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ARTICLE: FAME, THE FOUNDING, AND THE POWER TO DECLARE WAR

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SUMMARY:

... Almost without discussion, and essentially without opposition, the Framers and Ratifiers of the United States Constitution vested in Congress the

"Power ... To declare War, [and] grant Letters of Marque and Reprisal."

... The pro-Executive scholars have argued either that the power to declare war was intended to be a very limited power - conferring on Congress the power to classify a conflict as a war for purposes of international law (rather than conferring on it the exclusive power to initiate conflict or that, for reasons

unique to the War Powers Clause, original understanding is irrelevant to resolution of modern controversies. ... Therefore, Professor Yoo, a sophisticated pro-Executive scholar, argues not that all the Founders thought that the President could initiate war, but that this was the dominant view. ...

As the Founders reflected on fame and its significance for constitutional government, the desire for military glory became a particular focus of concern.

... But analysis of the ratification debates about war, fame, and the Executive reveal a fear of Executive desire to lead the nation into war in order to achieve personal glory. ... Abigail Adams wrote her friend Mary Cranch: "What

benefit can war be to him? He has no ambition for military Glory." ...

TEXT:
[*695]

PAGE 2

82 Cornell L. Rev. 695, *695

Almost without discussion, and essentially without opposition, the Framers and Ratifiers of the United States Constitution vested in Congress the "Power ... To declare War, [and] grant Letters of Marque and Reprisal." n1 During the past fifty years, one of the fiercest controversies in constitutional law has concerned what the Founders meant by this grant. It is a debate that has had, and that continues to have, dramatic importance. When Presidents committed troops or prepared to commit troops in Korea, Vietnam, Grenada, Panama, Iraq, Somalia, Haiti, and, most recently, Bosnia, they claimed that the Constitution did not require them to seek explicit congressional approval for their actions. In each instance, critics proclaimed the Presidents' actions unconstitutional. n2 When Congress sought to control presidential warmaking by passing the War Powers Act of 1973, n3 defenders of the statute declared that it simply tracked the War Powers Clause. Presidents, however, have repeatedly claimed that the statute violates the Constitution, because they believe the War Powers Clause grants Congress only limited powers. n4 The same question has been at issue on each occasion: Does the Constitution give Congress alone the power to initiate conflict? [*696]

The roster of scholars engaged in the controversy over the original understanding of the warmaking power reads like a who's who of constitutional scholars and scholars of foreign affairs. n5 On one side of the debate - the pro-Congress side - are such academics as Raoul Berger, n6 Alexander Bickel, n7 John Hart Ely, n8 Louis Fisher, n9 Harold Koh, n10 Leonard Levy, n11 Charles Lofgren, n12 Arthur Schlesinger, Jr., n13 and William Van Alstyne. n14 They have argued that the original understanding [*697] was that, except for a limited power to repel sudden attacks, the President could not commit

troops to combat without congressional authorization. They believe that modern constitutional law should reflect that understanding. In contrast, other scholars have adopted a pro-Executive stance. These include Phillip Bobbitt, n15 Robert Bork, n16 Edward Corwin, n17 Henry Monaghan, n18 Eugene Rostow, n19 Robert Turner, n20 W. Michael Reisman, n21 and John Yoo, n22 among others. n23 The pro-Executive scholars have argued either that the power to declare war was intended to be a very limited power - conferring on Congress the power to classify a conflict as a war for purposes of international law n24 (rather than conferring on it the exclusive power to initiate conflict - [*698] or that, for reasons unique to the War Powers Clause, original understanding is irrelevant to resolution of modern controversies. n25

The debate has reached a point of stalemate. As Professor Stephen Carter concluded, "Evidence concerning the original understanding ... does not come down firmly on one side or the other." n26 Although the evidence is limited - with the critical part of the constitutional debates consisting of little more than a page of the published record n27 and subject to various plausible readings - this is not the principal cause of the stalemate concerning the original understanding. Rather, the problem is that neither side is able to square its claims fully with the evidence that exists. To the extent that the Founders made statements about the war power, those statements support the view that Congress alone has the power to initiate conflict. n28 But pro-Executive scholars can plausibly counter that historical context strongly supports their position. The phrase "declare war" had a fixed meaning in international law; it did not mean to start war, but rather to classify a conflict as a war for legal purposes. Accordingly, precedent in England and in this country suggests a "shared understanding" n29 that the Executive could start wars. To put it simply, the pro-Executive position is that pro-Congress scholars have failed to explain why the Founders would have taken from the Executive the power to

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PAGE 3

82 Cornell L. Rev. 695, *698

declare war. Given that failure, pro-Executive scholars argue that the intent of the great majority of the Founders to have the President possess the power to

start war must be given effect, regardless of the belief of a handful of individuals that Congress alone has that power.

There is, finally, one bit of evidence that neither side has explained convincingly. Numerous contemporaneous statements indicate that the decision to declare war was purely a congressional matter, which means that the President could not veto declarations of war. ⁿ³⁰ This absence of a veto seems inconsistent with the view of pro-Congress scholars that the Founders sought to slow the path to war as much as possible. Yet it is also inconsistent with the pro-Executive view that the Founders were supportive of presidential involvement (and, generally, control) in all war matters. [*699]

This Article breaks the stalemate by advancing an explanation for why the Founders would have wanted Congress alone to have the power to start war, the question that pro-Congress scholars have been unable to answer. In offering that explanation, the Article takes a different approach than previous work, which has, in accordance with the normal conventions of legal and constitutional scholarship, explored the original understanding by focusing on what the Founders said about the allocation of the war power, the constitutional structure, the language used, and prior practice. Although this Article uses evidence of this type, it also seeks to employ the approaches of intellectual history, probing the structure of the founding generation's thoughts and the often implicit values that underlie the choices they made. ⁿ³¹ In pursuing this project, it will look not merely at the traditional sources directly concerning original understanding, but, more generally, at how political leaders in the early republic talked about war, government, and individual motivation.

This analysis brings to the forefront a subject of critical importance to the Framers as they created the Constitution, but one which constitutional law scholars have essentially ignored: the individual's desire to achieve immortal fame. Although the subject of the Framers' views of fame (using the term in the eighteenth century sense of one whom posterity will remember as great) has yet to receive close, sustained study, a number of historians, and in particular the

late Douglass Adair, have shown how the Framers' actions and their political theory reflected their hope of achieving lasting renown. The Framers had, in Adair's words, "an almost obsessive desire for fame" ⁿ³² - and they believed that such a desire was a widely-shared [*700] trait. But these historians have not attempted to show the relationship between the Founders' view of fame and the constitutional structure that they created. Similarly, constitutional scholars have not examined the subject, either with respect to the War Powers Clause or the document as a whole. They have thus wholly ignored the way in which the Framers' ideas about fame shaped the Constitution, a disregard which seriously distorts our perception of the original understanding. Piecing together sometimes implicit views, the Article argues that the allocation of the war power reflected the Framers' understanding of the desire for fame. The founding generation believed that, if the President could commit the nation to war, his desire for fame might lead him into war even when war was not in the national interest. ⁿ³³ By contrast, however, individual members of Congress would not win fame if the nation went to war and won. Therefore, Congress alone could be trusted to decide questions of war correctly. Animated by their concern that Presidents would fall prey to the lure of fame, the Founders thus structured the war power in a way that conflicts with the original understanding of the War Powers Clause as articulated by previous scholarship. The Founders

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PAGE 4

82 Cornell L. Rev. 695, *700

intended that the clause would vest in Congress principal responsibility for initiating conflict; in this regard, pro-Congress scholars have been right and pro-Executive scholars wrong. But the Founders denied the President a veto over congressional decisions to wage war, something that all scholars have missed.
ⁿ³⁴

Part I of the Article outlines the background against which this work is set. It discusses the post-World War II era's history of controversies about presidential authority to initiate conflict, the current debate among

academics

about the original understanding, and the ways in which the explanations

that

have been offered fail. Part II then begins the analysis of why Congress

was

given the sole power to start wars by discussing the Founders' conception

of

fame and the role of that conception in the constitutional order. Part III

argues that the Founders' concern that a President's desire for immortal

fame

would lead him to start wars that were not in the national interest caused

them

to give Congress alone the power to start war. This Part begins with a

close

analysis of the way legislators spoke and wrote about war during the

ratification debates. It then turns to the nation's first three crises

involving

the war power, focusing in each instance on how the desire for individual

fame

and the desire for war were linked in statements from the period. Indeed,

in one

of the examined documents, James Madison explicitly states that Congress

was

given the power to start war because a President would use that power too

aggressively in [*701] order to achieve fame. n35 This statement from

the

most important Founder dramatically supports the thesis of this Article

concerning the original understanding.

Part IV then explores the contemporary significance of the historical

analysis. For originalists, the evidence offered here is important because

it

greatly strengthens the case for a pro-Congress reading of the Clause. It

is

also important because it suggests that the President should not be able

to veto

a declaration of war.

The thesis of this Article is significant for nonoriginalists as well.

Although it does not try to treat the matter conclusively, Part IV presents

evidence that, even though we no longer think of people as motivated by a

thirst

for fame in the eighteenth century sense, Presidents have, in fact, been so

motivated. A range of historical accounts indicate that Presidents, in

contemplating questions of war, have been motivated by a desire for fame.

That

desire may, in part, explain why throughout our history Presidents have

typically been more in favor of initiating wars than Congress. Recognition

of

the motivational stakes in the war powers area indicates that courts'

current

application of the political question doctrine to avoid resolution of war

powers

controversies is misguided. Such a strategy rests on the false premise

that this
is an area in which Congress will struggle for control, when in fact this
is an
area in which Congress has an incentive to evade responsibility. More
broadly,
for nonoriginalists, recognition of the fact that the President has an
incentive
to favor war does not resolve the question of who should have the
responsibility
to decide questions of war. Rediscovery of the Founders' concern
ultimately leads back to the two fundamental questions with which the Founders
struggled
and which have largely been forgotten: When does the desire for a place in
history become dangerous? When does it, instead, inspire greatness?

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PAGE 5

82 Cornell L. Rev. 695, *701

The Debate about the War Powers Clause

The meaning of the War Powers Clause has long been the subject of bitter
dispute, both in the realm of politics and in the realm of academia. This
Part
begins by presenting in summary fashion recent presidential military
actions and
congressional responses. Strikingly, [*702] the Executive has grown
more, not
less, aggressive in recent years. n36 The Part then discusses the two
principal schools of academic thought concerning the meaning of the War
Powers
Clause. It focuses on the ways in which they treat the original
understanding
and its significance, and concludes by discussing why neither school of
thought
has convincingly made its case.

A. The Executive Branch and the War Power Since the Korean War

Throughout most of this nation's history, Presidents did not claim that
they
could commit the nation to war without congressional authorization. n37
In
1950, for the first time, the Executive explicitly took the position that
it did
not need congressional authorization to send troops abroad to fight. n38
In
justifying his decision to send United States troops into Korea, President
Truman relied on a Security Council resolution. n39 Subsequently, after
consulting with Secretary of State Dean Acheson, he decided not to seek
congressional authorization, but to rely on his powers as President and

Commander in Chief. n40 The Department of State issued a supporting memorandum of law. n41

President Johnson's actions in Vietnam were, in contrast, almost modest. As in Korea, the Department of State formally took the position that the President needed no congressional support to send troops into combat. n42 Nonetheless, President Johnson could plausibly claim that he had secured congressional approval for every stage of [*703] the Vietnam War through the Gulf of Tonkin Resolution; n43 Congress's 1967 declaration of "its firm intentions to provide all necessary support for members of the Armed Forces of the United States fighting in Vietnam"; n44 and congressional appropriation statutes. n45 Significantly, Dean Ely and Professor Henkin, despite their general criticism of executive branch overreaching in warmaking, have found this claim of congressional approval convincing. n46

Recent history is very different. When President Reagan directed the invasion of Grenada in 1983, he simply acted "with respect to the conduct of foreign relations and as Commander-in-Chief of the United States Armed Forces" n47 without subsequently seeking congressional ratification of his actions. n48 Similarly, in 1986, he unilaterally ordered the bombing of a number of targets in Libya pursuant to his power as Commander in Chief. n49

President Bush continued this trend. Without seeking congressional approval, he sent 24,000 troops into Panama to oust the government of General Manuel Noriega. n50 Later, as the Bush administration prepared for the Gulf War, it initially took the position that it would not secure congressional approval. n51 Although it ultimately reversed its course and obtained authorization for the commencement of hostilities, n52 President Bush repeatedly proclaimed that he did not need that congressional sanction to send troops into combat. At one point he declared, "I didn't have to get permission from some old goat in the United States Congress to kick Saddam Hussein out of Kuwait." n53 [*704]

The election of a Democratic President in 1992 did not cause the trend to

abate. At the end of his administration, President Bush sent United States troops to Somalia as part of a United Nations relief effort. In June 1993, when twenty-three Pakistani soldiers were killed in Somalia, President Clinton, without seeking congressional authorization, altered the nature of the relief effort by ordering United States military action against Mohamed Farah Aideed, the Somali political leader whom the United Nations believed was responsible for the killing. n54 The President simply announced that, in response to the killing of the Pakistani soldiers, the United States mission in Somalia had become a military one. n55

The following year, President Clinton prepared to send troops into Haiti to oust that country's military junta without receiving congressional sanction. n56 He stated, "Like my predecessors of both parties, I have not agreed that I was constitutionally mandated" to secure congressional approval before military intervention. n57 United States troops were on the verge of invasion when former President Jimmy Carter negotiated an agreement under which Haitian leaders resigned. n58 In some regards, however, Bosnia represents an even more dramatic assertion of executive authority over the military. Troops were deployed into a war zone pursuant to the President's Commander-in-Chief power, n59 not only without congressional approval, [*705] but over the clearly and repeatedly expressed objections of the House of Representatives. n60

Congress's principal check on the military power of the Executive has been the War Powers Resolution, n61 which was passed in 1973 over President Nixon's veto. n62 The resolution provides that the President must notify Congress within forty-eight hours of the start of combat involving American troops and that, unless Congress authorizes hostilities, he or she must withdraw those troops within sixty days (a time period that can be extended to ninety days upon appropriate presidential certification). n63 The measure explicitly presents itself as reflecting the constitutional dictates according to the original understanding, not as altering either the constitutional powers of Congress or of the President. It states that "it is the purpose of this chapter to fulfill the intent of the framers of the Constitution of the United States." n64

Presidents have seen the matter differently. In his veto message, President

Nixon denounced the resolution as an unconstitutional infringement on his powers as Commander in Chief and as violative of [*706] the original understanding.

n65 Nixon's response has served as the model for subsequent presidential action.

As Professor Michael Paulsen has written, "No President has accepted the 1973

War Powers Resolution as binding, on the ground that it unconstitutionally interferes with the President's powers as

Commander-in-Chief." n66 Since 1973, Presidents committing United States troops to combat have repeatedly failed to notify Congress or have filed a report which was intentionally not identified as a hostilities report (and which

therefore, according to executive branch officials, did not start the War Powers

Resolution's sixty day clock). n67 In the face of Executive actions reflecting

the view that the Resolution is unconstitutional, Congress has failed to muster

anything remotely resembling an effective response. It has neither denied funding to any of these military efforts nor legislatively proclaimed that, despite the fact that the President has not filed a required hostilities report,

the sixty day clock was triggered. n68

B. Competing Interpretations of the War Powers Clause

Given the ongoing real-world controversy about the meaning of the War Powers

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PAGE 7

82 Cornell L. Rev. 695, *706

Clause and the enormous stakes involved in such controversy, it is hardly surprising that, since the start of the Vietnam War, the academic debate about

the meaning of the War Powers Clause has been one of the most prominent in constitutional law. Two sharply divergent readings of the Clause have emerged,

and scholars have justified each reading as consistent with the original understanding.

Defenders of a broad Executive power to initiate combat have claimed that

the Framers intended that the War Powers Clause be [*707] read narrowly. n69

Under this view, when the Framers gave Congress the power to "declare war," they

intentionally used a term with a precise meaning in international law, a meaning

familiar to them from their reading of Blackstone n70 and such civil law scholars as Grotius n71 and Vattel. n72 Dean Rostow, a leading proponent of

this view, has written:

Under international law, force may be used between states both in time of war and in time of peace.... A "declaration of war" transforms the relationship between the belligerents into a state of war.... The state of war contemplates unlimited hostilities between [*708] the belligerents, the internment or expulsion of enemy aliens, the termination of diplomatic relations, the sequestration or even confiscation of enemy property, and the imposition of regulations - censorship, for example - which would be unthinkable in liberal-minded states during peacetime. n73

In other words, the power to declare war is a quasi-judicial power: Congress determines whether to make a legal declaration that a state of war exists. Such a determination is significant, since a declaration has important consequences for the rights of both citizens and aliens. But the declaration typically follows the onset of hostilities, rather than preceding them, and the declaration is not necessary to legalize the hostilities themselves. n74

Similarly, when the Founders gave Congress the power to "grant Letters of Marque and Reprisal," n75 they were also using "language ... peculiar to international law," n76 and, again, that language had a precise, and limited, meaning. Sovereigns granted letters of marque and reprisal to individuals allowing them to pursue specific claims against citizens of other countries. n77 These people were thereby authorized to take the property - and sometimes, even seize the persons - of their debtors and those who had wronged them. In wartime, the letters empowered civilians to capture the property of the enemy and her citizens. n78 But the power to grant letters of marque and reprisal was not the power to start war. n79 For proponents of this view, then, the power to initiate conflict is not to be found solely - or even primarily - in the War Powers Clause. Rather, it is to be found in the Constitution's designation of the President as Commander in Chief n80 and, in addition, in its grant to him or her of all executive power. n81

Proponents of the pro-Congress reading of the War Powers Clause offer a diametrically opposed reading of the original understanding. They reject the idea that the phrases in the Clause were intended to be read in the

established,
technical sense. According to [*709] Professor Charles Lofgren, for
example,
the word "declare" as used in the Constitution "had a broader meaning than
it
did in the treatises and international practice. It meant 'commence.'"
n82
Similarly, the phrase "Letters of Marque and Reprisal" "conferred on
Congress

PAGE 8

82 Cornell L. Rev. 695, *709

power over general reprisals outside the context of declared war." n83
Most
important, the two phrases were meant to be read together. n84 They are
the
only two specific grants of war-initiating power in the Constitution. n85
Thus, regardless of how they are parsed individually, together they mean
that
the Founders intended Congress to have the power to initiate all conflict -
except when necessary to repel sudden attacks. In this regard, it should be
stressed that pro-Congress originalists do not maintain that all wars had
to be
formally declared, merely that they be approved in advance in some
fashion. As
Dean Ely writes, "All wars, big or small, 'declared' in so many words or
not ...
had to be legislatively authorized." n86

Under this view, the Founders were not ignorant of the fact that the
phrases
they used had specific meanings at international law. They knew, moreover,
that
by the eighteenth century most wars were not declared - as Hamilton wrote
in
Federalist No. 25, "The ceremony of a formal denunciation of war has of
late
fallen into disuse" n87 - and letters of marque and reprisal were
rarely
issued. n88 But, as Professor Lofgren observed, "Deviation from
international
usage [with respect to these terms] would have seemed proper ... since the
Constitution involved domestic arrangements." n89 According to Professor
Bestor, "The phrase 'declare war' [in the Constitution] was universally
understood as synonymous with what the Articles of Confederation had
described
as [Congress's] 'sole and exclusive right and power of determining on ...
war.
'" n90

Pro-Executive scholars have a counter to such claims (apart from
offering
their competing vision of the original understanding). These writers

contend
that, even if the pro-Congress camp is correct about the original
understanding
of the War Powers Clause, that understanding should not bar Presidents from
initiating conflict. The argument [*710] is not that original intent is
never
relevant, but that it is irrelevant here for reasons unique to the War
Powers
Clause.

The first "unique" reason advanced is that, regardless of the original
understanding, the President's ability to initiate and conduct war without
explicit congressional approval is constitutional because of long-standing
practice. For example, J. Terry Emerson, after stating that there are over
two
hundred incidents in which Presidents have initiated the use of military
force
abroad, concludes that "'history has legitimated the practice of
presidential
war-making.'" n91 Emerson follows Henry Monaghan, who notes "the long and
ever-accumulating practice of presidential 'war-making'" and observes that
"[a]
practice so deeply embedded in our governmental structure should be
treated as
decisive of the constitutional issue." n92

A closely-related second reason is that this practice reflects broader
constitutional concerns that have become more pressing with the passage of
time.
Thus, Judge Bork argues that the President has "primacy in foreign
affairs," and
that primacy is the joint product of constitutional structure and
historical
evolution: "The respective roles of Congress and the president developed
according to their structural capacities and limitations. Congress,
consisting
of 535 members assisted by huge staffs, is obviously incapable of swift,
decisive, and flexible action in the employment of armed force" n93
Because [*711] situations change so rapidly and dangers to the national well-being arise almost instantaneously,
necessity dictates that the
Executive
have the power to use force abroad without congressional approval. As
Judge Bork
has argued, "The need for Presidents to have that power, particularly in
the

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PAGE 9

82 Cornell L. Rev. 695, *711

modern age, should be obvious to almost anyone." n94

In contrast, pro-Congress scholars have not been as quick to argue that
their reading of the War Powers Clause is superior, even if not supported
by the

original understanding. Ely's treatment here is illustrative. The saliency he accords to the original understanding in framing his proposal for contemporary jurisprudence is similar to that accorded the original understanding by, for example, Professors Glennon, ⁿ⁹⁵ Koh, ⁿ⁹⁶ and Henkin. ⁿ⁹⁷ Ely offers three closely-related reasons which he suggests animated the Founders and support giving Congress the power to initiate war. First, and most important, the requirement of congressional consent ensures that "the concurrence of a number of people of various points of view" has been obtained before the nation goes to war. ⁿ⁹⁸ (Ely explicitly assumes here that the War Powers Clause also requires that the President consent before the nation go to war). ⁿ⁹⁹ Second, large bodies move more slowly, ensuring careful consideration before war begins. ⁿ¹⁰⁰ Third, "the requirement of authorization by both houses of Congress was ... calculated to increase the probability that the American people would support any war we entered into." ⁿ¹⁰¹ But the focus of his argument is not that these rationales are independently correct. Rather, it is that, because the original understanding is clear, it must be followed. He writes:

One of the recurrent discoveries of academic writing about constitutional law - an all but certain ticket to tenure - is that from the standpoint of twentieth-century observers, the "original understanding" of the document's framers and ratifiers can be obscure to the point of inscrutability. Often this is true. In this case, however, it isn't. ⁿ¹⁰²

Because of its clarity, the original intent is dispositive: "In language and recorded purpose the War Clause made an unmistakable point [*712] that needed no further gloss: Acts of war must be authorized by Congress." ⁿ¹⁰³

Thus, the question is squarely presented: Who is right about the original understanding? And is the underlying rationale that informed the Founders' decisionmaking one that merits serious independent regard, or is it merely one that merits respect to the extent that the original understanding merits respect?

The next section examines the evidence to which scholars typically

attach
the greatest significance - the debates at the Philadelphia constitutional convention and the state ratifying conventions. The section focuses on what the words "To declare War" meant. There was almost no debate in Philadelphia on the Commander-in-Chief Clause or the phrase "letters of marque and reprisal." n104 Neither generated much concern. To the extent that there was discussion, the Commander-in-Chief Clause received more. n105 According to both pro-Executive and pro-Congress writers, n106 the most influential comments about the Commander-in-Chief Clause were made by Alexander Hamilton and James Iredell, both of whose statements reflect a view of the Commander-in-Chief power as limited to commanding troops once war is in progress. n107 At the same time, these comments do not represent [*713] a sufficient quantity of evidence to reveal clearly the meaning of the Commander-in-Chief Clause or, by inference, the meaning of the War Powers Clause.

C. The Framing of the War Powers Clause

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PAGE 10

82 Cornell L. Rev. 695, *713

Although the War Powers Clause has become the source of extensive controversy, it received very limited discussion at the time of the founding. Moreover, as discussed below, the critical passage in the debates at the Constitutional Convention is obscure and confusing. Thus, the documents on which scholars traditionally focus in their quest to determine the original understanding of constitutional text provide only limited insight.

