-existent WMD in that earlier era, most Americans did not fear that Assad’s chemical weapons would threaten the United States.\textsuperscript{175} Instead, they viewed Assad’s use of chemical weapons as just one more awful thing Assad did in an awful civil war that the United States should not get involved in.\textsuperscript{176}

We believe that the correct question to ask is whether the war powers dialogue between the President and Congress worked in 2013. The answer is yes. Syria gave up its chemical weapons in a way that did not require combat, casualties, massive expenditures, or a rending of the international fabric.\textsuperscript{177}

What that outcome did require was that the President not rush ahead unilaterally with air strikes on Syria. Had President Obama moved unilaterally on air strikes (as both Reagan and Obama did in Libya), there would not have been the time for the multilateral diplomatic process to work. Through the process of trying to persuade and listening to Congress, Obama came to understand that the public and Congress would vastly prefer a diplomatic solution, even one with Russia, over air strikes.\textsuperscript{178}

The democratic and legitimate process that followed Obama’s decision to seek congressional authorization produced an airing of both the calculations about Syria’s chemical weapons and the public’s reluctance to get involved.

III. ISIS from 2014 to the Present: President and Congress Find a Modus Vivendi

A. Presidential Claim that 2001 and 2002 AUMFs Authorized 2014 Airstrikes

ISIS burst onto the international scene in 2014 by seizing control of

\textsuperscript{172} See id. at 1302–03.
\textsuperscript{173} See Blow, War-Weariness, supra note 104.
\textsuperscript{175} See id. at 245 n.7, 256; see also Mark Thompson, The U.S. Military: Sidelined by a Fatigued Nation, TIME (May 13, 2014), http://time.com/98310/the-u-s-military-sidelined-by-a-fatigued-nation/.
\textsuperscript{176} Blow, War-Weariness, supra note 104.
\textsuperscript{178} Remarks by the President in Address to the Nation on Syria, WHITE HOUSE (Sept. 10, 2013), https://www.whitehouse.gov/the-press-office/2013/09/10/remarks-president-address-nation-syria.
In early June 2014, ISIS seized Mosul, the second largest city in Iraq. This signaled that Iraqi forces could not resist ISIS. In early August, ISIS forces set out to slaughter a large ethnic minority in Iraq, the Yazidis. President Obama responded, in a national address, by authorizing air strikes coupled with air drops of humanitarian supplies. In September, the President began explaining to the press his authority to institute these actions. The President’s justifications to Congress for these actions cited Article II of the Constitution, the 2001 Authorization for Use of Military Force (AUMF) for al Qaeda and Afghanistan, and the 2002 AUMF against Iraq. The White House comments to the press, including background “talking points” explaining legal theories, went into more detail. Secretary of State John Kerry defended the policy at a hearing of the Senate Foreign Relations Committee.

Each of these justifications, taken separately, was debated. The Administration argued that in addition to humanitarian concerns, the scale and operations of ISIS threatened strategic U.S. interests in Iraq. But similar arguments could be made about terrorist groups that controlled territory in other countries, from al-Shabaab in Somalia and Kenya to Boko Haram in Nigeria.
Haraam in Nigeria. It would be a very broad claim for the President to argue that he could unilaterally make war against any terrorist group he might feel like, without obtaining any approval from Congress.

The 2001 AUMF seemed stretched to reach ISIS. It had been drafted to reach Afghanistan, not Iraq or Syria some thirteen years later. It addressed al Qaeda, which had launched the 9/11 strike. But the lineal descendant of al Qaeda was not ISIS, but al-Nusra. Using the 2001 AUMF as authorization for war-fighting in a different country thirteen years later against a terrorist group that was not tied to al Qaeda raised questions about how many countries, and for how many years, the President could engage in war-making.

The 2002 AUMF served as the basis for the long war by the United States against the Saddam Hussein regime and, later, the insurgency against the U.S. occupation, and the United States eventually declared that it had made peace in Iraq. It was a strain to construe an old authorization for war against Iraq as authorization for airstrikes or other military action against Syria.

In 2014, ISIS beheaded American journalists and posted videos of the beheadings on the Internet. The public had taken these videos as, in effect, ISIS’s declaration of war on the United States, and deemed presidential retaliation tit-for-tat. The President’s action had broad public support.

Mosul’s fall cut the ground out from under the argument that Iraq could manage ISIS without more help from the American military.

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191. Gonzalez, supra note 14, at 163.