The initial discussion at the Constitutional Convention concerning the war power occurred in response to the plan of government submitted by Edmund Randolph of Virginia. The Virginia plan did not address the question of who should be able to commit the nation to war; it merely allocated to the "National Legislature ... the Legislative Rights vested in Congress by the Confederation" and assigned to the "National Executive ... the Executive rights vested in Congress by the Confederation." n108 The question of which powers were executive and which were legislative was left open. A number of speakers urged that the war power be given to Congress. While South Carolina's Charles Pinckney

proclaimed himself an advocate of a "vigorous Executive," he declared that he
"was afraid the Executive powers of [the existing] Congress might extend to peace & war." n109 James Wilson argued that the "Prerogatives of the British Monarch [were not] a proper guide in defining the Executive powers." n110 "Some of these prerogatives," he stated, "were of a Legislative nature. Among others that of war & peace &c." n111 James Madison "agree[d with] Wilson in his definition [sic] of executive powers - executive powers ex vi termini, do not include the Rights of war & peace &c. but the powers [should] be confined and defined - if large we shall have the Evils of elective Monarchies." n112 Finally, John Rutledge of South Carolina announced that "he was not for giving [the Executive] the power of war [*714] and peace." n113 No one argued that the Executive should have the power to initiate war. n114

The Convention subsequently created the Committee on Detail and assigned to it the task of preparing a constitution that reflected the decisions previously made. n115 None of the resolutions forwarded to the Committee, however, provided guidance in allocation of the war-initiating function. n116 At the same time, as indicated above, to the extent the matter had been debated, the consensus had been that the power to initiate war should be a legislative function. Moreover, Wilson and Randolph submitted draft constitutions that gave the legislature the power "to make war." n117 Reflecting these points of view, the Committee's final report assigned Congress the sole power "To make war; To raise armies; To build and equip fleets;" as well as "To call forth the aid of the militia, in order to execute the laws of the Union, enforce treaties, suppress insurrections, and repel invasions." n118 The Convention debated the proposed War Powers Clause on August 17, 1787. Although the account of what was said - the account recorded in Madison's notes - is brief, the debate was apparently the most sustained discussion of the proper allocation of the power to declare war. Therefore, this short and cryptic interchange tends to be the focus of modern academic discussion about the original understanding. n119 Although it is clear that one participant in that debate, South Carolina's Pierce Butler, n120 thought that the President should have the [*715]

power
to make war, the intent of virtually every other participant is subject to dispute.

According to Madison's notes, following Butler's comment, he and Elbridge Gerry "moved to insert 'declare,' striking out 'make' war; leaving to the Executive the power to repel sudden attacks." n121 This motion is the critical

PAGE 11

82 Cornell L. Rev. 695, *715

moment in the debates and has inspired dramatically different readings. Ely, for example, contends that it makes clear that the President has the power under the Commander-in-Chief Clause to assume "tactical control" of military operation that had already received congressional authorization, and that it "reserved to the president the power, without advance congressional authorization, to 'repel sudden attacks.'" n122 Thus, the change did not take from Congress the sole power to start wars, except in case of emergency created by "sudden attacks." In contrast, pro-Executive scholars see this amendment as departing from the original proposal and granting the President the power to start wars; they minimize the significance of the phrase "leaving to the Executive the power to repel sudden attacks." Thus, Professor Yoo contends that "to repel sudden attacks" was seen as establishing the floor of executive power under the amended clause, not its ceiling: "Adopting the amendment made clear that the President could not unilaterally take the nation into a total war, but that he might be able to engage the nation in hostilities short of that." n123

Following the motion of Gerry and Madison, Connecticut's Roger Sherman stated that the original language "stood very well. The executive [should] be able to repel and not to commence war. 'Make' better than 'declare' the latter narrowing the power too much." n124 Thereby, on a pro-Executive reading, Sherman asserted his view "that the President already had the power to respond to attacks, and that reducing Congress' power to that of declaring war would permit the Executive to commence wars unilaterally." n125 A pro-Congress reading is simply that Sherman feared that the new language would, by narrowing Congress's power, in some unspecified way, increase the power of the

Executive.

n126

Gerry then said that he "never expected to hear in a republic a motion to empower the Executive alone to declare war." n127 The standard pro-Congress reading is that he is responding to Butler's comment [*716] that the President should be able to make war. n128 Thus, Gerry is using "declare" as synonymous with "make." n129 The problem with this view is that it breaks the sequence - Sherman, not Butler, was the speaker before Gerry - and Butler was not addressing the motion that was on the floor at the time of Gerry's speech. Thus, it would seem odd for Gerry to be responding to Butler. On the other hand, Professor Yoo argues that Gerry thought that Sherman was seeking to give the President the power to declare war (in the sense of declaring war under international law), and was asserting that he was appalled that anyone would suggest that the President should have such a power. n130 But, as Yoo acknowledges, n131 this reading is based on Gerry's complete misunderstanding of Sherman. Although Sherman's statement can be read in different ways, there is nothing in Madison's notes that would indicate that Sherman wanted to expand presidential power. n132

Neither the pro-Congress nor the pro-Executive reading is necessarily wrong. After all, people misunderstand each other all the time and they frequently address the comments of someone other than the previous speaker. But each reading is problematic. And so the record provided by Madison - both with respect to Gerry's comment and, more generally, with respect to the debate as a whole - does not tell us with any certainty what the Convention understood itself to be doing when it voted eight to two (with one abstention) to substitute "declare" for "make." n133 Professor Jack Rakove has recently suggested an explanation for the unsatisfying record of this debate. n134 He notes that the War Powers Clause was discussed toward the end of the proceedings [*717] in Philadelphia. n135 Weary delegates were no longer carefully

PAGE 12

82 Cornell L. Rev. 695, *717

articulating their positions, and Madison was no longer carefully recording them. n136

In addition to arguing that the debates in Philadelphia support their view, pro-Congress scholars also highlight statements made during the

ratification

debates in the states, which they believe demonstrate that the power to declare

war was the power to initiate conflict. n137 The most powerful statement from

this perspective is one made by James Wilson at the Pennsylvania ratifying convention:

This [new] system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of

men, to involve us in such distress; for the important power of declaring war is

vested in the legislature at large: this declaration must be made with the concurrence of the House of Representatives: from this circumstance we may draw

a certain conclusion that nothing but our national interest can draw us into a

war. n138

As Lofgren writes, in this statement Wilson "not only implicitly equated declaring war and entering war, but also explicitly foreclosed exercise of the

power by the President acting alone." n139 Others at the state conventions

equated Congress's power over war under the Constitution with its power under

the Articles of Confederation, and thus implicitly indicated that Congress was

retaining the power to initiate conflict. As Robert Livingston declared at the

New York convention: "But, say the gentlemen, our present [Articles of Confederation] Congress have not the same powers [as Congress would have under

the Constitution]. I answer, They have the very same ... [including] the power

of making war...." n140 [*718]

In contrast, there are apparently no statements in which the term "declare

War" as used in the Constitution is clearly defined by reference to international law. n141 But this absence is far from dispositive. A

number of

pro-Congress scholars - although not all n142 - have acknowledged that their

evidence, while probative, is not sufficient to decide the question. As Lofgren

candidly observes of his reading of the clause, "One cannot pretend that the

matter is beyond all doubt." n143 Similarly, W. Taylor Reveley III, the author

of War Powers of the President and Congress, perhaps the most thorough

treatment
of the war power, concludes that the records of the Constitutional
Convention
are "inconclusive" and that they "are not sharpened by available accounts
of the
ratification debates." n144 [*719]

Not surprisingly, pro-Executive scholars find this evidence
unconvincing, in
part because only a few speakers equate the power to declare war and the
power
to initiate conflict, but also because many of the statements quoted above
are
unreliable indicia of what the Constitution meant. Thus, Yoo suggests that
Livingston's statement equating the new and old Congress's power reflected
a
"misunderstanding [that] may have occurred due to a failure to read the new
Constitution carefully" n145 Wilson's statement, in contrast, is
clear, and he was obviously familiar with the Constitution's text as a result of
his
service as a delegate at the Philadelphia Convention. It is nonetheless
possible
to argue that his statements only reflect his view, and that he is a
"dissenter
from the prevailing Federalist view on war powers." n146 Therefore,
Professor
Yoo, a sophisticated pro-Executive scholar, argues not that all the
Founders

PAGE 13

82 Cornell L. Rev. 695, *719

thought that the President could initiate war, but that this was the
dominant
view. n147 Of course, if all that the pro-Executive camp could do was
criticize and minimize the evidence offered by the pro-Congress camp, the
case
for a pro-Executive reading of the Clause would not be very substantial -
particularly in view of the absence of statements directly supporting that
reading. But pro-Executive scholars have advanced a strong independent
argument:
the Founders operated against a background in which there was a "shared
understanding" n148 that the Executive had the power to start war, and
pro-
Congress scholars have failed to offer convincing evidence that the
Founders
departed from that understanding. This argument and the inability of pro-
Congress scholars to respond to it or to another type of evidence that
challenges their thesis - evidence that the President did not have a veto
over
declarations of war - are discussed in the next section.

D. The Case against the Pro-Congress Reading of the War Powers Clause

Pro-Executive scholars have advanced a number of contextual arguments favoring their reading of the War Powers Clause. Knit together, these arguments powerfully suggest that, in the absence of some countervailing consideration not previously uncovered by scholars, the Founders would not have given Congress alone the power to initiate war.

The first point, and the point that has been treated as central by pro-Executive scholars, has already been discussed. n149 The terms used [*720] in the War Powers Clause - declarations of war and letters of marque and reprisal - were terms that had a particular meaning under international law. The power to declare war was a quasi-judicial function, and letters of marque and reprisal had a limited role. The Founders knew these meanings and presumably relied on them when they used these terms. As Dean Rostow explains, "The language ... can only be understood in the setting of international law." n150 "Why," J. Terry Emerson asks, "if the framers meant to make the Executive no more than the 'agent' of the Legislature in matters of military affairs, did they not say so in clear words ... ?" n151

Second, English precedent accorded the Executive the power to initiate war. Professor Yoo writes:

The eighteenth-century English monarch was commander-in-chief of the armed forces and possessed exclusive power to enter into treaties, to declare war, and to raise and regulate the army and navy.... Naturally, then, when the Framers allocated war powers between the President and Congress, they used as their baseline the separation of powers they believed to exist between King and Parliament. n152

Third, the writers to whom the Founders looked on separation of powers matters - John Locke, William Blackstone, and Montesquieu - all believed that the Executive should have responsibility for starting and carrying on war. n153

Fourth, the majority of state constitutions that preceded the Federal Constitution "either assumed that the governors had broad war-making authority, or explicitly gave them such power in terms reminiscent of the British

constitution and the colonial charters." n154

PAGE 14

82 Cornell L. Rev. 695, *720

Fifth, as former Secretary of State William Rogers has argued, the Founders believed that the Executive was distinguished by its capacity to act swiftly, vigorously, and secretly, attributes that they recognized were of peculiar value in the realm of foreign affairs. n155

Sixth, the Federal Constitution vested in the Executive powers that the first state constitutions, departing from English and colonial precedent, had given to the legislature. n156 "An impartial review of the history of this early period," Terry Emerson observes, "reveals that the attitudes of the majority of persons who wrote the state constitutions [*721] had undergone a change from an initial dread of the royalty in the 1770's to a perception of the need for a strong executive by the 1780's." n157

Taken together, these factors suggest that it would be profoundly surprising for the Founders to have granted Congress the power to initiate conflict. For them to believe that such a decision was appropriate, there would have had to have been some concern causing them to turn against the great tide of constitutional history. In general, the first state constitutions took from the Executive his traditional powers; the Constitution gave them back. n158 To allocate the war power to Congress alone would have been directly countercyclical - taking from the Executive a power that was so much a core Executive function that even anti-Executive state constitutions had allocated it to him.

Moreover, each of the points made by pro-Executive scholars is historically accurate. The power to start war was historically an Executive function, and this was an allocation supported by the thinkers who influenced the Founders. Blackstone was unambiguous in describing British practice. "The King," he wrote, "has also the sole prerogative of making war and peace." n159 "War is not undertaken by private persons, but by the will of the whole community; whose

right of willing is in this case transferred to the supreme magistrate by the fundamental laws of society." n160 Locke believed that this was the proper assignment of the power, n161 and Montesquieu similarly assigned to the Executive the power to start and conduct war. n162 The [*722] Founders also recognized that the President possessed certain attributes of obvious value in war. As Hamilton explained, "Decision, activity, secrecy, and dispatch will generally characterise the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number" n163

It is also true that the first state constitutions, enacted in the initial flush of independence, had vested in the legislatures powers traditionally held by the Executive. n164 This system of governance gave many of the Framers an appreciation of the importance of limiting legislative power. Accordingly, as Gordon Wood observed, the Federal Constitution represented a "repudiation" n165 of the first state constitutions because the Federal Constitution gave the President traditional executive functions which the state governors had been denied. n166 There is, however, a complicating factor regarding the pro-Executive trend that pro-Executive scholars have not addressed: although it is true that the first state constitutions gave the Governor substantial authority over war matters, the later constitutions, surprisingly, assigned the Governor less such power. For example, South Carolina and Virginia, the two states that in the 1770s enacted constitutions with clauses specifically allocating war power, involved the Governor in the exercise of that power. n167 Virginia's 1786 constitution [*723] was similar. n168 However, the two

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PAGE 15

82 Cornell L. Rev. 695, *723

other state constitutions from the 1780s that contained provisions concerning starting war - the Maryland Constitution of 1780 and the New Hampshire Constitution of 1784 - gave the power to initiate war to the legislature alone. n169 Moreover, the Massachusetts Constitution, despite the fact that it generally created a strong Executive, gave the legislature the power to appoint army and navy officers. n170 Thus, the history of the revolutionary era state constitutions suggests that treatment of war functions was counter-cyclical to the overall trend in separation of powers.

This point supports a pro-Congress reading of the War Powers Clause, but it is hardly conclusive. It merely leads us back to the larger question created by the factors stressed in pro-Executive scholarship: Why might the Framers, at a time in which they were taking so many powers from the Legislature, give Congress alone the power to start war? In explaining why the Founders gave the power to initiate war to Congress, pro-Congress scholars have highlighted a simple explanation. In the words of Dean Ely, requiring congressional approval before the nation went to war, reflected "a determination not to let such decisions be taken easily." n171 Similarly, Professors Firmage and Wormuth observed, "The legislative branch was purposely given the war power as a check upon the impulsive use of military force by the executive," n172 and Professor Bickel argued that "the Framers of the Constitution intended ... to make it harder [to start wars]." n173

Pro-Congress scholars point to a number of statements made by the Founders as an indication that, because the Founders believed presidents would be war-prone, they designed the Constitution to make war less likely by circumventing the Executive and granting Congress sole warmaking power. As previously noted, Wilson wrote that "this system will not hurry us into war It will not be in the power of a single man ... to involve us in such distress" n174 Similarly, Madison wrote Jefferson: "The constitution supposes, what the History of all ... [Governments] demonstrates, that the Executive is the branch of power most interested in war, and most prone to it. It has accordingly with studied care, vested the question of war in the [*724] Legislature." n175 Jefferson wrote Madison that the system gave an "effectual check to the Dog of war," n176 and early treatise-writer William Rawle opined that "every possible precaution should be used before a nation is plunged into [war]." n177

Yet the question remains why the Founders would have thought this an area in which the President was less prudent than Congress - given that they repeatedly stated in a range of other contexts that it was legislative abuses of power that most needed to be guarded against. n178 Moreover, why did they think that the

path to war had to be slowed? Perhaps because most of the pro-Congress literature is shaped by an explicit or unstated view that the war in Vietnam was a tragic mistake, in 179 it is typically assumed that the Founders would have wanted to avoid war. But the Founders themselves engaged in warfare with some frequency. Not only had the new republic fought successfully for independence in the Revolutionary War, but before it was twenty-five years old, it had engaged in a series of wars with Native Americans; launched military actions against the Barbary states; and fought the world's two most formidable military powers - France, in the undeclared naval "Quasi-War" of 1798 to 1800, and Great Britain, in the War of 1812. In 180 Given early America's apparent proclivity for armed conflict, it cannot simply be assumed that, even if the Founders thought the President was particularly likely to lead the nation into war, they would have thought such inclination was a bad thing. Thus, some explanation is required as to why they would have thought that the President was too likely to lead the

PAGE 16

82 Cornell L. Rev. 695, *724

nation to war.

This Part has so far focused on the evidentiary weaknesses of the pro-Congress reading of the Constitution. However, one significant evidentiary problem undermines the positions advanced by both pro-Congress and pro-Executive scholars: the fact that relevant evidence strongly indicates that the predominant view was that the President did not have the power to veto declarations of war. Early statements about the War Powers Clause repeatedly feature the assertion that the decision to declare war is Congress's alone, and that the Executive has [*725] no role in the matter. For example, in 1793 George Washington wrote, "The Constitution vests the power of declaring war in Congress; therefore no offensive expedition of importance can be undertaken until after they have deliberated upon the subject and authorized such a measure." In 181 During the same year, James Madison similarly declared that it was "the simple, the received and the fundamental doctrine of the constitution, that the power to declare war ... is fully and exclusively vested in the legislature; that the executive has no right, in any case to decide the

question, whether there is or is not cause for declaring war" n182
Furthermore, while President, Jefferson acknowledged that "Congress alone
is
constitutionally invested with the power of changing our condition from
peace to
war." n183 In fact, Chief Justice Marshall ruled that "the whole powers
of war
being, by the constitution of the United States, vested in congress, the
acts of
that body can alone be resorted to as our guides in this inquiry [of
whether '
war' existed]." n184

Also significant are President John Adams's actions regarding the
Quasi-War
with France and the legislature's response to them. In 1798, the Federalist
congressional caucus debated whether to seek a vote of Congress declaring
war
against France - a declaration that Adams, a Federalist, opposed. Adams's
position against a declaration of war; the motions on the floor of
Congress in
favor of a declaration of war; and the abandonment of those motions after
the
caucus's vote not to pursue war have been frequently discussed. n185
Strikingly, there [*726] is no mention in any of this material of the
possibility of a presidential veto of a congressional decision to declare
war.
This implies that it was understood that the President did not have the
power to
veto declarations of war. Presumably, if anyone thought that the President
had
such veto power, that fact would have entered into the discussions of
whether
Congress should declare war over the President's opposition. Furthermore,
when
Congress debated whether to declare war, numerous legislators stated that
the
decision whether to go to war was Congress's alone. For example,
Congressman
Sitgreaves declared:

The House knows that, by the distribution of powers under this
Government, it
is only competent for Congress to declare the country in war; therefore,
until
that declaration is made by this department, the Executive and Judiciary
cannot
act in the same way as if the country was at war. n186

Made in the teeth of presidential opposition, such statements strongly suggest a belief that the President had no role of
any kind - including a
veto -

in the decision whether to declare war.

Moreover, in his 1812 message asking Congress for a declaration of war, President Madison made clear that the decision about whether to declare war was,

PAGE 17

82 Cornell L. Rev. 695, *726

under the Constitution, purely a matter for Congress:

Whether the United States shall continue passive under these progressive usurpations and these accumulating wrongs, or, opposing force to force in defense of their national rights, shall commit a just cause into the hands of the Almighty Disposer of Events ... is a solemn question which the Constitution wisely confides to the legislative department of the Government. In recommending it to their early deliberations I am happy in the assurance that the decision will be worthy the enlightened and patriotic councils of a virtuous, a free, and a powerful nation. n187 [*727]

The day after Congress voted to declare war, Madison issued "A Proclamation," which asserted that the United States was in a state of war because of congressional action:

Whereas the Congress of the United States, by virtue of the constituted authority vested in them, have declared by their act bearing date the 18th day of the present month that war exists between the United Kingdom of Great Britain and Ireland and the dependencies thereof and the United States of America and their Territories n188

Surprisingly, given the wealth of literature on the original intent of the War Powers Clause, no scholar has argued that the original understanding was that the President could not veto a declaration of war. This is particularly striking because modern scholars have argued on textualist grounds that the War Powers Clause means precisely what it says - that "Congress shall have

power ...

To declare War" - and the President cannot veto such declarations. n189

Only

two scholars, Dean Ely and Gregory Sidak, have even raised the possibility that

the original understanding was that the President could not veto declarations of

war, and they dismiss the possibility rapidly. n190 Instead, they argue on

purely textual ground that declarations of war fall within Article I, Section 7,

Clause 3 of the Constitution, the Presentment Clause, which requires that every

congressional "Order, Resolution, or Vote" be presented to the President for his

signature or veto. n191 The problem with this argument is that the Framers

understood the Presentment Clause narrowly. That is, if all congressional orders, resolutions, and votes must be presented to the President, this presumably applies, not just to declarations of war, but also to congressional

proposals for constitutional amendments. However, in the 1798 case *Hollingsworth*

v. *Virginia*, n192 the one early Presentment Clause case, the Supreme Court

rejected the claim that the Eleventh [*728] Amendment was invalid because it

had not been signed by the President. The Court observed that the Presentment

Clause "applies only to the ordinary cases of legislation" n193 A congressional declaration of war, like a congressional decision to propose amendments, would seem to fall outside the category of "ordinary cases of legislation."

The other principal piece of evidence on which Ely and Sidak rely is that

Madison signed the declaration of war against England which Congress passed in

1812. n194 But Presidents sign documents for political reasons - even when

they know the signature has no legal consequence - in order to highlight a

PAGE 18

82 Cornell L. Rev. 695, *728

personal endorsement. For example, despite *Hollingsworth*, on the eve of the Civil War, President Buchanan signed the congressionally-approved Corwin Amendment, which would have barred subsequent amendments banning slavery, n195

and President Lincoln signed the Thirteenth Amendment after it was approved by

Congress in 1865. n196 The real question is not whether Madison signed the

declaration, but what significance he attached to that signing. Evidence of

Madison's intent can be found in his previously-quoted message to Congress and his proclamation following the declaration of war. Neither document is discussed by Ely or Sidak. Both documents, however, clearly state that the decision whether to go to war is purely congressional. According to Madison's war message, "The Constitution wisely confides [the decision about whether to go to war] to the legislative department of the Government." ⁿ¹⁹⁷ And, according to Madison's proclamation, "[The Members of] Congress ... have declared [war] by their act." ⁿ¹⁹⁸ The President is not part of the process. Ely's and Sidak's position is further undercut by the evidence concerning the 1798 controversy over whether to go to war with France (a subject that neither discusses). ⁿ¹⁹⁹

That previous commentators - both pro-Congress and pro-Executive - have not even raised the issue of a presidential veto may reflect the fact that, under either view of the original understanding, it would make no sense for the President to be without veto power. If the Founders sought to ensure that the President was intimately involved in all matters of foreign policy, as pro-Executive scholars maintain, he ^[*729] should obviously have been equipped with veto power over warmaking decisions. Similarly, if the Founders sought to slow the path to war by constructing all possible barriers to war, as pro-Congress scholars maintain, a presidential veto would be one obvious barrier.

The remainder of this Article seeks to answer the question posed in this Part: Why would the Founders have given Congress the power to initiate war at the same time they denied the President a veto over those declarations? There are several reasons why the Founders might not have wanted to give the President much, if any, power over the decision whether to go to war. In addition, examination of the Founders' writings suggests that the continuing power of English oppositionist thought likely influenced the structuring of the War Powers Clause. That ideology made the Founders particularly fearful that unconstrained Executive control of the military would enable the President to seize power directly or to undermine the system of government indirectly through his use of patronage and the financial assets at his disposal. ⁿ²⁰⁰ However, this factor was at least as much a concern at the start of the Revolution

as it was at the time of the Federal Constitution, yet to the extent that they dealt with the matter, the first state constitutions involved the Governor in the warmaking decision. n201 Therefore, an additional explanation is needed for why the Founders might have become convinced that the President should be excluded from the decision to go to war, even as he was being re-invested with so many powers. In offering such an explanation, this Article will turn to a topic whose relationship to the War Powers Clause has gone wholly unexplored - the Framers' conception of fame.

II

Fame

In his 1967 essay, *Fame and the Founding Fathers*, Douglass Adair advanced the novel argument that the Framers' conception of fame played a critical role in shaping their actions. n202 Adair began by contrasting the "explosion of

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PAGE 19

82 Cornell L. Rev. 695, *729

[political] talent" in late eighteenth century America with the comparative dearth of such talent in the modern United States. n203 He noted that the nation that produced "a Hamilton, [*730] a Dickinson, a Rutledge, and the galaxy of great Virginians" had a population "slightly less than that of Wisconsin." n204 He added:

Virginia in 1790, the largest of the states, contained just over seven hundred thousand people, if one counts the slaves as well as free inhabitants; but this state, which produced Washington, Mason, Henry, Jefferson, Madison, Marshall, had a total white population, including women and children, of about four hundred thousand souls. This is much smaller in number than such modern spawning grounds of political genius as the Wilkes-Barre metropolitan area or Phoenix, Arizona. n205

These comparisons suggested an obvious question: "How can we account for this amazing concentration of political ability in this generation born into a tiny nation on the fringe of the Atlantic?" n206

The answer lies in the fact that "lust for the psychic reward of fame, honor, glory, after 1776 became a key ingredient in the behavior of Washington and his greatest contemporaries." n207 Following eighteenth century usage, Adair defined fame as:

the action or behavior of a "great man," who stands out, who towers above his fellows in some spectacular way. To be famous or renowned means to be widely spoken of by a man's contemporaries and also to act in such a way that posterity remembers his name and his actions.... The love of fame encourages a man to make history, to leave the mark of his deeds and his ideals on the world; it incites a man to refuse to be the victim of events and to become an "event-making" personality - a being never to be forgotten by those later generations that will be born into a world his actions helped to shape. n208

Desiring to be remembered, the Framers became great.

Three reasons explain why this desire for fame was particularly powerful among the framing generation. Part of the reason was cultural. The writers they read - classical authors such as Plutarch, Cicero, and Aristotle, as well as more modern authors such as Machiavelli and Francis Bacon - celebrated fame and its pursuit and deemed fame an appropriate measure of individual worth. Aristotle declared, "Honor and dishonor are the matters with which the high-minded man is especially concerned." n209 Francis Bacon opined, "[The] winning of Honour is but the revealing of a man's virtue and worth." n210 And these authors placed the founders of states and the legislators [*731] who created perfect constitutions at, or near, the apex of justly-won fame. Thus, Plutarch provided as a model for emulation the "great LAWGIVER and the FOUNDER OF A COMMONWEALTH." n211 Machiavelli found "the Founders of a Republic" to be the most praiseworthy individuals, except for "the authors and founders of religions." n212 Bacon declared the individuals most worthy of fame to be the "FOUNDERS OF STATES AND COMMONWEALTHS[,] such as ... Romulus, Cyrus,

Ottoman,
and Julius Caesar." n213

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PAGE 20

82 Cornell L. Rev. 695, *731

Second, Adair contended that many of the Framers had no faith in a heavenly afterlife. n214 Fame was important to them because it offered them what religion no longer could: immortality. "We must recognize," Adair wrote, "[that] the hope of fame like the hope of Christian immortality is a mode for dealing with proud Death and conquering him." n215

Finally, the Founders became obsessed with fame because the Revolutionary War proved that great fame was attainable. Despite their generally high ambition, the Founders nonetheless had limited aspirations before the war. "When I was young," Adams wrote Jefferson in 1813, "the Summum Bonum in Massachusetts was to be worth ten thousand pounds Sterling, ride in a Chariot, be a Colonel of a Regiment of Militia and hold a seat in his Majesty's Council. No Man's Imagination aspired to anything higher beneath the skies." n216 Even Hamilton, one of the few Founders who dreamt of personal glory years before the Revolution, dreamt almost modestly: he fantasized about following in the steps of General James Wolfe who won immortality, a great victory for his country, and death on the Plains of Abraham. n217 The Revolution opened previously unimaginable horizons. According to Adair, "As the War for Independence enlarges the provincial stage upon which they act their roles to that of a world theater, the greatest of the great generation develop an almost obsessive desire for fame. They become fantastically concerned with posterity's judgment of their behavior." n218 And so, to take two examples, Adams came to develop "a sort of pathology of 'the love of fame'" n219 while Hamilton became consumed with a "demonic passion [*732] for fame," n220 and adopted a somewhat grander role model than Wolfe: Julius Caesar. n221

Thus, Adair concludes that the Founders' desire for fame made possible national independence and the creation of the republic. n222 Their concern for immortality "became[] a spur and a goad that urged some of them to act with a

nobleness and greatness that their earlier careers had hardly hinted at." n223

Although a number of historians and students of the Founding Fathers have explored Adair's insight, n224 legal scholars have mistakenly ignored it, despite the wealth of writings on original intent. The same concern with fame that Adair saw as guiding the personal actions of the Founders also profoundly influenced their thinking about governance. "Love of fame," Hamilton wrote, is "the ruling passion of the noblest minds, which would prompt a man to plan and undertake extensive and arduous enterprises for the public benefit." n225 "Love of fame," declared Gouverneur Morris at the constitutional convention, "is the great spring to noble & illustrious actions." n226 "The love of honest and well earned fame is deeply rooted in honest and susceptible minds," James Wilson asserted. n227 He then rhetorically asked,

Can there be a stronger incentive to the operations of this passion, than the hope of becoming the object of well founded and distinguishing applause? Can there be a more complete gratification of this passion, than the satisfaction of knowing that this applause is given - that it is given upon the most honourable principles, and acquired by the most honourable pursuits? n228 [*733]

John Adams observed that "if the citizens, or a majority of them, or any party or individual of them, in action and practice, preferred the public to their private interest, as many undoubtedly would, it would not be from any such

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PAGE 21

82 Cornell L. Rev. 695, *733

passion as love of the democracy." Such a preference was instead likely rooted in "a desire of fame, and the applause, gratitude, and rewards of the public." n229

At the same time, the Framers did not see the desire for fame as wholly beneficial. Their conception of a "passion" for fame followed David Hume's approach. In classifying the "love of fame" as a "passion," Hume conceived

of
the attraction of fame as emotional rather than rational in nature, and he
therefore broke with the classical celebration of the quest for fame.
n230
Thus, for the Framers, while love of fame could inspire individuals to
serve the
polity, it also could harm, and even endanger, when not properly channeled
and
constrained. Although the proper future audience was the wise and good, an
individual, fearful of being forgotten, might care more about simply being
remembered, rather than by whom or for what. The haunting example from
antiquity
of Herostratus burning down the beautiful Temple of Diana at Ephesus so
that his
memory would be immortal n231 teaches that the desire for such
immortality can
triumph over concern for others. Adams was cognizant of this danger when he
wrote:

With what impatience does the man of spirit and ambition, who is
depressed by
his situation, look round for some great opportunity to distinguish
himself? No
circumstances, which can afford this appear to him undesirable; he even
looks
forward with satisfaction to the prospect of foreign war, or civil
dissension;
and with secret transport and delight, sees, through all the confusion and
bloodshed which attend them, the probability of those wished-for occasions
presenting themselves, in which he may draw upon himself the attention and admiration of mankind. n232

Hamilton, too, warned of the dangers posed by the "man of irregular
ambition"
driven by his love of fame and power. n233

Furthermore, the Founders did not consider their peers immune from the
corruption caused by love of fame. For example, when Hamilton, after
dinner with
Jefferson one evening in 1791, declared, "The greatest man that ever
lived, was
Julius Caesar," Jefferson concluded, [*734] as he wrote Benjamin Rush,
that
Hamilton intended to overthrow the government in order to achieve a place
in
history like Caesar's. n234 Fittingly, a few months later Rush received a
letter from Adams accusing Jefferson of illegitimately pursuing glory.
Adams
wrote: "The Declaration of Independence I always considered as a theatrical
show. Jefferson ran away with all the stage effect of that ... and all the
glory
of it." n235 As Leo Braudy has explained, "It is impossible to read the
letters and sometimes even the public statements of virtually any one of

the
Founding Fathers without quickly finding an attack on one or several of the
others for their ambition, their greed for praise, their vanity, and so
on."
n236

Thus, a crucial problem in structuring government became how to
control the
desire for fame and renown. In his Discourses on Davila, Adams observed,
"The
desire of the esteem of others is as real a want of nature as hunger."
n237 He
added, "It is a principal end of government to regulate this passion,
which in
its turn becomes a principal means of government." n238 Returning to the
subject later in the book, the future President quoted with approval Adam
Smith's observation, "To those who have been accustomed to the possession,
or

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PAGE 22

82 Cornell L. Rev. 695, *734

even to the hope of public admiration, all other pleasures sicken and
decay,"
and then framed his discussion around a question posed by the poet Johnson:
"Heroes proceed! What bonds your pride shall hold?" "The answer," Adams
wrote,
"can be none other than this, that, as nature has established in the
bosoms of
heroes no limits to those passions; and as the world, instead of
restraining,
encourages them, the check must be in the form of government." n239
Adams's
choice of language is significant. Government does not seek to root out the
desire for applause; it seeks only to "check" it, to "regulate" it, to
convert
it into "a principal means of government." Similarly, in discussing the
proper
response to a person's "love of fame," Hamilton urged that it be
harnessed, not
eradicated: "The desire of reward is one of the strongest incentives of
human
conduct, [and] the best security for the fidelity of mankind is to make
their
interest coincide with their duty." n240

According to one important group of scholars, the Founders of the
Constitution concluded that individuals inevitably pursued economic [*735]
self-interest, and therefore the Founders sought to create a system of
governance that would channel that drive in a beneficial fashion and
contain it
when it posed a harm to the polity. n241 In Creation of the American
Republic,
the most influential work of this school of thought, Gordon Wood contended

that
this acceptance of the pursuit of economic self-interest as legitimate (or
at
least as an unavoidable aspect of human nature) marked a sharp departure
from
the republicanism that had been the dominant mode of thought at the start
of the
Revolutionary Era. n242 In republicanism, a principal, and perhaps the
principal, purpose of the polity was to inculcate virtue - the sacrifice of
individual interest to the commonweal. n243 According to Wood, the
Framers
decisively rejected this view and accepted liberalism. n244 Similarly, in
Democracy and The Federalist, a classic explication of the view that the
Founders accepted self-interest as part of the constitutional system,
Martin
Diamond argued that Madison saw "the real problem in popular government
... [as]
the majority faction, i.e., the great mass of the little propertied and
unpropertied." n245 Federalist No. 10, according to Diamond, is premised
on
the view that this threat could not be resolved by an appeal to "'moral and
religious motives' whose efficacy [Madison] deprecated." n246 Rather, it
was
to be mastered by pitting economic interest against economic interest. "The
struggle of interests is a safe, even energizing, struggle which is
compatible
with, or even promotes, the safety and stability of society." n247 Thus,
the
Founders solved "the problem posed by the dangerous passions and interests
of
the many ... primarily by a reliance upon passion and interest themselves."
n248

More recent scholarship - including new work by Wood n249 - has
indicated
that the story of ideological transformation that Wood depicted in
Creation of
the American Republic was too stark and that, while [*736] republicanism
grew
less influential, it was still important at the time of the framing. For
example, Isaac Kramnick has written:

Federalists and Antifederalists ... tapped several languages of
politics
None dominated the field, and the use of one was compatible with the use of
another by the same writer or speaker. There was a profusion and confusion
of
political tongues among the founders. They lived easily with that clatter;
it is
we, two hundred and more years later, who chafe at their inconsistency.
n250

There is currently a broad (although not universal) acceptance among historians of the view that, at the time of the founding, both republican and liberal ideas were widely held and that both affected constitutional discourse. n251 Thus, the Framers were concerned both with harnessing self-interest and with promoting virtue. n252

The Founders' comments about fame and glory are in accord with this account, suggesting parallels between the Constitution's treatment of economic self-interest and its treatment of the desire for fame. In the classical republican vision, the desire for fame was an unmitigated good: "the noblest of the passions." n253 The attitude of the Founders towards fame represents a tempering - but not a rejection - of this initial vision through the collective experience of a famous generation. Thus, the Founders had a complex view of fame, seeing it as an impetus for great deeds and as an impetus for great harms; fame was both a manifestation of virtue and a possible threat to the polity. The Constitution the Founders created reflects this complexity. It seeks to facilitate the pursuit of fame, to harness the pursuit of fame and to check the pursuit of fame - all at the same time.

The Constitution reflects this strategy in a number of different ways. For example, Hamilton invoked the love of fame as a reason not to bar presidential re-election. The bar would "deter" the President from beginning large-scale enterprises "when he foresaw that he must quit the scene, before he could accomplish the work, and must commit that, together with his own reputation, to hands which might be unequal or unfriendly to the task." n254 Morris also invoked the love of [*737] fame as he urged the convention to permit presidential re-election, and his argument was more dramatic than Hamilton's. By denying the President the continued opportunity for fame, the term limitation would "give a dangerous turn to one of the strongest passions in the human breast.... Shut the Civil road to Glory & he [the President] may be compelled to seek it by the sword." n255

Similarly, the open-ended texture of the Constitution may reflect, in part,

the Founders' view of the desire for fame and its perils. Antifederalists criticized the Constitution for not being specific enough and for not putting adequately precise limits on federal governmental powers; they were comfortable with the idea that if a Constitution of the type they proposed was enacted, it would soon need to be replaced. n256 The Framers, in contrast, celebrated the timelessness of their creation. "Constitutions of civil Government," Hamilton declared, "are not to be framed upon a calculation of existing exigencies; but upon a combination of these, with the probable exigencies of ages." n257 Such assertions, however, raise the question of why the Framers thought it so important that the system they were building last forever. Professor Paul Rahe suggests an answer:

In order that "no manner of Food might be left unto ambition," most of [the Founders] even tried what George Washington, like Harrington's Lord Archon, actually accomplished: to contrive affairs so that "the minds of men were firme in the opinion, that he could be no seeker of himselfe, in the way of earthly Pompe and Glory." n258

Thus, the Framers' conception of fame makes their desire for constitutional flexibility understandable. As creators of a nation, the Founders knew how

PAGE 24

82 Cornell L. Rev. 695, *737

powerful and how dangerous the lust for fame could be; they sought to enact a constitution flexible enough to prevent tempting future generations of fame-seekers to overturn the polity.

On a less grand level, the Opinions Clause - empowering the President to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices" n259 - sought to harness individual concern for fame. James Iredell wrote that the Clause would lead [*738] the Cabinet to weigh the courses of action that they recommended with care: "[A written opinion] must for ever afterwards speak for itself, and commit the character of the writer, in

lasting colors, either of fame or infamy, or neutral insignificance, to future ages, as well as the present." n260 Recognition of the importance of the desire for fame also lies behind Adams's attempt to create titles for the holders of national office. For example, he proposed to the Senate that the President be referred to as "His most benign highness." n261 Although Adams's effort met with abuse - it was suggested that Adams be styled "His Rotundity" - it was consistent with his belief that, unless the desire for distinction was used to attract people to the public life, they would wholly abandon it for the private realm. n262

Finally, the Founders' conception of the desire for fame also provides an explanation for the constitutional provisions concerning the military. As the Founders reflected on fame and its significance for constitutional government, the desire for military glory became a particular focus of concern. The Revolution had made only one individual a world figure: the nation's military leader, George Washington. n263 And Washington had devoutly sought that fame. Richard Brookhiser has recently written that Washington "hoped his reputation would be honored in later years by the country he had made and celebrated by its poets." n264 His contemporaries acknowledged his preeminent fame, although not all thought it just. Writing about the fact that Washington was treated as the greatest leader of the Revolutionary War, Adams sarcastically observed to Benjamin Rush that "mankind bow down with [the most] reverence" to "bloody battles and splendid victories." n265 "The French and American Revolutions differed from each other in many things," Rush wrote Adams, "but they were alike in one particular - the former gave all its power to a single man, the latter all its fame." n266 While Rush and Adams deplored this state of affairs, Jefferson celebrated it. In his Notes on the State of Virginia, Jefferson argued for America's capacity to produce great individuals and listed Washington first: "In war we have produced [*739] a Washington, whose memory will be adored while liberty shall have votaries, whose name will triumph over time, and will in future ages assume its just station among the most celebrated worthies of the world" n267

Although the Founders disagreed about whether Washington deserved preeminence, all believed that he was remarkable for having been in a position to pursue greater fame and power and for not yielding to the temptation. As George Mason declared, "So disinterested and amiable a character as General Washington might never command again." n268 Patrick Henry, as well, stressed the nation's rare fortune in having found such a man:

In great dangers [dictatorial] power has been given. - Rome had furnished us with an illustrious example. - America found a person worthy of that trust: She looked to Virginia for him. We gave a dictatorial power to hands that used it

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PAGE 25

82 Cornell L. Rev. 695, *739

gloriously; and which were rendered more glorious by surrendering it up. Where is there a breed of such Dictators? Shall we find a set of American Presidents of such a breed? Will the American President come and lay prostrate at the feet of Congress his laurels? I fear there are few men who can be trusted on that head. n269

Few would have Washington's ability to forsake the opportunity to gather the laurels of war. Indeed, the memorial given at Washington's death suggests that the Senate feared that even he might have been tempted to overreach:

With patriotic pride, we review the life of our Washington, and compare him with those of other countries, who have been pre-eminent in fame. Ancient and modern names are diminished before him. Greatness and guilt have too often been allied; but his fame is whiter than it is brilliant.... The scene is closed, and we are no longer anxious lest misfortune should sully his glory Favored of heaven, he departed without exhibiting the weakness of humanity. n270

Given the Founders' conception of the lure of military fame, the President was a logical choice to head the military because his desire for fame would

motivate him to win any wars that the nation waged. At the same time, as the next Part will argue, this same desire for military glory meant that the President could not be trusted to decide when to start war. [*740]

III

Fame and the War Powers Clause

As previously discussed, at the time the Constitution was drafted and ratified, there was little discussion about what the War Powers Clause meant. But analysis of the ratification debates about war, fame, and the Executive reveal a fear of Executive desire to lead the nation into war in order to achieve personal glory. These statements thus provide the missing link in the argument made by pro-Congress scholars; they suggest the motivation for giving Congress alone the power to start war. After surveying evidence from the ratification debates, this Part turns to a discussion of the new nation's first foreign policy crisis - the Neutrality Crisis of 1793 - and focuses on Madison's Helvidius letters. In these letters, Madison made explicit the previously implicit link between concerns about the dangers of the desire for fame and the decision to vest the war power in Congress. The Part will then turn to John Adams's analysis of Alexander Hamilton's role in the Quasi-War of 1798-1800 and the Federalist attacks on the War of 1812 as further examples of the early view that an individual's desire for glory could lead him to push the nation into battle.

A. Constitutional Debates

As supporters and opponents of the Constitution debated the resolution of military questions, they revealed a common belief that kings and other individuals with the power to lead their nation into war were likely to do so in order to gain personal glory. In other words, Adams's observation that "the man

of spirit and ambition ... looks forward with satisfaction to the prospect of foreign war ... in which he may draw upon himself the attention and

admiration
of mankind" operated with particular force when the person in question was
a
leader who would reap the lion's share of fame from victory. n271

In Federalist No. 4, John Jay argued that a united country was
necessary,
among other reasons, to protect against unjust wars initiated by European
powers. In explaining why European nations were prone to initiate such
conflicts, he wrote:

Absolute monarchs will often make war when their nations are to get
nothing
by it, but for purposes and objects merely personal, such as, a thirst for
military glory These and a variety of motives, which affect only the
mind
of the Sovereign, often lead him to engage in wars not sanctified by
justice, or
the voice and interests of his people. n272 [*741]

Thus, the "absolute monarch[] ... thirsting for military glory," will
start
wars that "the voice ... of his people" would counsel against starting. In
defending the federal taxing power, Hamilton in Federalist No. 34 relied on
similar assumptions. He contended that the new nation's military needs
would be
modest, and contrasted them with Great Britain's. "The expences incurred
in the
prosecution of the ambitious enterprizes and vain-glorious pursuits of a
Monarchy, are not a proper standard by which to judge of those which might
be
necessary in a republic" n273 Paralleling Jay, Hamilton took the
position
that the "ambition" and "vain-glory" of the monarch would cause him to
begin
wars that would not have been begun by a republic. n274 Significantly,
although ambition today is most commonly the love of power or wealth, its
most
common usage in the late eighteenth century was, "the desire of preferment
or
honour." n275

A Federalist writing under the pen name "Foreign Spectator" also
suggested
that the desire for military glory caused leaders to make war:

Military honor ... is indeed very dazzling Yet this honor is not
sufficient for republics, because it regards war rather as a theatre of
glory,
than a trial of patriotic virtue, and values a Caesar [who] ... to

astonish the world by his talents, became its conqueror, and the master of his own country.
n276

It is, then, the desire for glory, to "astonish the world by his talents," that motivates a Caesar to conquer. To offer one final Federalist example, in the Virginia ratifying convention, Federalist leader George Nicholas favorably compared the Constitution, which gave Congress the power to call out the militia, with the English system, in which the monarch held that power. "[The] Prince[']s decision would be] governed by ... ambition, or mere motives of personal interest," while Congress "will be actuated by motives of fellow-feeling." n277

The Antifederalists, in fact, shared the Federalists' belief that an individual, entrusted with control over the military, would use it to gain

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PAGE 27

82 Cornell L. Rev. 695, *741

glory. Patrick Henry proclaimed:

A republic has this advantage over a monarchy, that its wars are generally founded on more just grounds. A republic can never enter into a war, unless it be a national war - unless it be approved of, or desired by the whole community.... I call also for an example, when a republic has been engaged in a war contrary to the wishes of its people. There are thousands of examples, where the ambition of [*742] its Prince [has] precipitated a nation into the most destructive war. n278

Henry's concern was not simply the narrow one that kings should not be given the power to lead a nation to war, but the broader one that any one individual - king or not - entrusted with the power to start war would use it to achieve personal glory. Thus, commenting on recent Dutch history, he stated: "The glorious republic of Holland has erected monuments of her warlike intrepidity and valor: Yet she is now totally ruined by a Stadtholder - a Dutch President. The destructive wars into which that nation has been plunged, has since involved

her in ambition." n279 An Antifederalist writing as "American Citizen" took a similar view: "There is a wide difference between the troops of such a commonwealth as ours, founded on equal and unalterable principles, and those of a regal government, where ambition and oppression are the profession of the king." n280

Antifederalist Melancton Smith contrasted the American situation with the European situation: "The European governments are almost all of them framed, and administered with a view to arms, and war, as that in which their chief glory consists" n281 According to Smith, personal reasons motivated the monarchs of Europe to declare war. He wrote, "Let the monarchs in Europe, share among them the glory of depopulating countries I envy them not the honor, and I pray heaven this country may never be ambitious of it." n282 Smith contrasted the illusory glory which European monarchs pursued with the real glory of substantial achievement: "The czar Peter the great, acquired great glory by his arms; but all this was nothing, compared with the true glory which he obtained, by civilizing his rude and barbarous subjects, diffusing among them knowledge, and establishing, and cultivating the arts of life" n283

The various examples of ambition and glory-seeking cited above do not directly involve Congress or a democratically-selected President. But neither Antifederalists nor Federalists thought that Americans were immune from the fame-seeking and glory-seeking that affected Europeans. I have previously discussed the Federalist belief that a proper constitution needed to account for the desire for fame. Antifederalists were at least as vociferous on this point, with the significant difference being that while the Federalists believed that the Constitution [*743] controlled glory-seeking, the Antifederalists did not. An Antifederalist writing as "Denatus" observed:

For purposes best known to this almighty sovereign of pure goodness and order, we are subject to many jarring propensities. Among these, vanity, ambition, and the love of riches are not the least. - While reason and conscience can confine the passions, their action and re-action on each other, constitute human happiness. But, when they overcome reason and conscience, they produce our misery. To guard against this misfortune, as much as human foresight

could discover, ought to have been the chief business of the late foederal
[sic]
convention. n284

In arguing against a standing army, Melancton Smith asked: "Are we so
much
better than the people of other ages and of other countries, that the same
allurements of power and greatness, which led them aside from their duty,
will
have no influence upon men in our country?" n285 The answer was obvious:
"The
passion for pomp, power and greatness, works as powerfully in the hearts
of many
of our better sort, as it ever did in any country under heaven." n286

Antifederalist "Candidus" made a similar argument against entrusting
the
national government with the war power. As he did, he strikingly described
the
rarity of selfless leaders who refused to misuse their power:

To trust this [war] power in the hands of a few men delegated for two,
four
and six years, is complimenting the ambition of human nature too highly, to
risque the tranquility of these States on their absolute determination.
Certain
characters now on the stage, we have reason to venerate, but though this
country
is now blessed with a Washington, Frnaklin [sic], Hancock and Adams, yet
posterity may have reason to rue the day when their political welfare
depends on
the decision of men who may fill the places of these worthies. n287

As historian Forrest McDonald has explained, "It was a cliché that in
public
affairs the ruling passions of most men were avarice and ambition, the
love of
money and the love of power or popular applause." n288 Governmental
actors
were all prone to ambition. But it was the individual who acted alone -
who had
special power, responsibility, and visibility - who was most likely to
pursue
fame because he had the greatest opportunity to achieve it. The legislator
did
not fall into this category. As Madison wrote in Federalist No. 10, "moral
...
motives" - among which Madison considered concerns about reputation [*744]

n289 - "lose their efficacy in proportion to the number combined together."
n290 But the President, as a lone actor, was likely to be driven by fame.
Significantly, when Hamilton and Morris spoke about the love of fame and
what it
meant for the American constitutional system, their sole focus was on how
it
would affect presidential action. n291

In discussing the desire to be known and remembered and the
consequences of
that desire, Adams put the point more broadly: "In proportion as men rise
higher
in the world, whether by election, descent, or appointment, and are
exposed to
the observation of greater numbers of people, the effects of their own
passions
and of the affections of others for them become more serious, interesting,
and
dangerous." n292 It is not the mode by which the individual comes to
lead a
nation that matters - whether, for example, he is an hereditary king or an
elected president - it is the simple fact that he leads a nation that
makes his
passions "serious, interesting and dangerous." n293

In Federalist No. 6, Hamilton made a related point in discussing the
origins
of war. Some wars, he wrote:

take their origin intirely in private passions; in the attachments,
enmities,
interests, hopes and fears of leading individuals in the communities of
which

PAGE 29

82 Cornell L. Rev. 695, *744

they are members. Men of this class, whether the favourites of a king or
of a
people, have in too many instances abused the confidence they possessed;
and
assuming the pretext of some public motive, have not scrupled to sacrifice
the
national tranquility to personal advantage, or personal gratification.
n294

Hamilton offered Pericles as his example of a popular favorite who had
embroiled his nation in conflict for reasons stemming from "private
passions,"
the consequence of which was "the ruin of the Athenian commonwealth."
n295 In
short, the "leading individuals in the community" are likely to use their

power
to lead their nation into war for personal reasons. n296 This is true
regardless of whether they derive their power from being "the favourites
of a
king or of a people." n297 Either way, the consequences are disastrous.
[*745]

Combined, these statements about fame and war strongly suggest why the Framers gave Congress the power to declare war. First, these statements are evidence of a widely-held belief among Federalists and Antifederalists that kings - the "executive" that they knew - had frequently led their nations into war solely to achieve glory. Second, they reveal a widespread conviction that the passions that influenced leaders of a monarchy would also hold sway over leaders of a republic. Third, the statements reflect an understanding that the President, the head of the new executive branch, was the governmental official most likely to pursue fame. These statements lead to the logical, if unexpressed, conclusion that the President could not be trusted with the power to declare war because, in order to achieve glory, he would lead the nation into war when it was not in the national interest.