196. Goodman, supra note 190.


199. See id. (detailing public support for action against ISIS).

200. The unchallenged nature of the operation resembled Grenada and Panama in that the lack of domestic dispute owed to its popularity, rather than to Congressional
August 2014, President Obama wrote Congress, explaining that the ISIS threat had grown and required American countermeasures.\textsuperscript{201} Over time, the Administration increased the commitment, pursuing air strikes in Syria and increasing the U.S. military presence in Iraq beyond 3,700 troops on missions like training and base security, with Special Forces missions in both countries.\textsuperscript{202}

B. Presidential Invitation to Congress

At a press conference on November 5, 2014, President Obama signaled that he wanted to develop, with congressional leaders, a new AUMF specifically targeting ISIS in order to “right-size and update whatever authorization Congress provides to suit the current fight, rather than previous fights.”\textsuperscript{203} In other words, he wanted a new AUMF addressing the current war with ISIS rather than relying on the 2001 and 2002 AUMFs.\textsuperscript{204}

Congressional hearings occurred on December 9th and 10th, but that was during a lame duck period before control of the Senate shifted from the Democratic Party to the Republican Party.\textsuperscript{205} At the Senate Foreign Relations Committee hearing on December 9th, Secretary Kerry stated the Administration’s views that the AUMF should provide flexibility, should not limit operations to Iraq and Syria, and should not completely preclude concurrence in virtually ceremonial pronouncements of legal justification. See Al-Salhy & Arango, supra note 180.

\textsuperscript{201} ID. It is tempting to link this to the result of the November 4th election of a Republican majority in the Senate, as well as, previously, the House. However, he had already raised the point. Waiting may simply have to avoid losing the consensus nature of the issue by injection into the politics of the election itself. In November, it could get unveiled, having undergone a short-term postponement, as part of the President having his own agenda, contrasting with Congress’s own, to get the government moving again after the election. See, e.g., Mark Landler & Jonathan Weisman, Obama Ready to Authorize Airstrikes on ISIS in Syria, N.Y. TIMES (Sept. 9, 2014), http://www.nytimes.com/2014/09/10/us/obama-isis-congress.html.

a role for ground combat forces. The Senate Foreign Relations Committee reported out a new authorization with a three-year sunset and heavy restrictions on the use of ground forces.

President Obama mentioned the issue during his State of the Union Address in 2015. To clarify his position, President Obama provided a draft proposal for a new AUMF in February of 2015.

The President’s invitation is an unusual stance and action in war powers. To be sure, Presidents have asked Congress for support or war-fighting authorization in the past. However, generally, these requests have fallen into two categories. Some, like the area support resolutions in the 1950s, were pro forma requests for non-controversial support that received comprehensive Congressional approval. More importantly, others were genuine authorizations of war overcoming some legislative resistance, like the arming of merchant ships on the eve of American involvement in World War I or the Persian Gulf War of 1991.

Although the public accepted air strikes on ISIS, the resolution sought here was not an entirely non-controversial statement of support. Nor was it a declaration of a new full-scale war. By this point, the United States had engaged in air strikes and other activities for many months using asserted authority from Article II and the 2001 and 2002 AUMFs, and was virtually unchallenged in domestic politics.


208. Wagner, supra note 193, at 260.


Earlier Presidents had gotten away with claims of unilateral Article II authority for military operations, but those were generally short-term operations, such as the invasions of Grenada and Panama and airstrikes in Bosnia and Libya. The military action against ISIS would become a long-term operation, and the President’s invitation to Congress could be seen as an attempt to bolster his previously asserted Article II authority with statutory support.

Over the long term, something questionable or controversial would likely occur in the war. If the public mood were to shift strongly against the war with ISIS, the President’s tenuous claim of authority without a fresh congressional enactment might cause the war’s unpopularity to fall only on the President. Congressional critics could attack the President for failing to seek congressional authorization. It would be more difficult for members of Congress to criticize the President’s war-making choices if they were on the record as authorizing the war. Those potential critics likely preferred not to take a public position on whether they wanted a more limited, or a more vigorous, intervention.

President Obama’s invitation shows a striking acceptance that Congress has a necessary role in saying yea or nay to war-fighting. Obama’s invitation contrasts sharply with the efforts of prior Presidents to minimize Congress’s role. Since the enactment of the War Powers Resolution over President Nixon’s veto in 1973, Presidents have consistently taken the position that it was unconstitutional. President Obama’s refusal to acknowledge that the 2011 Libya air strikes were “hostilities” reflected that struggle.

The previous President, President Bush, vetoed Congress’s

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214. Vice President Biden acknowledged this dynamic when he explained President Obama’s decision to seek authorization from Congress in connection with Syria. It matters to have Congress with you, in terms of your ability to sustain what you set out to do," he said. Obama “knew that if he was going to do anything, he better damn well have the public with him, or it would be a very short ride. . . . You need the support of the American people.

Goldberg, supra note 112.