Admittedly, this sentiment was not directly expressed in Philadelphia or during the ratification debates. However, there was also little discussion of any kind concerning why the power to declare war was given to Congress. n298 Moreover, in the course of the first prominent post-ratification debate about the War Powers Clause, James Madison clearly stated that the President's inclination to war because of his desire for fame justified the Framers' grant of the power to declare war to Congress. n299

B. The Helvidius Letters

In April 1793, President Washington proclaimed American neutrality in the war between France and Britain. n300 Hamilton, then Secretary of the Treasury, defended both the wisdom of Washington's decision and his constitutional power to issue the proclamation in a series of letters written under the pen name "Pacificus." n301 Hamilton grounded his constitutional claims in the contention that foreign policy was an Executive function and that congressional powers under the Constitution in the foreign policy area were therefore "to be

construed strictly - and ought to be extended no further than is essential to their execution." n302 He acknowledged that Executive actions could "affect the ... exercise of the Power of the Legislature to declare war," but argued that this did not prevent the President from exercising powers granted him under the Constitution. n303 According to Hamilton, [*746] "The division of the Executive Power [in the Constitution creates] ... a concurrent authority, in the distributed cases." n304

Madison was troubled by Washington's proclamation. A letter that he wrote Jefferson on June 13, 1793 indicates that he viewed Congress as having the sole

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PAGE 30

82 Cornell L. Rev. 695, *746

power to initiate war, and that he thought the Neutrality Proclamation represented an indirect but significant Executive intrusion on congressional power:

The right to decide the question whether the duty & interest of the U.S. require war or peace under any circumstances, and whether their disposition be towards the one or the other seems to be essentially & exclusively involved in the right vested in the Legislature, of declaring war in time of peace; and in the P. & S. [President and Senate] of making peace in time of war. n305

As Hamilton's Pacificus Letters appeared in print, Jefferson forwarded them to Madison and urged him to write a response: "Take up your pen, select the most striking heresies, and cut him to peices [sic] in the face of the public. There is nobody else who can & will enter the lists with him." n306

Complying with Jefferson's request, Madison wrote five letters under the nom de plume "Helvidius." n307 Madison's focus was on Hamilton's constitutional argument, rather than on the substantive merit of the proclamation. He attacked the notion of concurrent jurisdiction and proclaimed the importance "of a rigid

adherence to the simple, the received and the fundamental doctrine of the constitution, that the power to declare war including the power of judging of the causes of war is fully and exclusively vested in the legislature."
n308
Again, Madison here clearly equates the power to declare war with the power to initiate conflict.

Although Madison's argument against concurrent jurisdiction has often been criticized, n309 and Madison himself had limited enthusiasm [*747] for the project, n310 the letters merit close attention, not just because they reflect a pro-Congress understanding of the War Powers Clause, but because of their discussion of why the Framers gave Congress the power to declare war. As he concluded the fourth Helvidius letter, having articulated and defended his personal understanding of the War Powers Clause, Madison sought to strengthen his case by setting forth the concerns which prompted the Framers' decision to assign to Congress the power to declare war:

In no part of the constitution is more wisdom to be found than in the clause which confides the question of war or peace to the legislature, and not to the executive department. Beside the objection to such a mixture of heterogeneous powers: the trust and the temptation would be too great for any one man: not such as nature may offer as the prodigy of many centuries, but such as may be expected in the ordinary successions of magistracy. War is in fact the true nurse of executive aggrandizement. In war a physical force is to be created, and it is the executive will which is to direct it. In war the public treasures are to be unlocked, and it is the executive hand which is to dispense them. In war the honors and emoluments of office are to be multiplied; and it is the executive patronage under which they are to be enjoyed. It is in war, finally, that laurels are to be gathered, and it is the executive brow they are to encircle. The strongest passions, and most dangerous weaknesses of the human breast; ambition, avarice, vanity, the honorable or venial love of fame, are all in conspiracy against the desire and duty of peace.

Hence it has grown into an axiom that the executive is the department of

power most distinguished by its propensity to war: hence it is the practice of all states, in proportion as they are free, to disarm the propensity of its influence. n311

Here, in short compass, Madison pulled together the previously unspoken arguments for assigning to Congress the power to declare war. The power of his passions, Madison contends, makes the individual an unsuitable repository for the power to declare war. Perhaps "the prodigy of many centuries" will be able to triumph over these passions, but the ordinary individual - "such as may be expected in the ordinary successions of magistracy" - will not, because the lures are so compelling. n312 The President simply has too much to gain by leading [*748] the nation into war and then leading the nation during war. He increases his power in a very tangible way: he "directs" the "physical force... created." n313 He increases his control of money: he "dispenses" "public treasures." n314 He solidifies his power: the opportunities for "executive patronage" are "multiplied." n315 What is most striking is the conclusion to which Madison builds. The culminating passion is "love of fame." n316 The President will be inclined toward war because he will hope to wear the "laurels" of victory. n317 As a result, "the executive is the department of power most distinguished by its propensity to war." n318

Implicitly, Madison is also arguing that the legislator will not be affected by these passions (or at least not powerfully), and that he will therefore act disinterestedly in deciding whether he favors war. His passions will not be engaged, in part, because the legislature has only limited control of the instruments of war, and, in part, because any benefits from war that flow to the legislature will flow to a group, rather than to a single individual. Because the legislator does not control army operations or the actual dispersion of funds or the patronage generated by war, he will not seek war in order to increase his power or the wealth under his direction. The fame of a great triumph will not go to the legislator who votes in favor of a successful war, for he is but one of many and the fruits of victory will be diminished by

being
shared. Because he is not in control of the military, he will not be
hailed as
the conqueror. The laurels will not be his.

The Helvidius letters are critical evidence concerning the meaning of
the
War Powers Clause and the motives which led the Founders to give Congress
the
sole power to initiate war. The letters are roughly contemporaneous with
the
founding. They are the work of an individual who played a central role in
drafting the War Powers Clause, as well as a central role - perhaps the
central
role - in drafting the Constitution as a whole. The fact that they emerge
from a
political conflict and are partisan documents does not decrease their
evidentiary significance. Madison, a shrewd politician, was clearly trying
to
make his case against Hamilton by appealing to broadly held notions about
government and war. In doing so, he laid special stress on the lure of
fame.
[*749]

C. Hamilton and the Quasi-War

Further evidence of the founding generation's belief that an individual's
desire for glory could recklessly lead a nation to war comes, ironically,
from
the pen of a former President, John Adams who, in narrating the history of
his

PAGE 32

82 Cornell L. Rev. 695, *749

administration, discussed his refusal to lead the nation into a full-scale
war.
In 1809, as tensions between the United States and Great Britain
threatened to
end in war, Adams wrote a series of letters to the Boston Patriot
explaining why
he had opposed declaring war against France and had instead worked for
peace
during his presidency. n319

As previously noted, the undeclared naval war with France - the
"Quasi-War"
- lasted from 1798-1800 and marked the new nation's first sustained
military
conflict with a European power. n320 It also marked an exception to the
"axiom" that Madison enunciated in the Helvidius letters. That is, during
much

of the conflict, Congress took a more aggressive stance than the President.
n321 Adams took great pride in this fact, subsequently writing: "I desire
no
other inscription on my gravestone than: 'here lies John Adams, who took
upon
himself the responsibility of the peace with France in the year 1800.'"
n322
Those unsympathetic to Adams had a ready explanation for why he was not as
aggressive as others and the answer had to do with his inability to obtain
glory
from a war. Noting that "no part of [the Government] was more averse to
war than
the Executive," Congressman Rutledge opined: "[Adams] is no warrior, and,
consequently, war has no laurels in store for him." n323 A very similar
explanation for Adams's moderate behavior came from a far more sympathetic
quarter, his wife. Abigail Adams wrote her friend Mary Cranch: "What
benefit can
war be to him? He has no ambition for military Glory." n324

The champion of the forces pushing for an aggressive stance against
France
was Hamilton. n325 He sought not only the creation of a revitalized
army, but
he also engineered a campaign to be designated its Commander in Chief.
n326
When Secretary of State Timothy Pickering proposed naming Hamilton, Adams
immediately dismissed the possibility of awarding the position to his
antagonist. To crush the [*750] Hamilton boomlet, Adams sent Washington a
letter requesting that he serve as Commander in Chief, and then
precipitously
forwarded Washington's name to the Senate as his nominee for the post
without
waiting for the former President's reply. n327 Adams's haste angered
Washington. n328 Hamilton, now aware that he would not be Commander in
Chief,
convinced the offended former President to accept the post and then to
name him
as his second in command. n329 Adams balked, insisting that former
Secretary
of War Henry Knox serve as Washington's deputy. n330 Washington informed
the
President that he would resign his commission if Hamilton were not awarded
the
position. n331 A bitter Adams complied with Washington's demand,
afterwards
writing that he had been forced to name "the most restless, impatient,
artful,
indefatigable and unprincipled intriguer in the United States, if not the
world,
to be second in command." n332 Perhaps not coincidentally, at
approximately
this time, Adams's enthusiasm for war with France began to diminish. n333

As he recounted the events of the "Quasi-War" a decade later, Adams

made
clear that Hamilton had been the principal force behind the movement for
war.
"Such was the influence of Mr. Hamilton in Congress, that, without any
recommendation from the President, they passed a bill to raise an army,
not a
large one, indeed, but enough to overturn the then Federal government."
n334
And just as Congressman Rutledge had contended that Adams was reluctant to
go to
war because he was unlikely to win fame, Adams suggested that behind
Hamilton's
push for war was his desire for personal glory. "The army of fifty thousand
men," Adams wrote, "appeared to me to be one of the wildest extravagances
of a
knight-errant." n335 At another point, Adams observed that Hamilton
schemed of
"ensuring a war with France, and enabling him to mount his hobby-horse, the
command of an army of fifty thousand, ten thousand of them to be
horses." n336

PAGE 33

82 Cornell L. Rev. 695, *750

Peace was "pernicious ... to his [Hamilton's] views of ambition and
domination.
It extinguished his hopes of being at the head of a victorious army of
fifty
thousand men, without which, he used to say, he had no idea of having a
head
upon his shoulders for four years longer." n337 [*751] According to
Adams,
"Hamilton hoped [for] ... an irreconcilable breach and a declaration of
war. He
was disappointed, and lost the command of his army." n338 In a personal
letter
written shortly before his public letters to the Boston Patriot, Adams drew
together many of these themes in a sentence, stating: "Hamilton's hobby
horse
was troops! troops! ... With all of the vanity and timidity of Cicero, all
the
debauchery of Marc Anthony [sic] and all the ambition of Julius Caesar,
... his
object was the command of fifty thousand men." n339

As his personal letter suggests, Adams's public denunciation of
Hamilton was
consistent with his private thoughts about the man, and the public attack
was,
indeed, more temperate than many of Adams's private observations. For
example,
Adams wrote in a letter to Benjamin Rush that Hamilton was "a bastard brat
of a
Scotch pedlar," and a "creature ... in a delirium of ambition ... [who]

hated every man, young or old, who stood in his way or could in any manner eclipse his laurels or rival his pretensions." n340 Agreeing with Adams's assessment that Hamilton was motivated by a desire for "laurels," some historians have concluded that in urging war with France, Hamilton was "undoubtedly motivated by his ambition and quest for military fame." n341 Even some of Hamilton's friends thought this the case. For example, one wrote him that during the Revolutionary War, Hamilton had "devoted his talents to enhancing another's glory," and suggested that it was now his turn to obtain such glory. n342 Indeed, earlier in his life Hamilton himself had voiced his longing for war. The first surviving letter we have of Hamilton's is a letter that he wrote as a teen-age clerk in a St. Croix counting house to Edward Stevens, his childhood friend. n343 Stevens had departed the island to attend King's College in New York City. n344 Left behind, Hamilton sadly wrote, "Ned, my Ambition is prevalent that I condemn the grov'ling and condition of a Clerk or the like, to which my Fortune &c. condemns me and would willingly risk my life tho' not my Character to exalt my Station." n345 He closed, "My Folly makes me ashamd and beg youll Conceal it, yet [*752] Neddy we have seen such Schemes successfull when the Projector is Constant I shall Conclude saying I wish there was a War." n346

Therefore, when in Adams's letters to the Boston Patriot he described Hamilton's campaign against France as "one of the wildest extravagances of a knight-errant," and said that the would-be Commander-in-Chief sought to use the army as his "hobby-horse," he was simply giving public expression to his private beliefs. n347 He may even have been correct, at least in part, that Hamilton sought to provoke a war in order to gain personal glory. But the critical point to be made here does not concern whether Adams was right or wrong about Hamilton. It is, rather, that the world that the Framers inhabited was one in which it was possible for a national leader of the first rank to believe honestly and to state publicly - not in the heat of the moment, but in a considered way after a decade of reflection - that another national leader of the first rank sought to precipitate a war simply in order to achieve

personal
glory by leading the nation's troops in combat.

Adams's statements do not directly concern the War Powers Clause. The individual whom he saw pushing for war was not the President, and the branch of government over which that individual exerted power was legislative, not executive. But, in a larger way, these statements bear directly on our understanding of how the Clause came to take the form it did. Like the Helvidius ,
PAGE 34

82 Cornell L. Rev. 695, *752

letters, Adams's letters reflect the view that an individual who is in a position to gain military glory will be tempted to do so by pushing the nation to war, regardless of whether or not war is in the national interest. Adams's letters thus provide further evidence that members of the framing generation believed that, even in a republic, the desire for glory was so profound that the individual who controlled the military could not be trusted with the decision whether to go to war. Of course, both Adams and Madison believed that some could resist that temptation. Madison believed that "the prodigy of many centuries" would be able to master his passions. n348 And, Adams had faith in Adams. But the necessity of a rule framed to govern the ordinary case was clear. Alternatively, to view the matter from Congressman Rutledge's cynical perspective, the nation could not count on always having a president who, being "no warrior," would avoid war out of the fear that it had "no laurels in store for him." n349 [*753]

D. The War of 1812

Ironically, it was Madison - the individual who had cautioned that Presidents' love of fame would lead them to favor war - who served as President during the nation's first declared war, the War of 1812. When it was over, his supporters applauded him for not having sacrificed the good of the nation to the pursuit of glory. For example, the day he left office, a committee of Washington, D.C. citizens paid tribute to him, stating: "Power and national glory, Sir, have often before, been acquired by the sword; but rarely without the sacrifice of

civil or political liberty." n350 They lauded his "vigilance" in "restraining the sword within its proper limits, ... wielding an armed force of fifty thousand men, aided by an annual disbursement of many millions, without infringing a political, civil, or religious right." n351 But, during the course of the war, Federalist opponents painted a very different picture, suggesting that Madison's desire for glory and personal motives had drawn the nation into a disastrous war. Congressman Potter proclaimed Madison "an ambitious military chief" n352 and suggested that his ambition knew no limits:

If an Administration like the present, without money, without an army, or navy, would plunge this country so unprepared into a war ... the next thing they would want colonies, as other nations had done, and that Bermuda and New Providence would be in our way; and we must have Jamaica to get good rum and sugar. And instead of this country enjoying peace, which is above all things the most desirable, we should be involved like other nations in perpetual war. n353

Congressman Miller called the war a "war of conquest" and suggested that President Madison had started it in the hope of quieting opposition: "[A] weak and wicked administration ... finding the confidence of the people withdrawn, and their power about to pass into other hands, have nothing to do but to declare war, and instantly all opposition must cease" n354 Senator Goldsborough agreed. He observed that "the President himself is the father and patron of this war," n355 and suggested that the war had been declared to secure support for the Administration. "Thus," he said, "the tottering edifice is saved from the tempest of public opinion" n356 Congressman Daniel [*754] Webster attacked the war as one begun to obtain "the harvest of

PAGE 35

82 Cornell L. Rev. 695, *754

greatness and glory." n357 Congressman Law similarly attacked the war as one fought "for glory," n358 adding that he could not "consent to involve the country in carnage, distress and ruin, for that phantom." n359 Congressman Brigham invoked the individual who many Americans of the day would have offered as the principal example of a man whose pursuit of greatness and glory had come at tragic cost: "There is no right [in Canada] but a Napoleon right, and that

right is power, and not that which reason approves." n360

Early in the war, the link between the desire for glory and the decision to go to war received its fullest exploration in a speech by Massachusetts Congressman Josiah Quincy, a leading Federalist and future President of Harvard University. n361 Quincy argued that the motivation for war lay in personal interest, specifically "the personal or local ambition of the members of the American Cabinet." n362 "Whoever plants the American standard on the walls of Quebec," he stated, "conquers it for himself, and not for the people of the United States." n363 He ascribed to President Madison and Secretary of State James Monroe ambitions that had a monarchical cast:

To secure the succession, and keep it in the destined line, has been, is, and will continue to be, the main object of the policy of these men [Madison and his Secretary of State James Monroe]. This is the point on which the projects of the Cabinet, for the three years past, have been brought to bear - that James the First [James Madison] should be made to continue four years longer. And this is the point on which the projects of the Cabinet will be brought to bear for the three years to come - that James the Second [James Monroe] shall be made to succeed, according to the fundamental rescripts of the Monticellian dynasty.
n364

The desire to remain in power was joined with a desire for a kind of glory that Quincy pronounced ignoble, and, like Brigham, he invoked the example of Napoleon.

What glory [will victory bring]? Is it the glory of the tiger which lifts his jaws, all foul and bloody, from the bowels of his victim, and roars for his companions of the wood to come and witness his prowess and his spoils? Such is the glory of Genghis Khan, and of Bonaparte. [*755] Be such glory far, very far, from my country. Never, never may it be accursed with such fame.
n365

"A giant obtains glory by crushing a pigmy!" Quincy exclaimed. n366
"That
giant must have a pigmy's spirit who could reap, or hope, glory from such
an
achievement." n367 He called on the nation to pursue instead a different
kind
of fame:

"Fame is no plant that grows on mortal soil,
Nor in the glistening foil
Set off to the world, nor in broad rumor lies,
But lives and spreads aloft, by those pure eyes,

PAGE 36

82 Cornell L. Rev. 695, *755

And perfect witness of all-judging Jove,
As he pronounces lastly on each deed."
May such fame as this be my country's meed! n368

In January 1814, one year after Quincy's speech, the American
offensive in
Canada had proven a failure, and it was the British who had taken the
offensive. n369 In that month, Congressman Miller gave a speech that,
like
Quincy's, highlighted the relationship between war and the desire for
glory,
although the warning about the relationship now came from a different
perspective. Miller suggested that Madison had started the war in order to
achieve glory, mistakenly believing that the Canadians would surrender
rather
than fight: "The American commander was to gain his laurels, with 'rapier
unstained, and sword unhacked,' and in honor of his bloodless victory, was
to
have an 'ovation' decreed him." n370 This was an enormous
miscalculation. The
navy had won victories, but Madison could not properly take credit for
them:
"The Administration ought not to rob the individuals concerned of their
well-earned laurels." n371 Discussing Commander Perry's naval triumphs,
Miller
observed: "There is no glory without danger - and the fame acquired may be
in
proportion to the disparity of force. The Administration, however, is not
justified in omitting to place our naval force on Lake Erie on a more

respectable footing" n372 But the Executive could fairly be assigned responsibility for what the army had done. Miller sarcastically stated: "I deny this Administration any credit on account of the Navy; but I am content they should be decorated with all the laurels their army has gained. It is their army; let them monopolize its glory." n373 After listing a series of [*756] disasters, Miller highlighted one incident involving the army through which a kind of fame had been won: "Your commanding officer [General McClure] had determined to cross the Niagara, and yet with cold-blooded insensibility he burnt Newark, 'the loveliest village of the plain.' If General McClure panted for immortality he has obtained it; so did the miscreant who fired the temple of Ephesus." n374 McClure was thus the modern Herostratus, the man who had burned the temple of Ephesus; each had destroyed something beautiful to be remembered forever. n375 And that was Madison's fame as well, for having led the nation to war. He could "monopolize" the fame of a Herostratus.

IV

Current Significance

To this point, this Article has principally been an attempt at recovery - at unearthing a forgotten concern. It has shown that the Founders and political leaders of the early republic feared that the lure of fame would lead individuals, in general, and Presidents, in particular, to favor war, even when it was not in the national interest. The Article has argued that, because of this fear, the Founders gave Congress alone the power to start war. This Part explores the significance of this concern about fame to modern interpretations of the War Powers Clause, both from originalist and nonoriginalist perspectives.

A. Traditional Originalist

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PAGE 37

82 Cornell L. Rev. 695, *756

The greatest weakness of the pro-Congress originalist reading of the War Powers Clause is that pro-Congress scholars have been unable to offer an

explanation

for why the Founders thought that the power to initiate conflict should be exclusively vested in Congress. Pro-Executive scholars, in contrast, have been

able to offer a range of reasons why the Founders would have likely given this

power to the Executive. n376 In particular, precedent and the Founders' views

on the strengths of the President suggest that the Founders would have given the

President the power to start wars. n377 Moreover, the terms used in the Constitution - declare war, letters of marque and reprisal - were terms with a

fixed and narrow meaning in international law. n378 As a result of this evidence, Pro-Executive scholars argue that the warmaking power is vested in the

President, despite relevant statements from [*757] the founding generation

indicating that Congress alone had the power to initiate conflict.

By highlighting the Founders' concern with the lure of military fame, this

Article has offered a reason why the Founders would have taken the power to start war away from the President. Madison's Helvidius letters make the point

explicitly: "The question of war" is confided to the legislature because "it is

in war ... that laurels are to be gathered, and it is the executive brow they

are to encircle." n379 The Helvidius letters thus clarify both that Madison

understood Congress alone as having the power to start war, and that, because of

his concern with fame, he thought this allocation of power appropriate. Moreover, additional evidence offered in the previous section indicates that the

concern about the lure of military fame was widely shared. Given such concern,

the Founders would have wanted to give Congress alone the power to start war.

Thus, this Article has served to remedy the principal weakness in the pro-Congress argument. It dramatically strengthens the position that the War Powers

Clause - in giving Congress the power to declare war and issue letters of marque

and reprisal - was not intended to be read by reference to the usages of international law. Rather, what the Founders intended was to give Congress the

power to decide in all instances, except those of sudden attacks, whether the

United States should go to war.

The evidence presented above also suggests that the dominant original understanding was that the President could not veto declarations of war.

Scholars have previously argued on textual grounds that the President lacks the veto power, but no one has made that argument on originalist grounds. n380 The failure to do so is understandable because the conceptions of the War Powers Clause previously advanced by both pro-Executive and pro-Congress scholars indicate that the Founders would have wanted to give the President a veto. Whether the original understanding was that the President should be at the center of decisions on war and peace - as pro-Executive scholars maintain - or that as many barriers as possible to war should be imposed - as pro-Congress scholars maintain - presumably both ends are advanced by giving the President a veto. n381 But if the President's desire for military fame will consistently push him towards war, then a veto is pointless because it will not be exercised. Moreover, because the President's decisionmaking in this area will be hopelessly corrupted by self-interest, it is reasonable to wholly exclude him from the warmaking process. There is, then, a simple reason why the Founders [*758] consistently described the decision to declare war as exclusively a legislative decision: they understood it to be an exclusively legislative decision.

For the traditional originalist, then, the inquiry about the meaning of the War Powers Clause is at an end. Traditional originalists believe that judges should construe constitutional text as it was understood at the time of its

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PAGE 38

82 Cornell L. Rev. 695, *758

adoption. The leading champion of this approach - although he has forsaken it in the war powers area - is Robert Bork, and he has described it in the following fashion: "What is the meaning of a rule that judges should not change? It is the meaning understood at the time of the law's enactment." n382 But there is another school of originalism, the translation school. The translator seeks to identify the ends that the Constitution's Framers sought to advance, and then interprets the Constitution in the way that best advances those ends in today's world, while altering the original reading as little as possible. n383 Having established the concrete understanding of the founding generation, the translator must still answer a threshold question: Has the world changed in such

a way so that the concrete understanding of the constitutional text should change? n384 In other words, the Founders gave Congress, rather than the Executive, the power to decide whether to start wars because they wanted the warmaking decision to be disinterested, and they feared that Presidents would lead the nation into war in order to achieve a place in history. The translator must answer whether it continues to be true that the Executive is the branch of government most likely to have self-interested reasons to wage war.

There are, of course, nonoriginalist approaches to constitutional law, although it is rare for constitutional scholars to ignore history wholly. n385 In the war powers area, the writings that have accorded the least weight to the original understanding have been, as previously noted, the work of pro-Executive scholars, and the focus of this scholarship has been on evolving constitutional structure and pragmatic concerns. Scholars such as Bork, Rostow, and W. Michael Reisman [*759] have argued that because the President can move more rapidly, forcefully, and secretly than Congress, he should have the power to start war. n386 If the thesis of this Article is to have any significance for the nonoriginalist, it must be shown, not that the Framers feared that the President would lead the nation into war in order to achieve fame, but that such concern is a pressing one today.

In short, although their constitutional theories are different, both the translator and the nonoriginalist are concerned with the relationship between the Founders' insights and modern circumstance. This topic is the subject of the next section.

B. Fame, the Presidency, and War

Unlike the Founders, we no longer tend to perceive the desire to be remembered by history as a fundamental human drive. Writing in 1840, Tocqueville precisely captured the decline in the interest in fame in its traditional sense and offered a cogent explanation for that decline. He observed that one of the

first things that strikes a traveler in the United States is ... the

rarity
of lofty ambition to be observed in the midst of the universally ambitious
stir
of society. No Americans are devoid of a yearning desire to rise, but
hardly any
appear to entertain hopes of great magnitude or to pursue very lofty aims.
n387

Tocqueville noted that this was a relatively recent phenomenon and that
Americans of the revolutionary era had harbored such ambitions:

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PAGE 39

82 Cornell L. Rev. 695, *759

All revolutions enlarge the ambition of men.... When the former
barriers
that kept back the multitude from fame and power are suddenly thrown down,
a
violent and universal movement takes place towards that eminence so long
coveted
and at length to be enjoyed....

Ambition is therefore always extremely great as long as a democratic
revolution lasts, and it will remain so for some time after the revolution
is
consummated. n388

According to Tocqueville, the establishment of a constitutional and
social
order had led people to lower their goals:

A democratic nation, arrived at this permanent and regular state of
things,
will present a very different spectacle from that which I have just
described,
and we may readily conclude that if ambition becomes great while the
conditionsof society are growing equal, it loses that quality when they have grown
so.

.... [*760]

I believe that ambitious men in democracies are less engrossed than any
others with the interests and the judgment of posterity; the present moment
alone engages and absorbs them. They are more apt to complete a number of
undertakings with rapidity than to raise lasting monuments of their
achievements, and they care much more for success than for fame. n389

In accordance with Tocqueville's insight, soon after the founding many

Americans came to believe that "there was no more fame to be won." n390
The
young John Quincy Adams, for example, declared: "The field is extensive;
it is
fruitful ... but the copious treasures of its fragrance have already been
gathered by the hands of genius; and there now remains for the gleaning of
mental indigence, nought but the thinly scattered sweets which have
escaped the
vigilance of their industry." n391 The passing of the Founders' world
can be
marked, in part, by a linguistic change that may explain why their concerns
about fame have been obscured. When the Founders spoke of fame, they meant
a
desire to leave a mark on history for having done great things; for us, to
be
famous is simply to be widely-known. n392

This might suggest that the Framers' fear that a President's desire
for fame
or glory would lead him to initiate wars was a time-bound one. The argument
against the original understanding would thus be that, despite grounds for
fearing that a President's desire for glory would make him favor war in
1789 or
in 1812, we no longer live in a society where individuals are obsessed with
their place in history. Accordingly, the Framers' distrust of a President
with
the power to start war no longer has any relevance, and, to the extent that
constitutional law can move beyond a rigid application of the original
understanding, it should do so in this case. Moreover, we need not fear
that
Presidents will lead the nation into war in order to achieve fame as we now
understand the word; Presidents are already as "famous" as they can be.

However, the fact that our societal norms and concerns have changed
does not
necessarily mean that Presidents will behave differently than the Founders

PAGE 40

82 Cornell L. Rev. 695, *760

predicted. Systematic analysis of the continuing accuracy of the Framers'
view
is beyond the scope of this Article. There is, however, good evidence that,
despite cultural changes, they were right about the way in which a desire
for a
place in history would affect the occupants of the Executive office.
[*761]

In describing his life's goals, Woodrow Wilson wrote that he had "a
longing
to do immortal work." n393 He has not been alone in his desire for
immortality. A concern with how they would be remembered has driven many
Presidents. It is significant that Adair offers one example of a modern
American

who had a passion for fame in the eighteenth century sense. Urging a revival of the largely lost tradition, Adair concluded his essay:

Who can doubt that this obsessive concern with the judgment of posterity was not one of the ingredients that made the late John Kennedy something more than just another Irish politician from Boston. Who can doubt that it was his concern with his fame - his concern with the judgment of posterity - that made him respond, as Arthur Schlesinger has told us, to those lovely lines of Stephen Spender's poem:

I think continually of those who are truly great ...

The names of those who in their lives fought for life,

Who wore at their hearts the fire's center.

Born of the sun they travelled a short while towards the sun,

And left the vivid air signed with their honor. n394

One need not agree with Adair's view that Kennedy "responded to Spender's poem" to accept the underlying point that Kennedy was obsessed with history's judgment. Richard Reeves's recent biography of Kennedy provides further evidence of this concern:

There was no question in Kennedy's mind, and little argument from anyone else, that the struggle with communism would be the focus of the history of his times. As 1961 ended, he had begun an address to historians meeting in Washington by quoting Churchill's prediction that history would be kind to his role in World War II: "Because I intend to write it!"

And Kennedy intended to do the same, with the help of Sorensen and Schlesinger. He had invited one of the historians, David Donald of Princeton, an expert on Abraham Lincoln, to the White House and asked him: "How do you go down in the history books as a great president?" n395 [*762]

Ironically, at almost the exact time that Tocqueville was writing, one American who would later make his mark on history gave evidence that, despite the age in which he lived, he had dreams of the greatest glory. In 1838, Abraham Lincoln, a

PAGE 41

82 Cornell L. Rev. 695, *762

young state legislator, gave a speech to the Young Men's Lyceum of Springfield, Illinois. He saluted the Founders and the fame they had won. According to Lincoln, the Founders had desired to prove

the capability of a people to govern themselves. If they succeeded, they were to be immortalized; their names were to be transferred to counties and cities, and rivers and mountains; and to be revered and sung, and toasted through all time. If they failed, they were to be called knaves and fools, and fanatics for a fleeting hour; then to sink and be forgotten. They succeeded. The experiment is successful; and thousands have won their deathless names in making it so.
n396

Echoing Adams, Lincoln wrote that it seemed that "this field of glory is harvested, and the crop is already appropriated." n397 But, unlike Adams, he did not accept the view that glory was no longer attainable: "New reapers will arise, and they, too, will seek a field." n398 He continued:

Towering genius disdains a beaten path. It seeks regions hitherto unexplored. It sees no distinction in adding story to story, upon the monuments of fame, erected to the memory of others. It denies that it is glory enough to serve under any chief. It scorns to tread in the footsteps of any predecessor, however illustrious. It thirsts and burns for distinction; and, if possible, it will have it, whether at the expense of emancipating slaves, or enslaving freemen.
n399 [*763]

Moreover, it is not simply that the presidency attracts those interested in establishing an important historical reputation. Instead, once attained, the presidency - and all of its trappings - strengthen its occupants' concern for their place in history. As scholar Forrest McDonald observed:

What presidents do in office, or try to do, is powerfully influenced by a unique conception of history. The president lives in a museum of the history of the presidency. When walking along the halls of the White House, the president is constantly reminded that Jefferson walked the same halls as he waited for news of negotiations with Napoleon, that Lincoln walked them when waiting for news of Antietam. When dining, the president never entirely escapes the realization that he is using the same silver that Madison and both Roosevelts used. The president understands that he is a member of a mystical fraternity, representing an unbroken chain of history and mythology, and knows that far into the future presidents will be aware that he was a link in that chain, and cannot avoid wondering what his place will be in their memory and in the nation's memory. n400

The topic of how Presidents confront, and try to surpass, the legacy of their predecessors is an understudied one. William Leuchtenberg, the author of *In the Shadow of FDR*, n401 observed in 1983 that no previous book or article had focused on "the influence of a head of state on those who succeeded him." n402 Leuchtenberg's study suggests how powerfully a predecessor's legacy can

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PAGE 42

82 Cornell L. Rev. 695, *763

haunt Presidents. Leuchtenberg wrote:

The men who succeeded him [FDR] found one question inescapable: How did they measure up to FDR? They were expected to tread in the rows that he had furrowed,

even, like those who sought a sign of grace from a Chinese emperor, to exhibit the quality of hsiao, of filial piety. Little wonder that they sometimes felt much like the Athenian who voted to exile Aristides because he had wearied of hearing him called "the Just." n403 [*764]

There is also evidence that suggests that Presidents are well aware of the link between leading a nation to military triumph and historical immortality and, conversely, of the link between military disaster and infamy. The fear of the reputational consequences of military disaster is evidenced by what White House Butler Alonzo Fields reports was FDR's reaction to first hearing the news of Pearl Harbor. According to Fields, he put his head in his hands and said, "My God, my God, how did it happen? How did it happen? Now I'll go down in history disgraced." n404 Lyndon Johnson's explanation for why he would not end the war in Vietnam manifests a similar fear. He declared, "I will not be the first President to lose a war." n405

On the other hand, perhaps because of his heightened sensitivity to the desire for fame, Lincoln saw in Polk's support for war with Mexico a desire for "military glory - that attractive rainbow, that rises in showers of blood - that serpent's eye, that charms to destroy." n406 Numerous individuals have suggested similar links between modern presidents' desire for glory or concern with their place in history and war-like foreign policy. Historian Alan Brinkley has observed of Theodore Roosevelt:

Theodore Roosevelt complained frequently that his times had denied him the greatness to which he aspired and of which he considered himself capable. "A man has to take advantage of his opportunities," he said in 1910 after leaving office, "but the opportunities have to come. If there is not the war, you don't get the great general; if there is not the great occasion, you don't get the great statesman; if Lincoln had lived in times of peace, no one would know his name now." The great disappointment of Roosevelt's life was that World War

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came after he had left office, that, as he saw it, Woodrow Wilson and not
he had
the real opportunity for greatness. n407

The previously quoted excerpt from biographer Richard Reeves's book on
John
Kennedy suggests that Kennedy recognized Churchill's commanding place in
history
and wanted to win a parallel place for [*765] himself through the
struggle
with communism. n408 In describing the path to Vietnam, historian and
Johnson
presidential aide Eric Goldman wrote:

Intertwined with all aspects of his foreign policy was the President's
ambition. Much as [Johnson] wished that international affairs could be
de-emphasized, he was too seasoned a political leader not to know that
they were
certain to play an important part in the overall judgment of his
Administration.
He was determined that when he did have to deal with them, he would do so
with

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PAGE 43

82 Cornell L. Rev. 695, *765

effectiveness and splash. Lyndon Johnson was going to be a great
President, a
very great President, in all ways. n409

Leuchtenburg's account draws upon and parallels Goldman's account.
Johnson,
he writes:

was not satisfied to go down in the history books merely as a successful
president in the Roosevelt tradition. He aimed instead to be "the greatest
of
them all, the whole bunch of them." And to be the greatest president in
history,
he needed not just to match Roosevelt's performance but to surpass it.
n410

According to Leuchtenburg, this determination drove Johnson to Vietnam
and to
disaster: "In his determination to outdo Roosevelt, [Johnson] carried
everything
to excess - the overlaid apparatus of the Great Society; the insistence on
having both guns and butter, which had calamitous inflationary

repercussions;
and, most of all, the body counts and the napalm and the saturation bombing."
n411 Doris Kearns Goodwin puts the matter succinctly:

Lyndon Johnson had wanted to surpass Franklin Roosevelt; and Roosevelt, after all, had not only won the reforms Johnson envied, he had also waged a war. But there was a critical difference: Roosevelt did not attempt the New Deal and World War II at the same time. Only Johnson among the Presidents sought to be simultaneously first in peace and first in war; and even Johnson was bound to fail. n412

The 1970 Senate Foreign Relations Committee report calling for the repeal of the Gulf of Tonkin Resolution also reflected the view that concern for their place in history led Presidents to favor war. n413 [*766] As background for its recommendation, the Committee analyzed the rise of presidential power in the war powers area in the years following the Second World War. It offered one explanation for why Presidents had led the nation into war without securing congressional approval. That explanation was the Presidents' desire for greatness - "[the] notion that great Presidents are those who act effectively to strengthen the office of the Presidency as distinguished from strengthening the constitutional system as a whole." n414

Richard Nixon's writings and his personal statements reveal that he considered military triumphs and, more generally, foreign policy triumphs, as the key to greatness. War was, for Nixon, the truest crucible. He wrote: "It is a tragic reality that war, the most destructive activity of man, also calls forth his highest nature and greatest qualities." n415 According to Nixon, through "his brilliant leadership in World War II," n416 Winston Churchill had become the greatest leader of the modern era. Churchill was "a mythical hero who belongs to legend as much as to reality, the largest human being of our time." n417 More prosaically, Nixon told his aide Monica Crowley shortly before he died that President Clinton should focus on foreign affairs because "history will not remember him for anything he does domestically. The economy will recover; it's all short-term and, let's face it, very boring." n418

William Crowe, chair of the Joint Chiefs of Staff, suggested that President

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PAGE 44

82 Cornell L. Rev. 695, *766

Bush's concern with his place in history was part of the reason why he initiated the Gulf War: "To be a great president you have to have a war. All the great presidents have had their wars." n419 Even more recently, it has been suggested that regard for "his place in history" influenced President Clinton to be militarily aggressive in Bosnia. n420 [*767]

If Presidents equate military victories with historical greatness, they are correct - or, at least, their views are in accord with what historians regard as greatness. Admiral Crowe's observation about great Presidents is remarkably accurate. Washington, Lincoln, and Franklin Roosevelt - the trio that historians have consistently rated as our three greatest presidents n421 - each led the nation to victory in war, Lincoln and Roosevelt as Presidents, and Washington as Commander in Chief at a time when there was no President. The link between fame and war is not limited to this group. Of the four Presidents who are typically ranked next on the lists of presidential greatness - Jefferson, Theodore Roosevelt, Wilson, and Truman - two led the nation in a major war, Wilson during World War I, and Truman during World War II and the Korean War. n422

In the most detailed study on the topic of why historians view particular Presidents as great, Dean Keith Simonton used a regression analysis to examine the various presidential rankings compiled by historians. n423 He explored how over 200 variables - including factors such as number of bills signed, number of bills vetoed, percentage of [*768] judicial nominees confirmed, and number of books published - corresponded with ranking. n424 Other than years in office, the strongest predictor of positive ranking was years at war during the presidency. n425 In other words, the more years in which the nation was at war during his presidency, the higher the President's rating was likely to be. Nothing any President did while in office had as great a positive effect as leading the nation in war. Surveying the relevant data, a range of other studies

has also reached the conclusion that war years correlate with presidential greatness, as historians judge greatness. n426

This evidence suggests that the insight underlying the Founders' assignment of the power to start war to Congress, rather than the President, is at least as valid today as it was in 1787. Presidents' concern with their place in history still makes them likely to lead the nation to war. This explains, at least in part, why throughout the foreign affair crises in our history, in all but one case, Presidents have been more pro-war than Congress. n427

From the vantage point of constitutional law, the question becomes what effect should the continuing accuracy of the Framers' insight have. For an originalist of the translation school, the current reality of the Framers' fear that Presidents are particularly likely to lead the nation to war means that the concrete original understanding - that Congress alone should have the power to start war except in cases where it is necessary to repel sudden attacks - must be given effect. In other words, no changed circumstance warrants a re-allocation of power between the Executive and Congress.

This insight about presidential self-interest is also relevant to current constitutional discourse because it indicates that courts should not apply the political question doctrine to avoid resolving challenges to the constitutionality of Executive-initiated uses of force. Whether the political question doctrine currently exists at the Supreme Court level is an open question, n428 but the United States District Court for [*769] the District of Columbia and the District of Columbia Circuit court have both invoked the

PAGE 45

82 Cornell L. Rev. 695, *769

doctrine as the basis of decision in a series of cases in which they have dismissed suits seeking to overturn presidential decisions to send troops into combat. n429 Courts in these cases have held that they would not resolve the constitutionality of presidential actions because Congress had not affirmatively sought to block such actions. For example, in *Lowry v. Reagan*, n430 Judge Revercomb explained that he would not reach the merits of the case because "although styled as a dispute between the legislative and executive

branches of government, this lawsuit evidences and indeed is a by-product of political disputes within Congress regarding the applicability of the War Powers Resolution to the Persian Gulf situation." n431

The Court in *Dellums v. Bush* n432 reached a similar result, although it did not rely upon the political question doctrine. There, the district court held that the political question doctrine did not bar a suit challenging the military build-up that preceded Operation Desert Storm. n433 Nonetheless, the court dismissed the case for reasons of ripeness which reflected concerns similar to those expressed in *Lowry*: "Unless the Congress as a whole, or by a majority, is heard from, the controversy here cannot be deemed ripe; it is only if the majority of the Congress seeks relief from an infringement on its constitutional war-declaration power that it may be entitled to receive it." n434 These decisions reflect a view that Congress has adequate incentives and adequate tools to protect its power under the War Powers Clause and that, if Congress does not act as a body, courts should not intervene. n435 [*770]

The analysis in this Article indicates that this view is wrong. Presidents have a personal motive for starting wars. The Founders gave Congress the power to decide when wars should start, not because Congress has some countervailing and superior motive, but because Congress is, in contrast with the President, disinterested. The Founders believed that congressional representatives are too numerous to reap glory from war and therefore will fairly evaluate national interests in deciding whether to go to war. Moreover, Congress has no motive to try to stop the President from initiating conflict (as the failure of Congress to respond to presidential disregard of the War Powers Resolution illustrates). n436 Thus, a requirement imposed under the political question doctrine that Congress exert itself before courts intervene leads to a result inconsistent with the Founders' vision: the President will assert authority that the Constitution has not given him and Congress will, in general, fail to counter by asserting its prerogative. Congress will fail to assert its power under the War Powers Clause for the same reason that it was given that power -

disinterest.

This point leads back to the ultimate question: Did the Founders get it right? If Congress is disinterested, and the Executive, concerned with his place in history, has a motive to bring the nation to war, who should make the decision? For the originalist - either a traditional originalist or a translation originalist - the question has been answered by the Founders. But for someone who views the original understanding as not controlling, the question is more difficult.

As noted, pro-Executive scholars have offered a range of nonoriginalist reasons why the President should have the power to lead the nation into war.

n437 In contrast, pro-Congress scholars have not fully fought the battle on these terms. Although they have urged that it is wise to require congressional sanction for combat, they have generally placed primary reliance on Framers' intent. n438 This Article has offered a new rationale justifying the pro-Congress position: that the President's desire for a place in history creates a

PAGE 46

82 Cornell L. Rev. 695, *770

bias in favor of war. Self-interest in fame improperly skews decisionmaking.

The point can be put even more broadly. Although the Framers' principal concern may have been the influence of the desire for glory, that concern can be

generalized and re-framed as a concern that the President's self-interest creates a bias in favor of war. Although the desire for glory is highlighted,

Madison's Helvidius letters reflect other factors that would influence a President to initiate war out of self-interest - "ambition, avarice, vanity."

n439 In current politics, the [*771] principal concern along these lines is

that a President will recklessly bring the nation to war in order to win re-election. n440 Although this concern may not have specifically worried the

Framers, it has a long heritage, as some of the criticisms of the War of 1812

quoted above indicate. n441 It is reasonable, therefore, to suspect that Presidents are inclined to favor war, and accordingly to withhold from them the

power to lead the nation to war.

Not everyone will find this new argument for giving Congress alone the power

to initiate conflict compelling. The counter to this argument is as

follows:

just because Presidents may have personal reasons to lead the nation to war does not mean that power should be withheld from them. It can be argued that Congress, in the absence of a personal motivation to go to war, favors war too rarely. A proponent of this view might point, for example, to World War II and the Gulf War. In both instances, Congress was deeply divided whereas the President strongly favored war. Perhaps, in both instances, the President was right. Perhaps because war is so terrible, those who have no reason to favor it are too risk-averse. Our constitutional system is in large part based on the notion that self-interest can be harnessed for the national interest; this is but another example of how appropriate that approach is. In this regard, it is worth noting that Adair was urging that modern presidents concern themselves with fame, not warning us against such a concern. n442 The argument would then run that, because Presidents seek to be remembered well by history, they are precisely the individuals who should be making the decision about whether the nation goes to war.

Thus, for a nonoriginalist, this Article will not end the debate over who should have the power to start war. It will, however, bring a new concern and a new focus to that debate.

Conclusion

The extensive scholarly debate about the original understanding of the War Powers Clause thus far has been inconclusive. Previous [*772] writings in favor of the position that the Founders intended to give Congress alone the power to initiate conflict have suffered from a critical weakness: They have failed to offer a convincing explanation for why the Founders would have given that power to Congress when so many factors, including precedent and practical considerations, weighed in favor of giving the war-starting power to the President. This Article has advanced such an explanation: The Founders gave Congress the power to start war because they believed that Presidents, out of a desire for personal glory, would be too prone to war. This Article thus dramatically strengthens the originalist case for a pro-Congress reading of the

Clause.

This Article is also significant in that it presents evidence that the

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PAGE 47

82 Cornell L. Rev. 695, *772

Founders did not intend to give the President veto power over declarations of war. Although the argument that the President lacks this power has previously been made on textualist grounds, it has not been made on originalist grounds. Indeed, where the possibility that the Founders did not intend to give the President this power has been raised, it has been rapidly dismissed. Substantial evidence indicates, however, that most of the Founders thought that the decision to go to war was exclusively vested in Congress, and this Article, by highlighting the Founders' distrust of the President's decisionmaking in this area, has made this position comprehensible.

The argument presented here also has an important bearing on nonoriginalist debate about the proper meaning of the War Powers Clause. Because of their intellectual heritage, and because of the great glory that Washington achieved during the Revolutionary War, the Founders were particularly sensitive to the possibility that Presidents, motivated by a desire to secure an important place in history, would lead the nation to war. Modern scholars, in debating the meaning of the War Powers Clause, have lost sight of this concern. But strong evidence shows that this concern remains at least as relevant as it was two-hundred years ago. That is, modern presidents still tend to favor war because of their desire to be judged well by history. Recognition of this point indicates that courts err when they invoke the political question doctrine in order to avoid resolving challenges to presidential actions committing troops to combat. More basically, it provides a powerful argument for why Presidents should not have the power to bring the nation to war. Although it is not an argument that everyone will find convincing, it is an argument that forces us to re-examine a fear that animated the Founders, and which we have lost sight of over time. Yet it is a concern that continues to bear directly on the actions of those who occupy the most powerful office the Founders created. Even if we do not embrace the Founders' conclusions, we should admire their prescience.

FOOTNOTES:

n1. U.S. Const. art. I, 8, cl. 11.

n2. These controversies concerning presidential warmaking are discussed
infra
Part I.A.

n3. 50 U.S.C. 1541-48 (1994).

n4. For a discussion of the debate concerning the War Powers
Resolution, see
infra Part I.A.

n5. This Article approaches the question of original understanding from
two
perspectives. First, in light of the ongoing academic and political debate
about
the original understanding of the War Powers Clause - a debate in which the
relevance of the original understanding is often treated as a given - the
Article re-examines the question of what the Founders intended. Second,
wholly
apart from whether the original understanding is binding as a matter of
constitutional law, the Article asks whether the original understanding of
the
War Powers Clause is sensible in today's world, and whether we can learn
anything from the Founders' concerns. For further discussion, see infra
Part IV.
The underlying jurisprudential question of the extent to which the original
understanding binds modern interpretations of the Constitution is
discussed in
these contexts, but it is not a separate focus of the Article. The
discussion of
the significance of original intent builds on and synthesizes earlier
writings

PAGE 48

82 Cornell L. Rev. 695, *772

of mine discussing some particular part of the original understanding
question.

See William Michael Treanor, The Case of the Prisoners and the Origins of Judicial Review, 143 U. Pa. L. Rev. 491, 544-56 (1994) [hereinafter

Treanor,
Judicial Review] (describing significance of original understanding to
Founders
in construing Constitution); William M. Treanor, The Original
Understanding of

the Takings Clause and the Political Process, 95 Colum. L. Rev. 782, 855-80
(1995) [hereinafter Treanor, Takings Clause] (arguing for translation
model of
original understanding); William M. Treanor, Taking the Framers Seriously,
55 U.