216. Damrosch, supra note 118, at 127.

effort in 2007 to stop the Iraq War. Congress enacted war-ending provisions in a supplemental appropriations bill, which Bush vetoed and won the override fight on—a vivid battle between the branches. Going further back, in 1999, Congress denied President Clinton a clear authorization for his Serbian war, although the supportive votes on different propositions in each chamber were arguably akin to partial support. President Obama's invitation stood out against the background of that struggle.

The presidential invitation to Congress operated in many ways to adjust the climate of war powers. It replaced struggle between the branches with trust that Congress would act in the national interest. It pushed aside the apparent need for a President to claim expansive Article II powers, instead turning to Article I. Finally, it reflected a willingness to accept Congress's tendency to put conditions or limits on grants of authority.

The invitation created a precedent for the rest of the Obama years and for future Presidents because a Democratic President made concessions to a Republican Congress. This resembled the way that President Bush in late 1990 asked a Democratic Congress to authorize the Persian Gulf War, and, after a robust congressional debate, obtained authorization in January 1991, with a close Senate vote of fifty-two to forty-seven. Presidents Bush and Obama demonstrated that a President may seek and accept the authorization votes from a Congress controlled by the opposition party.

C. Congress Skeptical About Acting

In the wake of President Obama's invitation, the Republican-controlled Congress did give some consideration to the issue. However, as the New York Times put it, "President Obama’s formal request for congressional authorization to fight the Islamic State—once framed by lawmakers as a matter of great constitutional import—is now seriously imperiled because Republicans think it does too little and Democrats think it does

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219. Id.
220. GRIMMETT, supra note 82, at 4-5.
221. See Wagner, supra note 193, at 259-60 (describing President Obama's goal to unify the branches in the face of war).
222. See id. (describing President Obama's goal to unify the branches and the importance of the proposed legislation).
226. See generally Peters & Gordon, supra note 206.
too much."227

The "dovish" side objected to the Administration's proposal because it did not rule out ground combat operations.228 Rather, it ruled out "enduring offensive ground combat operations."229 In theory, this limit would avoid what took place in Iraq and Afghanistan, namely, a long-term offensive operation with American ground combat forces conducting most, and sometimes all, of the war.230 But these are not well-established terms of art. The Administration would impose its interpretation of these terms, which could be used as large loopholes.231

The White House press release accompanying the proposal laid out a list of examples in which the President could employ ground troops: "rescue operations," "the use of special operations forces to take military action against ISIL leadership," and "intelligence collection and sharing, missions to enable kinetic strikes, or the provision of operational planning and other forms of advice and assistance to partner forces."232 The Administration seemed to suggest that American forces could do what they wanted short of combat units carrying out full-scale offensives.233

The "hawkish" side had its own objections, doubting that the Administration strategy would bring victory.234 There was no consensus among these critics about what the United States should do, or what to include in an authorizing resolution.235 This in itself raised an important war powers issue. It is far from clear whether Congress can make a President step up a war.236 Had Congress passed an authorizing resolution directing offensive ground operations against ISIS in Syria, President Obama could have invoked his Article II powers, argued that Congress could not compel him, against his will, to engage in war-fighting, and deemed such a resolution as merely giving him the discretion to conduct a war.

Members of Congress held diverse views.237 In any event, as the months went by and the first anniversary of U.S. involvement came and

228. Peters & Gordon, supra note 206.
230. Obama, supra note 209.
231. Wong, supra note 229.
232. Wagner, supra note 193, at 267.
233. See id.
235. See Peters & Gordon, supra note 206 (detailing such debates).
236. Tiefer, Can Congress Make a President, supra note 218, at 448.
went, Congress still did not act, for reasons beyond those involved in alternative drafts of the authorization. Although there were partisan differences about what to say in the authorization, Senators Tim Kaine (D-Va.) and Jeff Flake (R-Ar.) developed a bipartisan draft in June 2015, but it went nowhere.

In January 2016, the Senate Republican Majority Leader, Senator McConnell, set the stage for Senate consideration of an authorization for the war with ISIS. The House and Senate continued to consider bipartisan action in 2016. Still, Republicans did not see the advantage in a vote. At the time, it seemed necessary for the American effort to continue. Since President Obama lacked fresh congressional authorization, he continued to assert that Congress authorized the current military actions when it passed the 2001 and 2002 AUMFs. Republicans were likely to be glad not to have their fingerprints on an authorization, giving them a clear field to blame Obama for a failed strategy.

In terms of war powers, this brought up a new variation on an old issue: does Article I give Congress constitutional duties along with the constitutional powers it provided? Congress chose to keep itself on the sidelines even though the President invited it to act. Would Congress find itself vulnerable to criticism for failing to vote on a war question, and for dereliction of its constitutional duty? Although some Members tried to get such a vote, the desire not to commit seemed bipartisan and bicameral.