Chi. L. Rev. 1016, 1023-40 (1988) [hereinafter Treanor, Framers] (book review) (explaining the relevance of Founders' worldview); William M. Treanor & Gene B. Sperling, Prospective Overruling and the Revival of "Unconstitutional" Statutes, 93 Colum. L. Rev. 1902, 1942-43 (1993) (analyzing original understanding and changing constitutional meaning).

n6. See Raoul Berger, War-Making by the President, 121 U. Pa. L. Rev. 29 (1972).

n7. See Alexander M. Bickel, Congress, the President and the Power to Wage War, 48 Chi.-Kent L. Rev. 131 (1971).

n8. See John Hart Ely, War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath 3-10, 139-52 (1993).

n9. See Louis Fisher, Presidential War Power (1995).

n10. See Harold Hongju Koh, The National Security Constitution: Sharing Power after the Iran-Contra Affair 74-77 (1990).

n11. See Leonard W. Levy, Original Intent and the Framers' Constitution 30-53 (1988).

n12. See Charles A. Lofgren, On War-Making, Original Intent, and Ultra-Whiggery, 21 Val. U. L. Rev. 53 (1986); Charles A. Lofgren, War-Making Under the Constitution: The Original Understanding, 81 Yale L.J. 672 (1972) [hereinafter Lofgren, Understanding].

n13. See Arthur M. Schlesinger, Jr., The Imperial Presidency 1-26 (1973).

n14. See William Van Alstyne, Congress, the President, and the Power to Declare War: A Requiem for Vietnam, 121 U. Pa. L. Rev. 1 (1972). For other leading accounts that are similar in approach to those mentioned in the text, see Edward Keynes, Undeclared War: Twilight Zone of Constitutional Power 31-40 (1982); W. Taylor Reveley III, War Powers of the President and Congress: Who Holds the Arrows and Olive Branch? 50-115 (1981); Abraham D. Sofaer, War, Foreign Affairs and Constitutional Power: The Origins 25-38 (1976); Francis D. Wormuth et al., To Chain the Dog of War: The War Power of Congress in History and Law 17-28 (1986); Arthur Bestor, Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined, 5

Seton
Hall L. Rev. 527, 555-613 (1974); Francis L. Coolidge, Jr. & Joel David
Sharrow,
The War-Making Powers: The Intentions of the Framers in the Light of
Parliamentary History, 50 B.U. L. Rev. 5 (special issue) (Spring, 1970);
Note,
Congress, the President, and the Power to Commit Forces to Combat, 81
Harv. L.
Rev. 1771 (1968).

n15. See Philip Bobbitt, War Powers: An Essay on John Hart Ely's War and
,
PAGE 49

82 Cornell L. Rev. 695, *772

Responsibility: Constitutional Lessons of Vietnam and its Aftermath, 92
Mich. L.
Rev. 1364, 1370-1388 (1994) (book review).

n16. See Robert Bork, Foreword to The Fettered Presidency: Legal
Constraints
on the Executive Branch at ix (L. Gordon Crovitz & Jeremy A. Rabkin eds.,
1989)
[hereinafter Bork, Foreword]; Robert Bork, Erosion of the President's
Power in
Foreign Affairs, 68 Wash. U. L.Q. 693, 698 (1990) [hereinafter Bork,
Erosion].

n17. See Edward S. Corwin, The President: Office and Powers, 1787-1984,
at
234, 256 (5th ed. rev. 1984).

n18. See Henry P. Monaghan, Presidential War-making, 50 B.U. L. Rev. 19
(special issue) (Spring, 1970).

n19. See Eugene V. Rostow, Great Cases Make Bad Law: The War Powers
Act, 50
Tex. L. Rev. 833, 864-66 (1972) [hereinafter Rostow, Great Cases]; Eugene
V.
Rostow, "Once More unto the Breach:" The War Powers Resolution Revisited,
21
Val. U. L. Rev. 1, 6 (1986) [hereinafter Rostow, Once More].

n20. See Robert F. Turner, Repealing the War Powers Resolution:
Restoring the
Rule of Law in U.S. Foreign Policy 80-81 (1991).

n21. See W. Michael Reisman, Some Lessons from Iraq: International Law
and
Democratic Politics, 16 Yale J. Int'l L. 203, 212 (1991).

n22. See John C. Yoo, The Continuation of Politics by Other Means: The
Original Understanding of War Powers, 84 Cal. L. Rev. 167 (1996).

n23. See, e.g., John Lehman, Making War: The 200-year-old Battle Between the President and Congress Over How America Goes to War 60 (1992); Ann Van Wynen Thomas & Aaron J. Thomas, The War-Making Powers of the President: Constitutional and International Law Aspects 8 (1982); Department of State, Office of the Legal Adviser, The Legality of United States Participation in the Defense of Viet Nam, 75 Yale L.J. 1085, 1101 (1966) [hereinafter Office of the Legal Adviser]; J. Terry Emerson, The War Powers Resolution Tested: The President's Independent Defense Power, 51 Notre Dame Law. 187, 204-13 (1975) [hereinafter Emerson, War Powers Resolution]; J. Terry Emerson, War Powers Legislation, 74 W. Va. L. Rev. 53, 72 (1971) [hereinafter Emerson, War Powers Legislation]; Patrick O. Gudridge, Ely, Black, Grotius and Vattel, 50 U. Miami L. Rev. 81 (1995); Patrick D. Robbins, The War Powers Resolution After Fifteen Years: A Reassessment, 38 Am. U. L. Rev. 141, 146-50 (1988); William P. Rogers, Congress, the President, and the War Powers, 59 Cal. L. Rev. 1194 (1971); Lee A. Casey & David B. Rivkin, Jr., In Constitutional Interpretation, Read the Framers' Words, Legal Times, Oct. 3, 1994, at 24.

n24. See, e.g., Bobbitt, *supra* note 15, at 1375; Emerson, War Powers Resolution, *supra* note 23, at 211-13; Rostow, Once More, *supra* note 19, at 6; Yoo, *supra* note 22, at 295.

n25. See, e.g., Bork, Erosion, *supra* note 16, at 698; Bork, Foreword, *supra* note 16, at x; Reisman, *supra* note 21, at 212; Rostow, Once More, *supra* note 19, at 48.

n26. Stephen L. Carter, The Constitutionality of the War Powers Resolution, 70 Va. L. Rev. 101, 111 (1984). See also Bobbitt, *supra* note 15, at 1374

PAGE 50

82 Cornell L. Rev. 695, *772

("Unlike other constitutional disputes, the partisans [of competing positions on the clause] appear to find each of their own points decisive and dispute the validity of all of their opponents' claims").

n27. See 2 The Records of the Federal Convention of 1787, at 318-19 (Max Farrand ed., rev. ed. 1986) [hereinafter Farrand].

n28. For discussion of the relevant statements, see *infra* Part I.C.

n29. Yoo, *supra* note 22, at 263.

n30. See *infra* text accompanying notes 181-201.

n31. Thus, there is a greater emphasis here on context and ideology than there is in standard legal history analyses of original understanding. My approach starts with the premise that, in determining who the founding generation thought should have the power to start war, it is helpful to look at their general views about war and human personality, rather than focusing exclusively on what they explicitly said about allocation of the warmaking power. This broader approach is particularly helpful here because the traditional sources are so slight. The difference between an historian's approach to interpretive questions and the approach traditionally used by legal scholars is incisively probed in Laura Kalman, *The Strange Career of Legal Liberalism* 167-236 (1996), and Martin S. Flaherty, *The Most Dangerous Branch*, 105 *Yale L.J.* 1725, 1745-55 (1996). It should be noted, however, that when historians have turned to questions of legal history, they have generally applied the approach of legal scholars, rather than that of intellectual historians. That is, they have devoted relatively little attention to ideology and context. The treatment of the original understanding of the War Powers Clause by Professor Lofgren, who is an historian, is an example of this practice. Although Lofgren's work is the most convincing treatment of the subject to date, it is still limited by the fact that it looks almost exclusively at the types of sources on which lawyers focus, such as statements about the War Powers Clause made at the constitutional convention and at the state ratifying conventions, English precedent, and early practice. See Lofgren, *Understanding*, *supra* note 12.

n32. Douglass Adair, *Fame and the Founding Fathers*, in *Fame and the Founding Fathers* 3, 7 (Trevor Colbourn ed., 1974).

n33. See *infra* Part III.

n34. See *infra* text accompanying notes 181-201, 380-81.

n35. See James Madison, "Helvidius" Number 4, in 15 *The Papers of James Madison* 106, 108 (Robert Rutland et al. eds., Virginia University Press 1985) [hereinafter *Madison Papers*]. Madison wrote:

It is in war, finally, that laurels are to be gathered, and it is the executive brow they are to encircle. The strongest passions, and most dangerous weaknesses of the human breast; ... the honorable or venial love of fame, are all in conspiracy against the desire and duty of peace.

PAGE 51

82 Cornell L. Rev. 695, *772

Id. See also *infra* text accompanying notes 309-18.

n36. For example, President Johnson had a legitimate claim to congressional authorization for the Vietnam War, while Presidents Reagan, Bush, and Clinton, in contrast, have repeatedly either sent troops into combat without congressional authorization or been prepared to do so. See *infra* text accompanying notes 42-68.

n37. For relevant presidential statements, see Reveley, *supra* note 14, at 277-85; Thomas & Thomas, *supra* note 23, at 31-35; Francis D. Wormuth, The Vietnam War: The President versus the Constitution, in 2 The Vietnam War and International Law 711 (Richard A. Falk ed., 1969); Lawyer's Memorandum, Indochina: The Constitutional Crisis, 116 Cong. Rec. 15,410-16 (1970).

n38. See Ely, *supra* note 8, at 10.

n39. See President Truman, U.S. Air and Sea Forces Ordered into Supporting Action (June 27, 1950), in Dep't St. Bull., July 3, 1950, at 5.

n40. See Schlesinger, *supra* note 13, at 131-33.

n41. Department of State Memorandum Authority of President to Repel the Attack in Korea (July 3, 1950), in Dep't St. Bull., July 31, 1950, at 173, 173 ("The President, as Commander in Chief of the Armed Forces of the United States, has full control over the use thereof....The President's power to send the Armed Forces outside the country is not dependent on Congressional authority").

n42. See Office of the Legal Adviser, *supra* note 23, at 1101 ("The Constitution leaves to the President the judgment to determine whether the circumstances of a particular armed attack are so urgent and the potential consequences so threatening to the security of the United States that he should act without formally consulting the Congress.").

n43. H.R.J. Res. 1145, Pub. L. No. 88-408, 78 Stat. 384 (1964).

n44. Act of Mar. 16, 1967 Pub. L. No. 90-5, 401, 81 Stat. 5, 6.

n45. See, e.g., Defense Appropriation Act of 1970, Pub. L. No. 91-171, 638, 83 Stat. 486 (1969); H.R.J. Res. 447, Pub. L. No. 89-18, 79 Stat. 109 (1965).

n46. See Ely, *supra* note 8, at 12-46; Louis Henkin, *Foreign Affairs and the Constitution* 101-02 (1972).

n47. Ronald Reagan, Letter to the Speaker of the House and the President Pro Tempore of the Senate on the Deployment of United States Forces in Grenada (Oct. 25, 1983), 1983 Pub. Papers: Ronald Reagan 1512, 1513.

n48. See Fisher, *supra* note 9, at 141-42.

n49. See Ronald Reagan, Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate on the United States Air Strike Against Libya (Apr. 16, 1986), 1986 Pub. Papers: Ronald Reagan 478, 478.

n50. See Louis Henkin, *The Invasion of Panama under International Law: A Gross Violation*, 29 Colum. J. Transnat'l L. 293, 293-94, 298 (1991).

PAGE 52

82 Cornell L. Rev. 695, *772

n51. See Secretary of Defense Dick Cheney, Testimony at Hearing of the Senate Armed Services Committee, Federal News Service, Dec. 3, 1990, available in LEXIS, News Library, Script File.

n52. See Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3, 3-4 (1991).

n53. Remarks of President George Bush Before the Texas State Republican Convention, Federal News Service, June 20, 1992, available in LEXIS, News Library, Script File. For further statements that congressional support was not necessary to launch a military attack against Iraq, see George Bush, Remarks at Dedication Ceremony of the Social Sciences Complex at Princeton University in Princeton, New Jersey, 27 Weekly Comp. Pres. Doc. 589, 590 (May 10, 1991); George Bush, Statement on Signing the Resolution Authorizing the Use of Military

Force Against Iraq, 27 Weekly Comp. Pres. Doc. 48 (Jan. 14, 1991).

n54. See Fisher, *supra* note 9, at 153-54.

n55. See *id.* at 153. Under pressure from Congress, President Clinton agreed to withdraw all troops from Somalia by March 31, 1994, and he carried out that agreement. See *id.* at 154.

n56. For discussion of the preparation of an invasion of Haiti and subsequent events, see *id.* at 154-57.

n57. Presidential News Conference: Health Care, Haiti and Crime Transcript of President Clinton's News Conference at the White House, N.Y. Times, Aug. 4, 1994, at A16. Assistant Attorney General Walter Dellinger justified the sending of troops to Haiti in a more limited way, arguing, among other things, that the deployment of troops would not be "war" in the constitutional sense because "a 'war' does not exist where United States troops are deployed at the invitation of a fully legitimate government in circumstances in which the nature, scope, and duration of the deployment are such that the use of force involved does not rise to the level of 'war.'" Walter Dellinger, *After the Cold War: Presidential Power and the Use of Military Force*, 50 U. Miami L. Rev. 107, 115 (1995). See also Word for Word: A President's Ability to Declare War, N.Y. Times, Sept. 30, 1994, at A29 (Office of Legal Counsel letter offering legal basis for troop deployment in Haiti). Neither house explicitly opposed the invasion. After the Security Council passed a resolution on July 31, 1994 urging the removal of the Haitian government, however, the United States Senate unanimously voted that that resolution "does not constitute authorization for the deployment of United States Armed Forces in Haiti under the Constitution of the United States or pursuant to the War Powers Resolution." 140 Cong. Rec. S10,415, 10,433, 10,510 (daily ed. Aug. 3, 1994).

n58. Elaine Sciolino, *On the Brink of War, a Tense Battle of Wills*, N.Y. Times, Sept. 20, 1994, at A1.

n59. See Donald L. Robinson, *Who Has the Power to Put U.S. Troops in Harm's Way?*, Christian Sci. Monitor, Dec. 19, 1995 (discussing President Clinton's "insistence that he did not need congressional approval to enforce the

Dayton Agreement"); Congressional Approval Not Needed for Bosnia Force, White House Says, Chi. Trib., Oct. 9, 1995, 1 at 3 (quoting White House Chief of Staff Leon Panetta as stating that "[President Clinton] believes that, like all other

PAGE 53

82 Cornell L. Rev. 695, *772

presidents, he is not about to give up on his prerogatives as commander in chief.").

n60. On October 30, 1995, the House passed a sense of the House resolution stating that "no United States Armed Forces should be deployed ... until the Congress has approved such a deployment." H.R. Res. 247(2), 104th Cong., 1st Sess., 141 Cong. Rec. H11398 (daily ed. Oct. 30, 1995). On November 17, the House passed a bill providing that, in the absence of future specific appropriations, the United States was not to use government funds to support United States troops in Bosnia. See H.R. Res. 2606, 104th Cong., 1st Sess., 141 Cong. Rec. H13,233 (daily ed. Nov. 17, 1995) (enacted). After troops were deployed, the Senate passed a resolution that expressed "reservations ... about President Clinton's decision to deploy United States Armed Forces," but, since the mission had begun, sanctioned it provided that the United States would lead an effort to arm Bosnian Muslims and that United States troops would leave Bosnia within "approximately one year." S.J. Res. 44, 104th Cong., 1st Sess., 141 Cong. Rec. S18552 (daily ed. Dec. 13, 1995). The resolution was not intended as support for the underlying policy; Senator Bob Dole, its co-sponsor, declared, "We oppose the decision to deploy troops." *Id.* at S18550. The House was even more critical of the President's actions. It passed a resolution deploring the fact that "despite the expressed will of the House of Representatives... , the President has chosen to proceed with the deployment of approximately 20,000 members of the United States Armed Forces" and formally declared "opposition to the President's policy." H.R. Res. 302, 104th Cong., 1st Sess., 141 Cong. Rec. H14849 (daily ed. Dec. 13, 1995).

For an excellent and detailed account of presidential activity in the years since the Second World War, see Fisher, *supra* note 9, at 70-161.

n61. 50 U.S.C. 1541-48 (1994).

n62. See Text of President Nixon's Message Vetoing the War Powers Resolution [hereinafter Nixon Veto], reprinted in Reveley, *supra* note 14, at 293-97.

n63. See 50 U.S.C. 1544(b) (1994).

n64. *Id.* 1541(a). The statute asserts that the Constitution permits the President to commit troops to combat on his own authority only where an attack upon American territory or against American troops creates "a national emergency." *Id.* 1541(c).

n65. See Nixon Veto, *supra* note 62, at 293, 295.

n66. Michael Stokes Paulsen, The Most Dangerous Branch: Executive Power to Say What the Law Is, 83 Geo. L.J. 217, 267 (1994).

n67. See John O. McGinnis, Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers, 56 Law & Contemp. Probs. 293, 315-22 (1993) (discussing executive branch nullification of resolution). See also Ely, *supra* note 8, at 49 (listing the war in Indochina, the Iranian rescue effort of 1980, the sending of troops to Lebanon in 1982-1983, the invasion of Grenada in 1983, the Gulf of Sidra incident and Tripoli bombing of 1986, the 1987-1988 Persian Gulf War against Iran, and the invasion of Panama in 1989 as instances in which Presidents should have, but did not, file hostilities reports). For examples of presidential

PAGE 54

82 Cornell L. Rev. 695, *772

reports, see Text of President Ford's Mayaguez Report of May 15, 1975, reprinted in Reveley, *supra* note 14, at 301-03; Text of President Carter's Iran Report of April 26, 1980, reprinted in Reveley, *supra* note 14, at 303-06; Report of President George Bush (Dec. 21, 1989), in Thomas M. Franck & Michael J. Glennon, Foreign Relations and National Security Law 596-97 (2d ed. 1993).

n68. See Yoo, *supra* note 22, at 182. Whether the War Powers Resolution could be revised in such a way as to be made effective is a matter for debate. Compare Ely, *supra* note 8, at 63-66 (suggesting how the Resolution could be amended to make it effective) with Bobbitt, *supra* note 15, at 1371, 1397-1400

(rejecting the War Powers Resolution as an "absurd failure").

n69. See, e.g., Bobbitt, *supra* note 15, at 1375-76; Emerson, War Powers Resolution, *supra* note 23, at 211-13; Rostow, *Once More*, *supra* note 19, at 5-7; Yoo, *supra* note 22, at 193-94.

n70. For Blackstone, conflict could begin without a declaration of war. In particular, issuance of letters of marque and reprisal created an "incomplete state of hostilities." 1 William Blackstone, *Commentaries* *250. The declaration of war served a limited, although important, role: "In order to make a war completely effectual, it is necessary with us in England that it be publicly declared and duly proclaimed by the king's authority; and, then, all parts of both the contending nations, from the highest to the lowest, are bound by it." *Id.* Blackstone thus treated the declaration of war as the culminating step with respect to conflict between nations.

n71. Grotius observed that "most wars are begun without declaration of war." Hugo Grotius, *On the Rights of War and Peace* 318 (William Whewell trans., abr. ed. 1853) (citing Dio Chrysostom). The declaration was necessary for certain "peculiar effects," *id.* at 319, such as to authorize seizure of the property of foreign nationals. See *id.* at 318.

n72. Like Grotius, Vattel concluded that not all wars had to be declared, though his treatment differed from Grotius's, see *supra* note 71, since Vattel took the position that in some situations declarations of war were necessary to begin hostilities legitimately. Vattel wrote, "He who is attacked and only wages defensive war, needs not to make any hostile declaration" Emmerich de Vattel, *The Law of Nations* 316 (Joseph Chitty ed., 1861). Thus, a declaration of war was not necessary to respond to attack. Pro-Executive scholar J. Terry Emerson has suggested that Vattel distinguished between "wars of aggression and conquest," which required declarations of war, and defensive wars, which did not require such declarations. See Emerson, War Powers Resolution, *supra* note 23, at 212. This, however, was not the distinction that Vattel himself drew. For

Vattel, nondefensive wars - the wars which required a declaration of war - were those in which the nation had not been attacked, but in which justice nonetheless dictated going to war. "The right of making war," Vattel began his chapter on declarations of war,

belongs to nations only as a remedy against injustice: it is the offspring of unhappy necessity. This remedy is so dreadful in its effects, so destructive to mankind, so grievous even to the party who has recourse to it, that unquestionably the law of nature allows of it only in the last extremity, - that is to say, when every other expedient proves ineffectual for the maintenance of justice.

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PAGE 55

82 Cornell L. Rev. 695, *772

Vattel, *supra*, at 314. Although Emerson suggests that Vattel thought that declarations of war were the means by which wars of "aggression and conquest" were sanctioned, see Emerson, War Powers Resolution, *supra* note 23, at 212 & n.131, Vattel believed that unjust wars violated natural law, writing that "in order to be justifiable in taking up arms, it is necessary ... that we have a just cause of complaint." *Id.*

Vattel agreed with Grotius that declarations of war had important juridical consequences: "Without such a public declaration of war, it would, in a treaty of peace, be too difficult to determine those acts which are to be considered as the effects of war, and those that each nation may set down as injuries of which she means to demand reparation." *Id.* at 316.

n73. Rostow, *Once More*, *supra* note 19, at 6.

n74. For more extensive development of this argument, see Bobbitt, *supra* note 15, at 1396-1400; Emerson, War Powers Resolution, *supra* note 23, at 211-12; Rostow, *Once More*, *supra* note 19, at 3-18; Yoo, *supra* note 22, at 204-08.

n75. U.S. Const. art I, 8, cl. 11.

n76. Rostow, *Once More*, supra note 19, at 6.

n77. See Yoo, supra note 22, at 250-51.

n78. See id.

n79. See id. at 206.

n80. See U.S. Const. art. II, 2, cl. 1.

n81. See id. art. 2, 1, cl. 1. Pro-Executive scholars do maintain, however, that the Framers did not intend for Congress to be powerless to check the President, since they gave it the power "to raise and support armies," id. art. I, 8, cl. 12, and the power of the purse, id. art. I, 8, cl. 1-2, 5. See Bobbitt, supra note 15, at 1388-1400; Emerson, War Powers Resolution, supra note 23, at 201-03; Rostow, *Once More*, supra note 19, at 14-15; Yoo, supra note 22, at 209-10.

n82. Lofgren, *Understanding*, supra note 12, at 695.

n83. Id. at 696.

n84. See, e.g., Fisher, supra note 9, at 2-3.

n85. Proponents of the pro-Congress reading argue that the Commander-in-Chief Clause was intended to give the President control over the military only after war has commenced. See Fisher, supra note 9, at 9-12.

n86. Ely, supra note 8, at 3 (footnote omitted).

n87. The Federalist No. 25, at 161 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

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PAGE 56

82 Cornell L. Rev. 695, *772

n88. See, e.g., Ely, supra note 8, at 3, 140 n.5; Bestor, supra note 14, at 608-09; Lofgren, *Understanding*, supra note 12, at 694-97.

n89. Lofgren, *Understanding*, supra note 12, at 695.

n90. Bestor, supra note 14, at 608 (alteration in original) (quoting Arts. of Confed. art. IX).

n91. Emerson, War Powers Legislation, *supra* note 23, at 72 (quoting with approval Monaghan, *supra* note 18, at 29). Proponents of this view disagree on the precise number of such incidents. Writing a few years before Emerson, the Office of the Legal Adviser for the Department of State justified President Johnson's activities in Vietnam by asserting more modestly that there were 125 instances of presidential warmaking. See Office of the Legal Adviser, *supra* note 23, at 1101. Critics of this view both contest its history and the underlying theory. Dean Ely thus argues that "post-ratification practice in violation of the Constitution [cannot] change it," and that "the original constitutional understanding was quite consistently honored from the framing until 1950." Ely, *supra* note 8, at 10. For other criticisms of the view that there was a pattern of executive-initiated conflict prior to the Korean War, see Schlesinger, *supra* note 13, at 133; Wormuth et al., *supra* note 14, at 140-49; W. Taylor Reveley III, Presidential War-Making: Constitutional Prerogative or Usurpation?, 55 Va. L. Rev. 1243, 1258 (1969).

n92. Monaghan, *supra* note 18, at 31.

n93. Bork, Foreword, *supra* note 16, at x. Explicitly embracing Judge Bork's position, Professor W. Michael Reisman has similarly declared that original intent should not control the meaning of the War Powers Clause: "The Constitution is part of our constitutive process in which we determine how to establish and maintain our fundamental decision-making institutions so that they can provide liberty, security, and the fulfillment of other constitutional goals in ways optimally consistent with historic values but responsive to contemporary exigencies." Reisman, *supra* note 21, at 212. See also Ely, *supra* note 8, at 143 n.24 (stating that Judge Bork's view of War Powers Clause "seems out of accord with [his] usual strongly argued 'original intent' approach to constitutional interpretation"). Dean Rostow has advanced an argument similar to Judge Bork's. See Rostow, Once More, *supra* note 19, at 48 ("The problem facing the nation is to fashion and refashion the Presidency and Congress as responsible and cooperative institutions capable of carrying out a foreign policy adequate

to
the security needs of our times and of the foreseeable future.").

n94. Bork, *Erosion*, *supra* note 16, at 698.

n95. See Michael J. Glennon, *Constitutional Diplomacy* 80-84 (1990).

n96. See Koh, *supra* note 10, at 69-79.

n97. See Henkin, *supra* note 46, at 32-35.

n98. Ely, *supra* note 8, at 4.

n99. See *id.*

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PAGE 57

82 Cornell L. Rev. 695, *772

n100. See *id.*

n101. *Id.*

n102. *Id.* at 3.

n103. *Id.* at 10.

n104. The principal discussion of the Commander-in-Chief Clause at the Philadelphia convention occurred when the convention considered the Committee on Detail's proposal, under which the President had equal command over the Army and Navy of the United States, and of the Militia of the Several States. See 2 Farrand, *supra* note 27, at 426. Roger Sherman moved that the Commander-in-Chief Clause be amended to provide that the President would only have control of the state militia "when called into the actual service of the [United States]" and his proposal was adopted. *Id.* (emphasis omitted). This comment about control of state militia is of little relevance to contemporary debates. As for the letters of marque and reprisal, the record is even slighter, the only significant comment being Elbridge Gerry's assertion, with reference to a list of legislative powers that "something [ought to be] inserted concerning letters of marque, which he thought not included in the power of war." *Id.* at 326.

n105. See *supra* note 104 (summarizing relevant discussion on both topics).

n106. Compare Lofgren, *Understanding*, *supra* note 12, at 685-86 (focusing on

Iredell and Hamilton), with Yoo, *supra* note 22, at 277-78 (same).

n107. Hamilton contrasted the King's powers as Commander in Chief with those of the President, which he described as "much inferior" to the King's:

[The President's power as Commander in Chief] would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the confederacy[;] while that of the British King extends to the declaring of war and to the raising and regulating of fleets and armies; all which by the Constitution under consideration would appertain to the Legislature.

The Federalist No. 69, at 465 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Similarly, in discussing the President's Commander-in-Chief powers, Iredell stated:

A very material difference may be observed between this power, and the authority of the king of Great Britain under similar circumstances. The king of Great Britain is not only the commander-in-chief of the land and naval forces, but has power, in time of war, to raise fleets and armies. He has also authority to declare war. The President has not the power of declaring war by his own authority, nor that of raising fleets and armies. These powers are vested in other hands. The power of declaring war is expressly given to Congress

4 The Debates in the Several State Conventions 107-08 (Jonathan Elliot ed., 1907) [hereinafter Elliot].

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PAGE 58

82 Cornell L. Rev. 695, *772

n108. 1 Farrand, *supra* note 27, at 21.

n109. *Id.* at 64-65 (alteration in original).

n110. *Id.* at 65.

n111. *Id.* at 65-66. See also *id.* at 73-74 ("Mr. Wilson said the great qualities in the several parts of the Executive are vigor and dispatch. Making

peace and war are generally determined by Writers on the Laws of Nations to be legislative powers.").

n112. *Id.* at 70.

n113. *Id.* at 65.

n114. The only other participant in the Convention to make relevant statements at this point in the debates concerning the scope of the executive power was Roger Sherman. Apparently concurring in the prevailing sentiment that the Executive should not have power over war and peace, Sherman responded to Pinckney's expressions of concern by stating that he saw the Executive "as nothing more than an institution for carrying the will of the Legislature into effect." *Id.*

n115. See 2 Farrand, *supra* note 27, at 85.

n116. William Paterson also formally submitted a plan to the Committee but, similar to Randolph's plan, it did not allocate the power to initiate war. See 1 Farrand, *supra* note 27, at 242-45 (Paterson's plan). Alexander Hamilton offered a third plan of governance, although, unlike Randolph and Paterson, he did not make a formal proposal. In general, Hamilton envisioned an extremely powerful Executive. Indeed, a few years later, as the author of the *Pacificus* letters, Hamilton was to take an expansive view of the Executive's war powers. See *infra* Part III.B. But in his speech he did not argue that the Executive should have the power to start wars. Rather, while the Executive was "to have the direction of war when authorized or begun," Hamilton urged, without offering an explanatory justification, that the Senate "have the sole power of declaring war." 1 Farrand, *supra* note 27, at 292.

n117. See 2 Farrand, *supra* note 27, at 143 (Randolph's draft plan); *id.* at 168 (Wilson's draft plan).

n118. *Id.* at 182.

n119. See *id.* at 314-19.

n120. Butler argued that the power "to make war" should be given to the

President "who will have all the requisite qualities, and will not make war but when the Nation will support it." *Id.* at 318.

n121. *Id.*

n122. Ely, *supra* note 8, at 5.

n123. Yoo, *supra* note 22, at 264.

PAGE 59

82 Cornell L. Rev. 695, *772

n124. 2 Farrand, *supra* note 27, at 318.

n125. Yoo, *supra* note 22, at 262.

n126. See Lofgren, *Understanding*, *supra* note 12, at 676.

n127. 2 Farrand, *supra* note 27, at 318.

n128. See Ely, *supra* note 8, at 3.

n129. See Bestor, *supra* note 14, at 603-04.

n130. See Yoo, *supra* note 22, at 262-63.

n131. See *id.* at 262.

n132. Philip Bobbitt offers another pro-Executive reading of the text:

Gerry

is responding to Sherman's appeal for "make," rather than "declare," by suggesting that use of the word "make" would have the consequence of giving the

President the power to declare war (again, using the term as it is used in international law). Bobbitt, *supra* note 15, at 1380-81. But this reading necessarily requires that Gerry engaged in hyperbole and indirection.

Sherman

had very clearly not made "a motion to empower the Executive alone to declare

war." 2 Farrand, *supra* note 27, at 318.

n133. Even the actual vote is unclear, and that is significant as well.

Madison indicates that the original vote was seven in favor, two against, one

abstention, and that Ellsworth changed his vote (and hence Connecticut's vote)

when Rufus King said "that 'make' war might be understood to 'conduct' it which

was an Executive function." 2 Farrand, *supra* note 27, at 319 n.*. This suggests

that, once Ellsworth understood that the change was needed to make clear that

Congress would not have tactical command of the military after it had

authorized
combat, he shifted his vote. The official record indicates, in contrast,
that
the change was originally defeated 5 to 4, but that on re-vote, it passed
eight
to one. See *id.* at 314. This would suggest that King's comment was not
simply
important to Ellsworth, but to the critical swing voters. See Lofgren,
Understanding, *supra* note 12, at 676-77; Yoo, *supra* note 22, at 264 &
n.475.

n134. See Jack N. Rakove, *Original Meanings: Politics and Ideas in the
Making
of the Constitution* 83-84 (1996).

n135. See *id.*

n136. See *id.*

n137. It should be added that, as a matter of constitutional
interpretation,
these statements are more significant than the statements made during the
constitutional convention, although the scholarly controversy about the war
power tends to focus on the Philadelphia debates. To the extent that the
founding generation thought original understanding relevant to
constitutional
interpretation, it was the understanding of the ratifiers, who made the
Constitution law, not the understanding of the participants at
Philadelphia,
whose deliberations were secret. The classic statement on point is
Madison's:
"As the instrument came from [the Philadelphia convention], it was nothing
more

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PAGE 60

82 Cornell L. Rev. 695, *772

than a draught of a plan, nothing but a dead letter, until life and
validity
were breathed into it, by the voice of the people, speaking through the
several
state conventions." James Madison, *Jay's Treaty: Speech in the House of
Representatives* (Apr. 6, 1796), in 16 *Madison Papers*, *supra* note 35, at
296. See
also Rakove, *supra* note 134, at 339-65; Charles A. Lofgren, *The Original
Understanding of Original Intent?*, 5 *Const. Commentary* 77 (1988); H.
Jefferson
Powell, *The Original Understanding of Original Intent*, 98 *Harv. L. Rev.*
885
(1985); Treanor, *Judicial Review*, *supra* note 5, at 544-52.

n138. 2 Elliot, *supra* note 107, at 528.

n139. Lofgren, *Understanding*, *supra* note 12, at 685.

n140. 2 Elliot, *supra* note 107, at 278. See also 3 *id.* at 259 (Madison).

A number of Antifederalists took the position that the Constitution vested in Congress the power to initiate war and criticized the Constitution for this reason. For example, at the Virginia debates Patrick Henry bemoaned the fact that "Congress can both declare war and carry it on, and levy your money, as long as you have a shilling to pay." *Id.* at 172. In making his argument, Henry highlighted the distinction between the United States Constitution and English practice since, under the latter, "the King declares war; the House of Commons gives the means of carrying it on." *Id.* at 172. For other examples of Antifederalist objections to the fact that Congress possessed both the powers of purse and sword, see 2 *id.* at 374-77 (John Lansing, Jr. & Melancton Smith); Richard Henry Lee, Letters of a Federal Farmer, in Pamphlets on the Constitution of the United States 279, 291 (Paul Leicester Ford ed., 1888). These criticisms drew on one of the traditional and fundamental principles of mixed government, which was, as George Mason stated it during the course of the Constitutional Convention, that "the purse & the sword might never get into the same hands <whether legislative or executive>." 1 Farrand, *supra* note 27, at 139-40. In response, some Federalists took the position that this reading of the Constitution was correct, but the concern unfounded. Thus, Oliver Ellsworth asked:

Does it follow, because it is dangerous to give the power of the sword and purse to an hereditary prince, who is independent of the people, that therefore it is dangerous to give it to the Parliament - to Congress, which is your Parliament - to men appointed by yourselves, and dependent upon yourselves? This argument amounts to this: you must cut a man in two in the middle, to prevent his hurting himself.

2 Elliot, *supra* note 107, at 195. Such statements reflect the view that the decision to declare war is not simply a decision as to whether hostilities should be classified as a war for purposes of international law. Rather, it is the power of the sword. Similarly, John Marshall asked: "Are the people of

England more secure, if the Commons have no voice in declaring war? or are we less secure by having the Senate joined with the President?" 3 *id.* at 233. Marshall's statement, however, apparently reflects a confusion of the war-making power and the treaty-making power.

n141. See Bestor, *supra* note 14, at 608 & n.279. Thus, even Professor Yoo, author of the most careful and complete pro-Executive history, does not offer

PAGE 61

82 Cornell L. Rev. 695, *772

any examples of this type. See generally Yoo, *supra* note 22.

n142. Dean Ely, for example, treats the evidence as unambiguous. See Ely, *supra* note 8, at 5 (noting "clarity" of original understanding). He has received significant criticism on this point. See Peter D. Coffman, *Power and Duty: The Language of the War Power*, 80 Cornell L. Rev. 1236, 1241 n.30 (1995) (reviewing Ely, *supra* note 8, and finding his discussion of original understanding "peremptory"); Peter J. Spiro, *War Powers and the Siren of Formalism*, 68 N.Y.U. L. Rev. 1338, 1357 (1993) (reviewing Ely, *supra* note 8, and attacking his treatment of original understanding).

n143. Lofgren, *Understanding*, *supra* note 12, at 697.

n144. Reveley, *supra* note 14, at 84.

n145. Yoo, *supra* note 22, at 282 n.532.

n146. *Id.* at 287 n.547.

n147. See *id.*

n148. *Id.* at 173.

n149. See *supra* Part I.B.

n150. Rostow, *Once More*, *supra* note 19, at 6.

n151. Emerson, *War Powers Resolution*, *supra* note 23, at 209.

n152. Yoo, *supra* note 22, at 217. Colonial governors also had broad military powers, although, as subordinate crown officials, typically lacked the power to declare war. See *id.* at 219-20.

n153. See id. at 199-204.

n154. Id. at 226.

n155. See Rogers, *supra* note 23, at 1196 & n.10.

n156. See Emerson, War Powers Resolution, *supra* note 23, at 208.

n157. Id.

n158. See id. at 207.

n159. 1 William Blackstone, Commentaries *249.

n160. Id. at *250.

n161. In Chapter XII of his Second Treatise of Government, Locke divided governmental power in a commonwealth into three parts: legislative, executive, and federative. See John Locke, Two Treatises of Government bk.II, 143-48 (Peter Laslett ed., Cambridge University Press 1960) (1690). The federative power encompassed relations between the commonwealth and all persons and entities outside of it. See id. at bk.II, 145. "The power of War and Peace" was

PAGE 62

82 Cornell L. Rev. 695, *772

part of the federative power. See id. at bk.II, 146. Locke contended that the federative power should be exercised by the executive:

Though, as I said, the Executive and Federative Power of every Community be really distinct in themselves, yet they are hardly to be separated, and placed, at the same time, in the hands of distinct Persons. For both of them requiring the force of the society for their exercise, it is almost impracticable to place the Force of the Commonwealth in distinct, and not subordinate hands; or that the Executive and Federative Power should be placed in Persons that might act separately, whereby the Force of the Publick would be under different Commands: which would be apt sometime or other to cause disorder and ruine.

Id. at bk.II, 148.

n162. Montesquieu divided governmental power into three parts: "the

legislative; the executive in respect to things dependent on the law of nations;
and the executive, in regard to things that depend on the civil laws." Montesquieu, *The Spirit of Laws* bk. XI, ch. 6, para. 1 (David Wallace Carrithers ed., University of California Press 1977). Although Chapter 6 is headed "Of the Constitution of England," examination of the text shows that Montesquieu is not merely describing the English system of Government, but prescribing the proper governmental framework. See Anne M. Cohler, *Montesquieu's Comparative Politics and the Spirit of American Constitutionalism* 104 (1988). The first category of executive power encompassed the power to "mak[e] peace or war." Montesquieu, *supra* at bk. XI, ch. 6, para. 21.

n163. *The Federalist* No. 70, at 472 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Hamilton's recognition that the Executive possessed these attributes was in accordance with the standard formulation. See, e.g., 1 Farrand, *supra* note 27, at 140 (Dickinson) (proper attributes of executive include "secrecy, vigor & despatch [sic]" and "responsibility"); James Iredell, *Answers to Mr. Mason's Objections*, in *Pamphlets on the Constitution of the United States* 351, 352 (Paul Ford ed., 1888) ("One of the great advantages attending a single Executive power is the degree of secrecy and dispatch with which on critical occasions such a power can act.").

n164. See Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* 86 (1985).

n165. Gordon S. Wood, *The Creation of the American Republic 1776-1787*, at 519 (1969).

n166. See *id.* at 521.

n167. South Carolina's 1776 constitution stated, "The president and commander-in-chief shall have no power to make war or peace ... without the consent of the general assembly and legislative council." S.C. Const. of 1776, art. XXVI. The state's 1778 constitution also provided that the governor "shall have no power to commence war" without legislative approval. S.C. Const.

of 1778

art. XXXIII. Likewise, Virginia's 1776 constitution gave the governor power to

"make war" as advised by his executive council. Va. Const. of 1776, pt. i, xi.

Vermont, although not recognized as a state at the time, passed a constitution

containing a similar provision. Vt. Const. of 1777, xviii.

PAGE 63

82 Cornell L. Rev. 695, *772

n168. See Va. Const. of 1786, ch. ii, art. xi (Governor to "make war" as advised by Executive Council).

n169. See Md. Const. of 1780, ch. ii, art. vii; N.H. Const. of 1784, pt. ii, cl. 10.

n170. See Mass. Const. of 1780, pt. II, ch. II, 4, art. 1. For a discussion of this Massachusetts clause, see Flaherty, *supra* note 31, at 1770.

n171. Ely, *supra* note 8, at 3.

n172. Wormuth et al., *supra* note 14, at 179.

n173. Bickel, *supra* note 7, at 131-32.

n174. 2 Elliot, *supra* note 107, at 528. For use of this quote as support for a pro-Congress reading of the war power, see, e.g., Wormuth et al., *supra* note 14, at 30.

n175. Letter from James Madison to Thomas Jefferson (Apr. 2, 1798), in 2 The Republic of Letters: The Correspondence between Thomas Jefferson and James Madison 1776-1826, at 1031, 1032 (James Morton Smith ed., 1995) [hereinafter Republic of Letters]. For use of these quotes, see, e.g., Ely, *supra* note 8, at 3-4.

n176. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 1 Republic of Letters, *supra* note 175, at 631, 635.

n177. William Rawle, A View of the Constitution of the United States of America 109 (2d ed. 1829).

n178. See, e.g., The Federalist No. 48, at 334-38 (James Madison) (Jacob E.

Cooke ed., 1961); The Federalist No. 71, at 483-84 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). See also Rakove, *supra* note 134, at 309-16.

n179. See Bobbitt, *supra* note 15, at 1373.

n180. See Sofaer, *supra* note 14, at 131-66, 208-24, 279-336.

n181. George Washington, 10 The Writings of George Washington 367 (Jared Sparks ed., 1836).

n182. "Helvidius" Number 4, *supra* note 35, at 106, 108.

n183. Annals of Cong., 9th Cong., 1st Sess. 19 (Dec. 1805).

n184. Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 28 (1801). See also United States v. Smith, 27 F. Cas. 1192, 1230-31 (C.C.S.D.N.Y. 1806) (No. 16,342) (power to make war "exclusively vested in congress"). The one proponent of a different view of the War Powers Clause was St. George Tucker. In his appendix to Blackstone's Commentaries, Tucker wrote, "With us the representatives of the people have the right to decide this important question [whether to declare war] , conjunctively with the supreme executive who may, on this occasion as on every other, (except a proposal to amend the constitution,) exercise a qualified

PAGE 64

82 Cornell L. Rev. 695, *772

negative on the joint resolutions of congress" St. George Tucker, Blackstone's Commentaries (1803), excerpted in 3 The Founders' Constitution 101, 102 (Phillip B. Kurland & Ralph Lerner eds., 1987). Tucker's statement indicates that there was not a consensus on the question of whether the President had a veto over the power to declare war. Moreover, Tucker was a prominent judge, legal educator, and lawyer, so his opinion deserves weight. At the same time, he had not been a member of the Philadelphia convention or his state ratifying convention, and, as indicated in the text, the predominant view was that the Congress alone had responsibility for determining whether war was declared. For information on Tucker's career, see Charles T. Cullen, St. George Tucker and Law in Virginia, 1772-1804, at 186-89 (1987); Treanor, Judicial Review, *supra* note 5, at 520-21.

n185. For leading secondary accounts, see Alexander DeConde, The

Quasi-War:

The Politics and Diplomacy of the Undeclared War with France, 1797-1801, at 103-141 (1966); Bradford Perkins, 1 The Cambridge History of American Foreign

Relations: The Creation of a Republican Empire, 1776-1865, at 105-07 (Warren I.

Cohen ed., 1993); Sofaer, *supra* note 14, at 144-45. Adams provides two additional accounts of the incident, one full and one partial. See John Adams,

To the Printers of the Boston Patriot [hereinafter Boston Patriot], in 9 The

Works of John Adams 241, 304-05 (Charles Francis Adams ed., 1854)

[hereinafter

Adams Works] (full account of 1809); *id.* at 305 n.1 (fragment account of 1801).

n186. Annals of Cong., 5th Cong., 2117 (July 1798). See also *id.* at 1321 (Congressman Baldwin: "The subject seemed to be placed wholly in the hands of

the Legislature."); *id.* at 1324 (referring to statement of Congressman Nicholas:

"He had never heard it doubted that Congress had the power over the progress of

what led to war, as well as the power of declaring war."); *id.* at 1336

(referring to statement of Congressman Pinckney: "Mr. P. agreed that this was

Legislative power, and not Executive.").

n187. James Madison, Message to the Senate and House of Representatives (June

1, 1812), in 2 A Compilation of the Messages and Papers of the Presidents 484,

489-90 (James D. Richardson ed., 1897) [hereinafter Compilation].

n188. James Madison, A Proclamation (June 12, 1812), in 2 Compilation, *supra*

note 187, at 497.

n189. For the most complete argument on point, see Carter, *supra* note 26, at

129-32. See also Bobbitt, *supra* note 15, at 1385 n.69 ("It seems clear from the

language of the Constitution that the President cannot veto a declaration").

n190. See Ely, *supra* note 8, at 231 n.21; Gregory Sidak, To Declare War, 41

Duke L.J. 27, 84 (1991).

n191. U.S. Const. art. I, 7, cl. 3. In its entirety, the clause reads:

Every Order, Resolution, or Vote, to Which the Concurrence of the Senate and

House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

PAGE 65

82 Cornell L. Rev. 695, *772

Id.

n192. 3 U.S. (3 Dall.) 378 (1798).

n193. Id. at 381 n.*.

n194. See Ely, *supra* note 8, at 231 n.21; Sidak, *supra* note 190, at 84.

n195. See Richard B. Bernstein & Jerome Agel, *Amending America: If We Love the Constitution So Much, Why Do We Keep Trying to Change It?* 91 (1993).

n196. See *id.* at 100.

n197. Madison, Message to the Senate and House of Representatives, *supra* note 187, at 490. See also *supra* text accompanying note 186.

n198. Madison, A Proclamation, *supra* note 188, at 497. See also *supra* text accompanying note 187.

n199. See *supra* text accompanying notes 185-86.

n200. For a detailed discussion of these concerns, see Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* 10, 274 (Rita & Robert Kimber trans., 1980); Charles Royster, *A Revolutionary People at War: The Continental Army and American Character, 1775-1783*, at 35-38 (1979).

n201. See *supra* text accompanying notes 164-66.

n202. See Adair, *supra* note 32.

n203. Id. at 5.

n204. *Id.* at 4.

n205. *Id.* at 5.

n206. *Id.*

n207. *Id.* at 8.

n208. *Id.* at 11.

n209. *Id.* at 12 n.8 (quoting Aristotle).

n210. *Id.* at 14 (quoting Bacon).

n211. *Id.* at 13 (citing Plutarch).

n212. *Id.* at 15 n.12 (quoting Machiavelli).

n213. *Id.* at 14-15 (quoting Bacon).

PAGE 66

82 Cornell L. Rev. 695, *772

n214. See *id.* at 12.

n215. *Id.*

n216. *Id.* at 6 (quoting John Adams).

n217. See *id.* at 7.

n218. *Id.*

n219. *Id.* at 3.

n220. *Id.* at 16 n.14.

n221. See *id.* at 16.

n222. See *id.* at 8.

n223. *Id.*

n224. For works that follow Adair in exploring the influence of the concept of fame on the Founders, see Richard Brookhiser, *Founding Father: Rediscovering George Washington* (1996); Michael Lienesch, *New Order of the Ages: Time, the Constitution, and the Making of Modern American Political Thought* (1988); Paul A. Rahe, *Republics Ancient and Modern: Classical Republicanism and the*

American
Revolution (1992); Garry Wills, *Cincinnatus: George Washington and the American Enlightenment* (1984); Bruce Miroff, *John Adams: Merit, Fame, and Political Leadership*, 48 J. Pol. 116 (1986). For a history of "fame" through the ages, see
Leo Braudy, *The Frenzy of Renown: Fame & Its History* (1986).

n225. The Federalist No. 72, at 488 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

n226. 2 Farrand, *supra* note 27, at 53.

n227. 1 The Works of James Wilson 405 (Robert Green McCloskey ed., 1967).

n228. *Id.* Wilson also wrote:

The love of reputation and the fear of dishonour are, by the all-gracious
Author of our existence, implanted in our breasts, for purposes the most
beneficent and wise. Let not these principles be deemed the growth of
dispositions only which are weak or vain; they flourish most luxuriantly in
minds, the strongest and, let me add, the most humble.

2 *id.* at 593.

n229. John Adams, *A Defence of the Constitutions of Government of the United States*, in 6 Adams Works, *supra* note 185, at 210 [hereinafter Adams, *Defence*].

n230. See David Hume, *A Treatise of Human Nature* 316-24 (L.A. Selby-Bigge ed., 1888) (discussing "love of fame" in the section of the book on "Passions").
For a discussion of the influence of Hume on the Founders with respect to their

PAGE 67

82 Cornell L. Rev. 695, *772

conception of fame, see Rahe, *supra* note 224, at 565-66.

n231. See Braudy, *supra* note 224, at 51.

n232. John Adams, *Discourses on Davila; A Series of Papers on Political History*, in 6 Adams Works, *supra* note 185, at 260 [hereinafter Adams, *Davila*].

n233. The Federalist No. 72, *supra* note 225, at 340 (Alexander

Hamilton).

n234. See Adair, *supra* note 32, at 13-14 (quoting from letter written by Thomas Jefferson to Benjamin Rush dated Jan. 16, 1811) (internal quotation marks omitted).

n235. Letter from John Adams to Benjamin Rush (June 21, 1811), in *The Spur Of Fame: Dialogues of John Adams and Benjamin Rush, 1805-1813*, at 180, 182 (John A. Schutz & Douglass Adair eds., 1966) [hereinafter *Spur*].

n236. Braudy, *supra* note 224, at 455-56.

n237. Adams, Davila, *supra* note 232, at 234.

n238. *Id.*

n239. *Id.* at 262-63.

n240. *The Federalist* No. 72, *supra* note 225, at 488 (Alexander Hamilton).

n241. See, e.g., Drew R. McCoy, *The Elusive Republic: Political Economy in Jeffersonian America* 120-35 (1980); McDonald, *supra* note 164, at 188-89; Wood, *supra* note 165, at 606-15; William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 *Yale L.J.* 694, 695-700, 704-05 (1985).

n242. See Wood, *supra* note 165, at 606-15. For a discussion of Wood's influence, see Daniel T. Rogers, *Republicanism: The Career of a Concept*, 79 *J. Am. Hist.* 11, 15-24 (1992); Treanor, *Takings Clause*, *supra* note 5, at 819-24.

n243. See Wood, *supra* note 165, at 65-70, 413-20.

n244. See *id.* at 606-15.

n245. Martin Diamond, *Democracy and The Federalist: A Reconsideration of the Framers' Intent*, 53 *Am. Pol. Sci. Rev.* 52, 64 (1959).

n246. *Id.* at 66 (quoting *Federalist* No. 10).

n247. *Id.*

n248. *Id.* See also Albert Hirschman, *The Passions and the Interests: Political Arguments for Capitalism before its Triumph* (1977); McCoy, *supra* note

n249. See Gordon S. Wood, *The Radicalism of the American Revolution* 243-70 (1991).