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238. See Jennifer Bendery, One Year In, Congress Still Hasn’t Authorized the War Against Isis, HUFFINGTON POST (Aug. 6, 2015), http://www.huffingtonpost.com/entry/congress-aumf-isis-us_55c2482be4b0138b0b4bca4; Eric Pianin, Why Congress Is Neglecting the War on ISIS, FISCAL TIMES (Aug. 16, 2015), http://www.thefiscaltimes.com/2015/08/06/Why-Congress-Neglecting-War-ISIS.


240. Herszenhorn, supra note 4.

241. Preliminary steps were taken, but no authorization bill actually was voted up or down by the two chambers of Congress. Demirjian, supra note 4; Herszenhorn, supra note 4; Poplin, supra note 4.


243. Douglas L. Kriner, Obama’s Authorization Paradox: Syria and Congress’s Continued Relevance in Military Affairs, 44 PRESIDENTIAL STUD. Q. 309, 323 (2014) (arguing that members who oppose authorizations are much more likely to criticize the resulting war than members who vote for the authorization); Beinart, supra note 242.


eral. It is extraordinary that Congress would stay silent on whether to authorize war, especially when the party opposite the President controls both chambers.

IV. How the War Powers Process Worked Democratically and Legitimately

The tradition in studying war powers is to focus on whether the President had sufficient authority for the war powers action he has taken. Put baldly, the question is whether the President or, alternatively, the Congress, prevailed. The pro-executive side insists that the President may exercise war powers without formal congressional authorization—thus, the President "wins." For example, President Reagan "won" by invading Grenada, and President George H.W. Bush "won" by invading Panama. Some think the President almost always wins.

The pro-Congress side urges that when Congress insists on a meaningful authorization vote and obtains a relatively honest exposition from the President about what is going on and what he wants to do, Congress "wins." For example, when President George H.W. Bush sought and obtained congressional authorization before invading Iraq in the first Persian Gulf War, Congress "won." And when President Obama (along with NATO allies) imposed a no-fly zone on Libya in 2011 without specific congressional authorization, Congress "lost."

The approach advocated for in this Article gives limited attention to the question of whether the President had formal authorization for military actions. Instead, this Article re-focuses the attention on the nature of the interaction between the President and Congress prior to any military action, examining whether the outcome is democratic and legitimate.

A purely formal and binary analysis of the Syrian episode in 2013 would suggest that the President "lost." Some traditional pro-executive critics would denigrate President Obama for his failure to assert unilateral executive authority. He started out asserting the power to make war decisions on his own, but then "backed down" and went to Congress. Those who value unilateral Presidential power would classify this episode as a Presidential "loss."

246. Bendery, supra note 238; Matt Fuller, Why Won't Congress Declare War on ISIS?, HUFFINGTON POST (Dec. 15, 2015), http://www.huffingtonpost.com/entry/congress-isis-war_us_566f47cae4b0fcee16f938b.

247. See, e.g., Collman, supra note 244.

248. Michael N. Treanor, Fame, the Founding, and the Power to Declare War, 82 CORNELL L. REV. 695, 703 (1997) (discussing Reagan’s authorization of war in Grenada, and President Bush’s authorization of war in Panama).


250. See Treanor, supra note 248, at 703.

251. For criticism, see Delahunty, supra note 90. See also S.C. Res. 1973 ¶¶ 6-12 (Mar. 17, 2011).

252. See Koh, Syria and the Law of Humanitarian Intervention, supra note 93.

253. Id.

Instead of merely classifying war powers battles as presidential or congressional "wins" or "losses," the approach taken in this Article examines the process of the interaction between the branches. In 2013, Syrian President Assad's use of chemical weapons against Syrian citizens created a novel challenge for U.S. policymakers. The American public and Congress were split on how to respond. Should the United States steer clear of the Syrian conflict despite Assad's use of chemical weapons?

Facing this, President Obama and Congress consulted relatively closely. In the past, Presidents have given lip service to consulting without any sign they paid heed. This time, President Obama sought a congressional vote in part because the Speaker of the House, John Boehner, advised putting it to a congressional vote, and promised to provide an opportunity for a vote on a straightforward basis. This action was not knee-jerk or ideological on either side. The two leaders attempted to craft a legislative process so that the outcome would have democratic legitimacy.

The President and congressional leaders sought full congressional consideration, including congressional hearings. Those hearings and the press coverage brought out the public's preferences concerning the issue. This was not a matter of a simple partisan split. Both parties split internally. In both parties, the party leaders backed President Obama, while many of the rank-and-file did not. The swing undeclared

255. See Koh, Syria and the Law of Humanitarian Intervention, supra note 93.
259. For example, President Reagan disastrously sent Marines into Lebanon in 1983, without consulting with Congressional leaders who would have warned him that it was no place for ground troops. Ford, supra note 30, at 638.
261. See Press Release, supra note 258; Walsh, supra note 260.
263. See Public Opinion Runs Against Syrian Airstrikes, supra note 256 (describing public opinion on Syrian airstrikes).
265. Id.
bloc consisted of House Democrats from anti-war districts.  

There are different ways to view the final outcome, with Russia brokering a deal under which Syria surrendered—and international authorities destroyed—Syria’s chemical weapons, avoiding any U.S. military action.  

Commentators who favor unilateral executive power would say that President Obama “lost” because he unnecessarily sought congressional authorization, risked defeat at the hands of Congress, and was bailed out by the Russians.

A process analysis, however, reveals a legitimate and democratic process through which the political branches deliberated on, and came to a successful resolution on, the possible exercise of war powers. There was robust interaction between the President and Congress on the issue, and the resulting decision reflected the democratic will.

The war powers process can move fast, as with the near instant congressional responses to the Pearl Harbor attack in 1941 and to the 9/11 attack in 2001. The process can also move slowly, delaying a rush to war. The Syrian chemical weapons incident demonstrates that in the absence of an attack, the President and Congress can take the time to evaluate, consult, debate, and consider options, producing a democratic and legitimate outcome.

Slowing down executive action allows time for other steps, which can avoid the need for war. Two diverse examples illustrate this phenomenon.

—In 1915, while World War I was raging on the European continent, but before the United States entered the war, a German submarine sank the Lusitania. President Wilson may have considered war, but Congress was not yet unified in favor of war, and the President sent diplomatic warnings to Germany. Germany agreed to back away from unrestricted submarine warfare, which it did until 1917, where its actions ultimately brought the

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266. This bloc was torn between their support for Obama’s concern for humanitarian considerations, on the one hand, and their antagonism, intensified after the Iraq War, to the United States getting into another war, especially another civil war in that region. See Dana Bash, Obama Officials Try to Sway House Democrats on Syria, CNN (Sept. 2, 2013), politicalticker.blogs.cnn.com/2013/09/02/obama-officials-try-to-sway-house-democrats-on-syria/; Deirdre Walsh, House Dems Proving a Tough Sell for Obama on Syria, CNN (Sept. 5, 2013), www.cnn.com/2013/09/05/politics/syria-democrats/.


268. Id. For examples of presidents taking unilateral action, thus “winning,” as opposed to seeking congressional approval, thus “losing,” see Koh, Why the President (Almost) Always Wins, supra note 167, at 1261–73.

269. See ZEISBERG, supra note 135, at 38 (describing “processual standards” for the exercise of war powers).


272. Id. at 1641.
United States into the war.\textsuperscript{273} The U.S. entry into the war was postponed for two years, allowing the country to become more unified before joining the terrible conflict.\textsuperscript{274}

-During the Korean War, General MacArthur wanted a wildly aggressive strategy, including the threat to use bombs against China.\textsuperscript{275} Congress was incensed at China for its assault on U.S. troops in Korea, and MacArthur was popular among members of Congress.\textsuperscript{276} Even so, Congress held a series of high-level, closed-door hearings about our strategy in Korea, and President Truman’s military chiefs explained that MacArthur’s approach could lead to a wider war, including the possibility of World War III.\textsuperscript{277} Those hearings discredited the MacArthur approach.\textsuperscript{278}

These examples and the 2013 Syrian chemical weapons episode highlight the important role that congressional debates and hearings on war powers issues can play. During the short but intense period between Obama asking for congressional authority and Russia brokering Syria’s surrender of chemical weapons, congressional hearings played an important role in the ultimately successful process. The hearings aired a wide range of views and considerations. They gave the public a window into the executive branch, and gave executive and legislative leaders a way to inform the public and ascertain the public’s ultimate (and better informed) views. Senate hearings, in particular the positions staked out by some Senators, convinced Secretary Kerry to disavow the use of regular U.S. ground combat units in Syria.\textsuperscript{279}

As for the ISIS fighting from 2014 on, President Obama was criticized for proceeding without fresh formal authorization.\textsuperscript{280} In this view, President Obama improperly attempted to stretch the authority granted under the 2001 and 2002 AUMFs to justify military action against ISIS.\textsuperscript{281}