PAGE 68

82 Cornell L. Rev. 695, *772

n250. Isaac Kramnick, *Republicanism and Bourgeois Radicalism: Political Ideology in Late Eighteenth-Century England and America* 261 (1990).

n251. See, e.g., Joyce Appleby, *Liberalism and Republicanism in the Historical Imagination* 322-39 (1992); Lienesch, *supra* note 224, at 78; Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism* 177-83 (1990); Wood, *supra* note 249, at 243-70; Lance Banning, *Jeffersonian Ideology Revisited: Liberal and Classical Ideas in the New American Republic*, 43 *Wm. & Mary Q.* 3, 12 (1986); Lance Banning, *Quid Transit? Paradigms and Process in the Transformation of Republican Ideas*, 17 *Revs. in Am. Hist.* 199, 199-200 (1989) (book review). See also Treanor, *Takings Clause*, *supra* note 5, at 823-24.

n252. See, e.g., McDonald, *supra* note 164, at 188-90; Wood, *supra* note 249, at 243-70.

n253. McDonald, *supra* note 164, at 190.

n254. *The Federalist* No. 72, *supra* note 225, at 488 (Alexander Hamilton).

n255. 2 Farrand, *supra* note 27, at 53.

n256. See Lienesch, *supra* note 224, at 145-50.

n257. *The Federalist* No. 34, at 210 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). See also Treanor & Sperling, *supra* note 5, at 1942-43 (discussing Framers' conscious choice of an open-ended constitution).

n258. Rahe, *supra* note 224, at 571 (quoting Harrington). See also Lienesch, *supra* note 224, at 181 ("Under the new system, Americans were never again to undertake extraordinary political actions, because from that time there were, at least in theory, no more revolutions to be fought and no more constitutions to

be founded. Above all, from that time there was no more fame to be won").

n259. U.S. Const. art. II, 2, cl. 1.

n260. James Iredell, Answers to Mr. Mason's Objections to the New Constitution, in Pamphlets on the Constitution of the United States, *supra* note 140, at 335, 348. See also Akhil Reed Amar, Some Opinions on the Opinion Clause, 82 Va. L. Rev. 647, 672-74 (1996).

n261. Miroff, *supra* note 224, at 124.

n262. *Id.*

n263. See Wills, *supra* note 224, at 109-32. The other American to achieve a similar level of renown, Benjamin Franklin, had become world famous before the Revolution. See *id.* at 199-200.

n264. Brookhiser, *supra* note 224, at 135.

n265. Letter from John Adams to Benjamin Rush (Nov. 11, 1807), in Spur, *supra* note 235, at 97.

n266. Letter from Benjamin Rush to John Adams (Aug. 14, 1805), in Spur, *supra* note 235, at 31, 32.

PAGE 69

82 Cornell L. Rev. 695, *772

n267. Thomas Jefferson, Notes on the State of Virginia, in Thomas Jefferson: Writings 123, 190 (Merrill D. Peterson ed., 1984).

n268. 10 The Documentary History of the Ratification of the Constitution 1378 (John P. Kaminski & Gaspare J. Saladino eds., 1976) [hereinafter Documentary History].

n269. 9 *id.* at 1058.

n270. Annals of Cong., 6th Cong. 17 (Dec. 1799).

n271. Adams, Davila, *supra* note 232, at 260. See also *supra* text accompanying note 232.

n272. The Federalist No. 4, at 191 (John Jay) (Jacob E. Cooke ed., 1961).

n273. The Federalist No. 34, *supra* note 257, at 213 (Alexander Hamilton).

n274. *Id.*

n275. Samuel Johnson, A Dictionary of the English Language 44 (reprint ed. 1877).

n276. "Foreign Spectator," Letter to Independent Gazetteer (Sept. 8, 1787), in Documentary History, *supra* note 268, at microfiche supplement 308.

n277. 10 *id.* at 1282.

n278. 9 *id.* at 1068 (alteration in original).

n279. *Id.* at 1058.

n280. 13 *id.* at 435.

n281. 15 *id.* at 236.

n282. *Id.*

n283. *Id.*

n284. 10 *id.* at 1602-03.

n285. 15 *id.* at 463.

n286. 15 *id.* at 463.

n287. 4 The Complete Anti-Federalist 128-29 (Herbert J. Storing ed., 1981).

n288. McDonald, *supra* note 164, at 163-64.

n289. See David F. Epstein, The Political Theory of the Federalist 183 (1984).

n290. The Federalist No. 10, at 61 (James Madison) (Jacob E. Cooke ed.,
PAGE 70

82 Cornell L. Rev. 695, *772

1961). See also The Federalist No. 63, at 423 (James Madison) (Jacob E. Cooke ed., 1961) (one of the advantages of the Senate over the House was that "a sense of national character ... can only be found in a number so small, that a

sensible degree of the praise and blame of public measures may be the portion of each individual.").

n291. See *supra* text accompanying notes 254-55.

n292. Adams, Davila, *supra* note 232, at 254.

n293. *Id.*

n294. The Federalist No. 6, at 29 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

n295. *Id.*

n296. See *id.*

n297. *Id.*

n298. See *supra* Part I.C. (discussing the ratification debates).

n299. See *infra* text accompanying notes 305-18.

n300. See Schlesinger, *supra* note 13, at 18.

n301. See Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic* 375-77 (1995); Schlesinger, *supra* note 13, at 18-19.

n302. Alexander Hamilton, *Pacificus* No. 1, in 15 *The Papers of Alexander Hamilton* 33, 42 (Harold C. Syrett & Jacob E. Cooke eds., 1969) [hereinafter *Hamilton Papers*].

n303. *Id.*

n304. *Id.*

n305. Letter from James Madison to Thomas Jefferson (June 13, 1793), in 15 *Madison Papers*, *supra* note 35, at 29.

n306. Letter from Thomas Jefferson to James Madison (July 7, 1793), in 15 *Madison Papers*, *supra* note 35, at 43.

n307. See James Madison, "Helvidius" Number 1, in 15 *Madison Papers*, *supra* note 35, at 66; James Madison, "Helvidius" Number 2, in 15 *Madison Papers*, *supra* note 35, at 80; James Madison, "Helvidius" Number 3, in 15 *Madison Papers*, *supra*

note 35, at 95; Madison, "Helvidius" Number 4, *supra* note 35, at 106; James Madison, "Helvidius" Number 5, in 15 Madison Papers, *supra* note 35, at 113.

n308. Madison, "Helvidius" Number 4, *supra* note 35, at 108.

n309. Professor Corwin, for example, criticized Madison for failing to offer an alternative constitutional vision. See Edwin Corwin, *The President's Control*

PAGE 71

82 Cornell L. Rev. 695, *772

of Foreign Relations 28 (1917). Professor Schlesinger has stated that Madison's "sketch of the constitutional situation did not really explain how, if the executive were to be so constrained, foreign affairs were after all to be conducted." Schlesinger, *supra* note 13, at 20. Professor Sofaer wrote that Madison's position was inconsistent with the concept of "mixing" that he advanced in the Federalist Papers, and that it was not logically coherent, since Madison acknowledged that the Executive could legitimately take some actions that would make war more likely. See Sofaer, *supra* note 14, at 114-15. But see Banning, *supra* note 301, at 527 n.18 (Helvidius "decimates the logic of Hamilton's argument that the executive possesses something like a concurrent right with the legislature to determine whether treaty obligations compel war or peace.").

n310. See Banning, *supra* note 301, at 377.

n311. Madison, "Helvidius" Number 4, *supra* note 35, at 108-09.

n312. *Id.* at 108.

n313. *Id.*

n314. *Id.*

n315. *Id.*

n316. *Id.*

n317. *Id.*

n318. *Id.* at 109.

n319. See Boston Patriot, *supra* note 185.

n320. For a general history, see DeConde, *supra* note 185. See also *supra* text

accompanying note 180.

n321. See Schlesinger, *supra* note 13, at 21.

n322. Letter from John Adams to James Lloyd (Jan. 1815), in 10 Adams Works, *supra* note 185, at 108, 113. Adams's moderation during the critical period in the conflict is described in DeConde, *supra* note 185, at 181-222.

n323. Annals of Congress, 5th Cong. 1326 (Mar. 1798).

n324. Letter from Abigail Adams to Mary Cranch (Mar. 27, 1798), in New Letters of Abigail Adams 147, 148 (Stewart Mitchell ed., 1947).

n325. See John Miller, Alexander Hamilton: Portrait in Paradox 474 (1959).

n326. See *id.* at 475.

n327. See *id.*

n328. See *id.*

PAGE 72

82 Cornell L. Rev. 695, *772

n329. See *id.* at 475-76.

n330. See *id.*

n331. See *id.* at 476; John Fehrling, John Adams: A Life 362 (1992).

n332. Letter from John Adams to James Lloyd (Feb. 17, 1815), in 10 Adams Works, *supra* note 185, at 124.

n333. See Miller, *supra* note 325, at 482.

n334. Boston Patriot, *supra* note 185, at 290.

n335. *Id.*

n336. *Id.* at 306.

n337. *Id.* at 309-10.

n338. *Id.* at 280.

n339. DeConde, *supra* note 185, at 112 (quoting letter from Adams to Adrian Van der Kemp (Apr. 25, 1808)).

n340. Letter from John Adams to Benjamin Rush (Jan. 25, 1806), in Spur,

supra
note 235, at 47-48.

n341. Editorial Note, in 22 Hamilton Papers, supra note 302, at 5. See also Miller, supra note 325, at 475. But see Forrest McDonald, Alexander Hamilton 443 n.21 (1979) (rejecting view that Hamilton was driven by desire for fame during the Quasi-War).

n342. Letter from Pickering to Jay (July 28, 1798), in 6 The Works of Alexander Hamilton 329, 330 (John C. Hamilton ed., 1850).

n343. See Miller, supra note 325, at 5.

n344. See id.

n345. Letter from Alexander Hamilton to Edward Stevens (Nov. 11, 1769), in 1 Hamilton Papers, supra note 302, at 4.

n346. Id.

n347. Boston Patriot, supra note 185, at 290.

n348. Madison, "Helvidius" Number 4, supra note 35, at 108.

n349. Annals of Cong., 5th Cong. 1326 (Mar. 1798).

n350. Address of James Blake, Chair of a Committee of Washington, D.C. Citizens, to James Madison (Mar. 4, 1817), quoted in Drew R. McCoy, The Last of the Fathers: James Madison and the Republican Legacy 12 (1989).

n351. Id. (alteration in original).

PAGE 73

82 Cornell L. Rev. 695, *772

n352. Annals of Cong., 12th Cong., 2d Sess. 449 (Dec. 1812).

n353. Id. at 448-49.

n354. Annals of Cong., 13th Cong., 1st Sess. 956 (Jan. 1814).

n355. Id. at 579.

n356. Id. at 580.

n357. Id. at 942.

n358. Annals of Cong., 12th Cong., 2d Sess. 540 (Jan. 1813).

n359. *Id.*

n360. *Id.* at 514. For a discussion of Napoleon, his desire for greatness, and popular perceptions, see Braudy, *supra* note 224, at 408-16.

n361. For a discussion of Congressman Quincy and the prominence of this speech, see Donald R. Hickey, *The War of 1812*, at 109 (1989).

n362. *Annals of Cong.*, 12th Cong., 2d Sess. 561 (Jan. 1813).

n363. *Id.* at 549.

n364. *Id.* at 564.

n365. *Id.* at 548.

n366. *Id.* at 547.

n367. *Id.*

n368. *Id.* at 548.

n369. See Hickey, *supra* note 361, at 158.

n370. *Annals of Cong.*, 13th Cong., 1st Sess. 965 (Jan. 1814).

n371. *Id.* at 971.

n372. *Id.* at 971-72.

n373. *Id.* at 963.

n374. *Id.* at 972.

n375. For a discussion of Herostratus and the use of his actions as a cautionary tale, see *supra* text accompanying notes 231-33.

n376. See *supra* text accompanying notes 69-81.

n377. See *supra* text accompanying notes 152-57.

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PAGE 74

82 Cornell L. Rev. 695, *772

n378. See *supra* text accompanying notes 70-79.

n379. Madison, "Helvidius" Number 4, *supra* note 35, at 108.

n380. See *supra* text accompanying notes 189-99.

n381. See *supra* text accompanying notes 186-200.

n382. Robert H. Bork, *The Tempting of America* 144 (1990).

n383. The translation model has been developed by Professor Lawrence Lessig.
See Lawrence Lessig, *Fidelity in Translation*, 71 *Tex. L. Rev.* 1165 (1993); Lawrence Lessig, *Translating Federalism: United States v Lopez*, 1995 *Sup. Ct. Rev.* 125; Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 *Stan. L. Rev.* 395 (1995). For an application of Lessig's model, see Treanor, *Takings Clause*, *supra* note 5, at 855-87.

n384. See Lessig, *Fidelity in Translation*, *supra* note 383, at 1263; Treanor, *Takings Clause*, *supra* note 5, at 856-57.

n385. Ronald Dworkin, for example, is the paradigmatic example of a constitutional philosopher who advances a moral reading of the document, but nonetheless draws on history and tradition as guides to constitutional decisionmaking through his concept of "fit." See Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* 3-18 (1996); Ronald Dworkin, *Law's Empire* 227-28 (1986). For further discussion of the role of history in constitutional interpretation, even among nonoriginalists, see Flaherty, *supra* note 31, at 1745-47.

n386. See *supra* notes 93-94 and accompanying text.

n387. 2 Alexis de Tocqueville, *Democracy in America* 243 (Phillips Bradley ed., Alfred A. Knopf 1945) (1840).

n388. *Id.* at 243-44.

n389. *Id.* at 244-47.

n390. Lienesch, *supra* note 224, at 181.

n391. *Id.* (quoting John Quincy Adams, *An Oration Pronounced July 4, 1793*).

n392. See Adair, *supra* note 32, at 8-13.

n393. John Morton Blum, *Woodrow Wilson and the Politics of Morality* 19 (1956) (quoting Wilson).

n394. Adair, *supra* note 32, at 26.

n395. Richard Reeves, *President Kennedy: Profile of Power* 278 (1993). Professor Donald, in recounting this meeting with Kennedy in the preface of his Lincoln biography, highlighted President Kennedy's concern about being regarded badly by historians:

PAGE 75

82 Cornell L. Rev. 695, *772

He [Kennedy] voiced his dissatisfaction with the glib way the historians had rated some of his predecessors as "Below Average" and marked a few as "Failures." Thinking, no doubt, of how his own administration would look in the backward glance of history, he resented the whole process. With real feeling he said, "No one has a right to grade a President - not even poor James Buchanan - who has not sat in his chair, examined the mail and information that came across his desk, and learned why he made his decisions."

David Herbert Donald, *Lincoln* 13 (1995).

n396. Abraham Lincoln, Address before the Young Men's Lyceum of Springfield, Illinois (Jan. 27, 1838), in 1 *The Collected Works of Abraham Lincoln* 108, 113 (Roy P. Basler ed., 1953) (emphasis omitted).

n397. *Id.*

n398. *Id.* (emphasis omitted).

n399. *Id.* at 114 (emphasis omitted). This speech has inspired extensive scholarly commentary since Edmund Wilson first focused attention on it. See Edmund Wilson, *Patriotic Gore: Studies in the Literature of the American Civil War* 106-08 (1962) (arguing that Lincoln envisioned himself as the individual who threatened the constitutional order). In particular, Lincoln psychobiographers have argued that the speech offers a key to understanding the former President. See Dwight G. Anderson, *Abraham Lincoln; The Quest for Immortality* 68-78 (1982); George B. Forgie, *Patricide in the House Divided: A Psychological Interpretation of Lincoln and His Age* 83-86, 249-70 (1979); Charles B. Strozier, *Lincoln's Quest for Union: Public and Private Meanings* 61 (1982). Garry Wills has recently criticized the psychobiographers'

argument that the speech reflects "hostility to 'the fathers.'" Garry Wills, *Lincoln at Gettysburg: The Words that Remade America* 79 (1992). My claim here, however, is not that Lincoln was hostile to the Founders. Rather, it is that he envied the fame they had achieved and hoped to achieve a similar immortality. My interpretation accords with, and was influenced by, Professor David Donald's reading of the speech. According to Donald, Lincoln's speech reflected "his thirst for distinction," and it accorded with statements that he had made privately to his close friend Joshua Speed. See Donald, *supra* note 395, at 81. "To this one intimate friend," Donald writes, "Lincoln confessed his ambition 'to link his name with something that would redound to the interest of his fellow man,' and in his darker moods he lamented 'that he had done nothing to make any human being remember that he had lived.'" Id. (quoting Letter from Joshua Speed to William H. Herndon, Feb. 1866). For further discussion of the speech, see William Michael Treanor, *Learning from Lincoln*, 65 *Fordham L. Rev.* (forthcoming 1997).

n400. Forrest McDonald, *the American Presidency* 466-67 (1994).

n401. William E. Leuchtenburg, *In the Shadow of FDR: From Harry Truman to Ronald Reagan* (rev. ed. 1989).

n402. Id. at 265. The first edition of Leuchtenburg's book was published in 1983.

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PAGE 76

82 *Cornell L. Rev.* 695, *772

n403. Id. at xi.

n404. Interview with Alonzo Fields, White House Butler, American Experience: FDR (PBS television broadcast, Oct. 12, 1994) (*Journal Graphics Transcripts* #702, on file with author). It should be noted that other accounts of Roosevelt's reaction to the bombing of Pearl Harbor are different. For example, relying on Sumner Welles's and Eleanor Roosevelt's statements, historian Doris Kearns Goodwin describes Roosevelt's "imperturbable demeanor." Doris Kearns Goodwin, *No Ordinary Time: Franklin and Eleanor Roosevelt: The Home Front in World War II* 289 (1994).

n405. James Reston, Private Behavior, Public Responsibility, N.Y. Times, Dec. 25, 1987, at A27.

n406. Abraham Lincoln, Speech in United States House of Representatives: The War with Mexico (Jan. 12, 1848), in 1 The Collected Works of Abraham Lincoln, supra note 396, at 439. For an analysis of this passage, see Donald, supra note 395, at 124.

n407. Alan Brinkley, The 43% President, N.Y. Times, July 4, 1993, 6, at 22.

n408. See Reeves, supra note 395, at 278. See also Michael S. Sherry, In the Shadow of War, The United States Since the 1930s, at 244 (1995) (asserting that Kennedy hoped his presidency would witness a "climax" to history "yielding winners and losers."); supra text accompanying note 395.

n409. Eric F. Goldman, The Tragedy of Lyndon Johnson 384 (1969).

n410. Leuchtenburg, supra note 401, at 142 (quoting Goldman, supra note 409, at 20).

n411. Id. at 160.

n412. Doris Kearns, Lyndon Johnson and the American Dream 285 (1976).

n413. See Committee on Foreign Relations, Termination of Middle East and Southeast Asia Resolutions, S. Rep. No. 91-834, at 6-8 (1970).

n414. Id. at 8. The Committee called on future Presidents to embrace, instead, the view of presidential greatness offered by the historian Thomas Bailey in his book Presidential Greatness:

"The bare fact that a President was a strong one, or a domineering one, does not necessarily mean that he was a great one or even a good one. The crucial questions arise: Was he strong in the right direction? Was he a dignified, fair, constitutional ruler, serving the ends of democracy in a democratic and ethical manner?"

Id. (quoting Thomas A. Bailey, Presidential Greatness 227 (1966)).

n415. Richard Nixon, In the Arena: A Memoir of Victory, Defeat and

n416. *Id.* at 27.

n417. *Id.* (quoting with approval Isaiah Berlin).

n418. Christopher Buckley, *Final Judgments*, N.Y. Times, Aug. 25, 1996, 7, at 5 (reviewing Monica Crowley, *Nixon Off the Record* (1996) (quoting Nixon statement recorded in Crowley book)).

n419. Bob Woodward, *The Commanders* 6 (1991) (quoting William Crane).

n420. See R.W. Apple, Jr., *Why the Choice of '96 Will Remain a Bafflement*, N.Y. Times, Aug. 18, 1996, 4, at 1. It should be noted that, just as Presidents are concerned with their place in history, so too have they been concerned with learning the lessons of history, although they have not always drawn the lessons scholars might think appropriate. In much of the post-World War II era, Presidents have concluded that the lesson to be drawn from history was the need for toughness in dealing with foreign nations. See Ernest R. May, "Lessons" of the Past: The Use and Misuse of History in American Foreign Policy 10, 57, 113-14 (1973). In the wake of the Vietnam War, the lessons of past wars have been understood differently by different Presidents. Compare Sherry, *supra* note 408, at 344-45 (asserting that Carter opposed militarization in part because of nation's experience in Vietnam), with *id.* at 392-93 (asserting that Reagan's "memories and experience of World War II and the War" encouraged his support for militarization).

n421. Arthur Schlesinger, Sr. conducted the first such poll of historians in 1948. See Arthur M. Schlesinger, *What Makes a President Great? Or a Failure? The Verdict of History Provides Some Answers*, *Life*, Nov. 1, 1948, at 66 (ranking Lincoln, Washington, and Franklin D. Roosevelt as the three greatest Presidents). Eight subsequent polls have similarly concluded that Lincoln, Washington, and

Franklin D. Roosevelt were our three greatest Presidents. And each of the polls has ranked Lincoln the "greatest" of the three. See, e.g., Robert K. Murray & Tim H. Blessing, *The Presidential Performance Study: A Progress Report*, J. Am. Hist. 535, 542 (1983) (ranking Lincoln, Washington, and Franklin D. Roosevelt as the greatest Presidents); Steve Neal, *Putting the Presidents in Their Place: Longtime Favorites Top the List*, Chi. Sun-Times, Nov. 19, 1995, at 30 (same); Arthur M. Schlesinger, *Our Presidents: A Ranking by 75 Historians*, N.Y. Times, Dec. 15, 1996, 6 (Magazine), at 12 (same); Arthur M. Schlesinger, Jr., *The Ultimate Approval Rating*, N.Y. Times, Dec. 15, 1996, 6 (Magazine), at 46 (same). The ranking lists produced by these surveys, except for the two most recent, are presented in Jack E. Holmes & Robert E. Elder, Jr., *Our Best and Worst Presidents: Some Possible Reasons for Perceived Performance*, 19 Presidential Stud. Q. 529 (1989).

n422. On designation of this group, see Dean Keith Simonton, *Why Presidents Succeed: A Political Psychology of Leadership 175-85* (1987) (presenting list and summarizing data). Theodore Roosevelt and Thomas Jefferson also have powerful associations with war, Roosevelt as a war hero during the Spanish-American War, and Jefferson as the author of the Declaration of Independence and a leading Revolutionary War political figure.

n423. See Dean Keith Simonton, *Presidential Greatness: The Historical Consensus and Its Psychological Significance*, 7 Pol. Psychol. 259, 270-71 (1986).

PAGE 78

82 Cornell L. Rev. 695, *772

n424. See id. at 269-71.

n425. See id. at 273.

n426. See, e.g., Holmes & Elder, *supra* note 421, at 544, 546; David C. Nice, *The Influence of War and Party System Aging on the Ranking of Presidents*, 37 W. Pol. Q. 443 (1984); Hans W. Wendt & Paul C. Light, *Measuring "Greatness" in American Presidents: A Model Case for International Research on Political Leadership*, 6 Eur. J. Soc. Psychol. 105 (1976).

n427. See Sidak, *supra* note 190, at 85-86. The one exception is President Grover Cleveland, who strongly and successfully opposed war with Spain in 1896. See *id.* at 86. Although President Adams opposed declaring war against France, despite a faction in Congress that wanted war, the clear majority of Congress opposed war - even among the Federalists. See Boston Patriot, *supra* note 185, at 305 n.2. (noting that Federalist congressional caucus voted against declaration of war).

n428. The classic statement of the political question doctrine is found in *Baker v. Carr*, 369 U.S. 186 (1962).

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. For the position that the doctrine is not followed at the Supreme Court level, see Ely, *supra* note 8, at 55; Louis Henkin, Is There a "Political Question" Doctrine?, 85 Yale L.J. 597 (1976).

n429. See *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973); *Lowry v. Reagan*, 676 F.Supp. 333 (D.D.C. 1987); *Crockett v. Reagan*, 558 F.Supp. 893, (D.D.C. 1982), *aff'd per curiam*, 720 F.2d 1355 (D.C. Cir. 1983).

n430. 676 F. Supp. 333 (D.D.C. 1987).

n431. *Id.* at 338.

n432. 752 F. Supp. 1141 (D.D.C. 1990).

n433. See *id.* at 1145-46.

n434. Id. at 1151.

n435. See also Jesse H. Choper, Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court 295-96 (1980) (arguing that separation of powers disputes between the President and

PAGE 79

82 Cornell L. Rev. 695, *772

Congress should not be addressed by courts since the injured branch can defend itself politically).

n436. See supra text accompanying notes 65-68.

n437. See supra text accompanying notes 91-94.

n438. See supra text accompanying notes 95-103.

n439. Madison, "Helvidius" Number 4, supra note 35, at 108.

n440. See, e.g., Ely, supra note 8, at 8, 146 n.41 (noting fears in 1992 "that the executive might start a war to demonstrate toughness and 'leadership' in perilous political times"); Bobbitt, supra note 15, at 1383 (noting existence of belief that President Bush was motivated by electoral concerns to start a war, although dismissing that belief as an "old canard"); Dennis Duggan, Church's Candle Flickers as Does the Hope for Peace, Newsday, Jan. 10, 1991, at 6 (claiming that Presidents Bush, Reagan, Nixon, and Johnson sought "the kind of war that gets a President re-elected"); Elizabeth Neuffer, Allies Assess the Possible Fallout, Boston Globe, Sept. 6, 1995, at 11 ("President Clinton faces a tough re-election campaign - and ... it is important to his image to be seen as forceful in Bosnia."); William Safire, Comeback Coming, N.Y. Times, Feb. 27, 1992, at A25 (suggesting that a prominent dictator "is going to get zapped" in order to aid Bush re-election campaign).

n441. See supra Part III.D.

n442. See Adair, supra note 32, at 26.

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