\textsuperscript{273} Id. at 1642-43.
\textsuperscript{274} Id.
\textsuperscript{275} See Tiefer, Can Congress Make a President, supra note 218, at 433.
\textsuperscript{276} Cody K. Carlson, This Week in History: China Enters the Korean War, DESERET NEWS (Nov. 26, 2014), http://www.deseretnews.com/article/865616489/This-week-in-history-China-enters-the-Korean-War.html?pg=all; see Mark Perry, Rethinking Douglas MacArthur, POLITICO (May 25, 2014), http://www.politico.com/magazine/story/2014/05/rethinking-douglas-macarthur-106397 (noting that MacArthur was “so popular that mothers named their children for him”).
\textsuperscript{277} Tiefer, Can Congress Make a President, supra note 218, at 433; see H.W. Brands, The Redacted Testimony that Fully Explains Why General MacArthur Was Fired, SMITHSONIAN MAG. (Sept. 28, 2016), http://www.smithsonianmag.com/history/redacted-testimony-fully-explains-why-general-macarthur-was-fired-180960622/ (noting that at these hearings, the Joint Chiefs of staff opined that MacArthur’s approach would “involve us in the wrong war, in the wrong place, at the wrong time and with the wrong enemy”).
\textsuperscript{278} Tiefer, Can Congress Make a President, supra note 218, at 433-34.
\textsuperscript{279} John Kerry, supra note 6.
\textsuperscript{280} See Gonzalez, supra note 14, at 163.
\textsuperscript{281} Id. The 9/11 resolution was over a decade old and had always been directed at al Qaeda; from a time and cause that long preceded the very existence of ISIS. It did not help that, years before, Obama himself had considered that 2001 9/11 measure as better repealed. Derek Tsang, To Justify ISIS Airstrikes, Obama Using Legislation He Wants Repealed, POLITIFACT (Sept. 18, 2014), http://www.politifact.com/punditfact/statements/2014/sep/18/julie-pace/justify-airstrikes-against-islamic-state-obama-usi/.
President Obama was attempting to have it both ways. He asserted that he already had enough authority under those two AUMFs without further congressional action, but also sought explicit congressional authorization for action against ISIS. Lawyers are used to “arguing in the alternative,” but from a pro-congressional perspective, President Obama did not actually defer to Congress because he initially took action without seeking explicit congressional authorization.

Rather than scoring the wins and losses of Congress and the President, let’s focus on the process that occurred beginning in 2014. President Obama found a way to exercise necessary war authority without riding roughshod over the separation of powers. He made an effort to honor Congress’s view—if Congress expressed a view. Obama had taken a stepwise effort to get Congress’s attention, giving it plenty of time to take up the matter, hold hearings, caucus, deliberate, and hold floor votes.

President Obama did not commit to end military engagement against ISIS even in the event that Congress formally rejected his request. Moreover, starting in late 2015, he unilaterally authorized the deployment of Special Forces missions in Syria. But by formally making his authorization request to Congress, he gave the impression that he would act in accordance with Congress’s wishes. By basing his own action on the 2001 authorization, Obama set the stage to accept that as a reason to reduce American involvement in the event that Congress repealed or limited the 2001 authorization.

Conversely, Congress had ample room—if it chose—to ask for a ratcheted-up war effort. The President passed the ball to Congress and gave it room to decide its role. From the beginning of 2015 until 2016, Congress has so far decided not to decide.

With regard to the ISIS conflict starting in 2014, the President’s interactions with Congress constitute a novel process to address a complex war powers situation. This is a situation where all relevant actors—the President, the Congress, and the public—are highly ambivalent. Few want to get dragged into a land war in Syria. Even fewer want the United States to lose more lives and treasure on top of so much already lost in that region. No one had a strategy that could definitively promise complete

287. John Kerry, supra note 6 ("We all agree there will be not American boots on the ground."); Peters & Gordon, supra note 206.
victory at an acceptable cost.\textsuperscript{288}

At the same time, no one wanted ISIS to flourish and become an established and financially sustainable terrorist nation by taking over Iraq and its enormous oil reserves. ISIS does not merely engage in terrorism, but is also ruthless in its hatred for the West.\textsuperscript{289} It could not be left to occupy Iraq. When ISIS took Mosul, and temporarily Ramadi, it demonstrated that it could defeat the Iraqi National Army. The doves in Congress naturally had many criticisms of Obama’s ISIS policy, but even they did not seriously suggest letting ISIS occupy all of Iraq, when there was not even a firm opposition bloc in Congress against air strikes.\textsuperscript{290}

Congress, for its part, did not falsely accuse the President of usurping authority and overplaying his hand. The decision not to have a conclusive congressional vote on the matter was not made by the President or even by the President’s own political party. It was the Republican congressional leadership that made that decision, which seemed to reflect a general consensus in Congress. Many members in both parties simply preferred not to put their fingerprints on a decision when they did not support an alternative to the President’s stance.\textsuperscript{291}

To be sure, critics said the President did not have a winning strategy for resolving the conflict.\textsuperscript{292} But Congress had not articulated an alternative strategy.\textsuperscript{293} The public, too, did not strongly back the President’s stance, but also did not support an alternative strategy.\textsuperscript{294} The President and Congress found a democratic and legitimate path for an ambivalent country to follow.

V. New and Positive Developments in Domestic War Powers Debates

Much of the scholarship on war powers focuses on “formal” actions taken by the executive, legislative, or judicial branch. These actions may

\begin{itemize}
  \item \textsuperscript{288} The only local force that could fight ISIS (putting aside the Kurds, who were not national in size) consisted of Shia militia. These were closely tied to Iran, and hated and feared by Iraqi Sunnis. A war by the United States with regular ground combat units could repeat the sectarian strife of 2003-2007. Hugh Naylor & Mustafa Salim, \textit{In Fighting ISIS, Iraq’s Shiite Militias Could Ignite a Sectarian Mess}, WASH. POST (June 3, 2016), https://www.washingtonpost.com/world/middle-east/in-fighting-isis-iraqs-shiite-militias-threaten-to-ignite-a-sectarian-mess/2016/06/02/1eb8b1a0-28d5-11e6-8329-6104954928d2_story.html.
  \item \textsuperscript{291} See Russell Berman, \textit{The War Against ISIS Will Go Undeclared}, ATLANTIC (Apr. 15, 2015), http://www.theatlantic.com/politics/archive/2015/04/the-war-against-isis-will-go-undeclared/390618/. On the one hand, Democrats knew that a “yes” vote in support of the Iraq War in Iraq had not looked so good later on. On the other hand, Congress-members either knew, or understood without knowing, that a “no” vote for the 1990 Iraq had not looked so good later on. It was dangerous to make a commitment either way on controversial wars.
  \item \textsuperscript{292} Baker & Weisman, \textit{supra} note 111.
  \item \textsuperscript{293} See Berman, \textit{supra} note 291.
  \item \textsuperscript{294} Baker & Weisman, \textit{supra} note 111.
\end{itemize}
include a President's initiation of military action, congressional authorizations and appropriations, the occasional judicial opinion, and even those of international organs, such as UN Security Council resolutions. In addition to the few contemporary court cases addressing war authorization disputes between the President and Congress, scholars also examine the Justice Department's legal opinions addressing presidential authority, such as the Justice Department opinion on the Libyan no-fly zone of 2011.

This Article takes a different approach, focusing less on formal authority and more on the process through which Congress and the President interact in the run-up to the exercise of war powers. Formal questions of authority do matter. But an under-examined aspect of the war powers debate is this interactive inter-branch process. The steps, stances, and actions of participants are expressed in many ways that do not necessarily produce formal legal instruments. What is most interesting in the contemporary development of war powers is the evolution of how politico-legal institutions interact in the run-up to war.

In this regard, for the 2013–2016 time frame, one of the most striking aspects has been how the President twice invited Congress to enact explicit authorization for military action. The first invitation, regarding Syrian use of chemical weapons, stunned observers who had taken it for granted that Presidents decide on war unilaterally. Later, President Obama invited Congress to enact explicit authorization for military action against ISIS. He was prepared to deem U.S. involvement to be authorized in the conflict in any case, but there was no serious doubt as to the sincerity of the invitation.

As a matter of formality, there is no obvious textual predicate or historical precedent for such an invitation (in contrast to the requirement that the President submit his proposed treaties and nominations to Senate for ratification and confirmation). The constitutional text does not say anything about invitations in the Declaration of War Clause or the Commander in Chief Clause. In the nineteenth century, two wars, the War of 1812 and the Spanish American War of 1898, were largely instigated by the hawks in Congress rather than the President (Madison and McKin-
In the twentieth century, Congress attempted to end or block military conflict several times, such as during the end of the Indochina War in 1974 and the Boland Amendments of 1984–1986, with Presidents vehemently objecting.304

In the contemporary period, Presidents have sought congressional authorization for ground combat wars, such as the invasions of Iraq in 1991 and 2003.305 For military interventions that consist of air strikes rather than ground combat, however, the pattern of congressional participation is not as consistent. This historical record does not mean that Presidents may unilaterally conduct air strikes.306 But President Obama’s decisions to invite congressional authorization to authorize air strikes against Syria in 2013 and against ISIS since 2014 stands out vividly as a major development in war powers debates.

Another important development is the focus on the specific wording of war authorization legislation.307 The Obama Administration argued that its actions against ISIS were authorized by the 2001 AUMF, interpreting it as authorizing action against ISIS because ISIS allegedly inherited the mantle of al Qaeda.308

For many, this broad interpretation of the 2001 AUMF raised hackles. A broad interpretation of the 2001 AUMF was inconsistent with the informal but decisive backroom drafting of that AUMF. Senate Democratic leaders personally intervened in the week between the September 11, 2001 attacks and the September 18, 2001 passage of the AUMF to tighten up the draft sent over by the White House.309 In particular, they deleted language that would have applied to terrorists unconnected to 9/11.310 The backroom negotiations regarding the 9/11 resolution—and the later significance of that specific language as applied to ISIS—are a classic example of the war powers dialogue.

In any event, putting aside that aspect of the enacted 2001 AUMF, there is a functional significance in the drafting of mere proposals. In the end, Congress did not enact an authorization in connection with Syria in

303. Tiefer, Can Congress Make a President, supra note 218, at 410.
304. Id. at 414.
305. Ackerman & Hathaway, supra note 62, at 458.
307. See Tiefer, Can Congress Make a President, supra note 218, at 408-09 (discussing the long-standing Supreme Court law establishing the meaningfulness of limitations in war authorizations). The wording of war authorizations has the full indicia of formal potency—judicial opinions, and, inscription on the formal instrument by which Congress authorizes war.
308. Savage, supra note 185.
310. See id.
2013 and has not enacted one in connection with ISIS since 2014.\textsuperscript{311} From a formal perspective, nothing happened. But during both periods, Congress considered and rejected proposed authorizations.\textsuperscript{312} It was clear that congressional consideration of those proposals focused on whether to prohibit regular units of ground combat troops. Congress’s consideration and rejection of the proposals suggest—even without formal enactment—that Congress meant to bar such units, and that President Obama should listen.

Take the converse proposition. One could argue that Congress simply decides whether to go to war and nothing else. According to the expansive view of presidential power, it is up to the President to decide how to use military forces to conduct the fighting.\textsuperscript{313} But as a pragmatic matter of domestic politics, that view does not explain the events of the 2013–2016 time period. Both the President and Congress expect congressional consideration of proposals to decide the matter, particularly when Congress expresses strong resistance to ground combat operations. The Commander-in-Chief takes such congressional views as defining the limits of his mandate.\textsuperscript{314}

Thirdly, a process-oriented view highlights the importance of using congressional hearings to uncover executive information, executive intentions, and possible executive distortion of intelligence. To look only at the binary choice between unilateral executive action and formal congressional authorization ignores the key insight that war powers processes malfunction when they are based on inadequate or inaccurate executive information and disguised executive intent. The consequences of an inadequately informed war powers dialogue can be disastrous for the country, as the wars that followed the 1964 Gulf of Tonkin Resolution and the 2002 AUMF for the Iraq War demonstrate.\textsuperscript{315}

In 2013, the interactive process brought out important executive information. Among other aspects, the hearings and other exchanges made clear that it would not be simple to destroy all of Syria’s chemical weapons. An air attack could inflict heavy damage on Syrian methods of delivering chemical weapons, such as missiles, but disposing of the chemical weapons stocks themselves could require an American effort on the ground.

\textsuperscript{312} Berman, supra note 291.
\textsuperscript{313} Tiefer, Can Congress Make a President, supra note 218, at 408–09. Congress has authorized and funded an army, a navy, and an air force, and has specified an enemy. The President is the Commander-in-Chief of all the forces, and, it is argued, it is up to the President whether to use one, two, or all three. \textit{Id.}
\textsuperscript{314} Tiefer, Appropriation Riders, supra note 23, at 291–92, 342.
\textsuperscript{315} Ackerman & Hathaway, supra note 62, at 447, 485.
Conclusion

The 2013 Syrian chemical weapons crisis and the ISIS fight since 2014 have drawn mixed reviews among those focused on the binary question of whether war-fighting has been authorized. During the 2013 chemical weapons crisis, it was unclear whether President Obama could have proceeded unilaterally, and some criticized him for inviting Congress to act. During the ISIS conflict, some legal analysts questioned whether the 2001 and 2002 AUMFs authorized the military effort, and Congress was in no rush to vote on a new authorization.

This Article advocates examining the war powers process rather than merely the end point of that process, focusing on whether the war powers dialogue proceeded in a democratic and legitimate way. Viewed through this framework, the actions of the political branches appear to be a success. Congress and the President took part in substantive consultation and dialogue. The public was able to become informed about the interests at stake and the available options. The nation, therefore, benefited from the war powers dialogue between the two political branches.

Above all, this Article has looked for answers not by engaging in formal, abstract analysis, but by examining the interactions between the branches in their politico-legal context. We can understand the nature of constitutional war powers not by formalism or vague theorizing, but by immersing ourselves in the details of how the political branches actually interact so that we can see how each branch functions in the shadow of the other. It is only through such fact-intensive analysis that we can assess whether the exercise of the nation's war powers is democratic and legitimate.