

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

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

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Introduction: How the War Powers Dialogue Can Work

Two recent major episodes, the United States' response to Syria's use of chemical weapons in 2013, and its war against the Islamic State of Iraq and the Levant ("ISIS") since 2014, illustrate the complicated sequence of actions and reactions by the executive and legislative branches that often occurs in connection with the exercise of our nation's war powers. In response to Syria's use of chemical weapons in 2013, President Obama initially proposed a military strike authorized by unilateral Presidential power.¹ Then he sought Congressional authorization for a military strike.² But before any Congressional decision, he agreed to a diplomatic solution with the assistance of Russia.³

In the war against ISIS, the President invited Congress to authorize a proposed military mission. But Congress did not vote on an authorization bill.⁴ Meanwhile, the executive branch implemented a campaign of air strikes, training the Iraqi military, and Special Forces missions.⁵ But President Obama refused to deploy "boots on the ground," or regular combat units.⁶ This combat strategy became an issue in the 2016 election.⁷ In 2017, the problem is one for President Trump.

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

2. *Id.*

3. Dan Friedman & James Warren, *President Obama Agrees to Pursue Diplomatic Solution in Syria, but Remains "Ready to Respond,"* N.Y. DAILY NEWS (Sept. 11, 2013), <http://www.nydailynews.com/news/world/syria-accepts-chemical-weapons-proposal-article-1.1450670>.

4. Karoun Demirjian, *Despite Ryan's Attention, Deal on ISIS Fight Authorization Still Elusive*, WASH. POST, Jan. 10, 2016, at A3; David M. Herszenhorn, *McConnell Clears Path for Debate on Giving Obama Broad Powers to Combat ISIS*, N.Y. TIMES (Jan. 21, 2016), <http://www.nytimes.com/2016/01/22/world/middleeast/mcconnell-clears-path-for-debate-on-giving-obama-broad-powers-to-combat-isis.html>; Cody M. Poplin, *35 Lawmakers Pen Bipartisan Letter Calling for ISIS AUMF*, LAWFARE (Nov. 9, 2015), <https://www.lawfareblog.com/35-lawmakers-pen-bipartisan-letter-calling-isis-aumf>.

5. David Martosko et al., *Obama to Expand Air Strikes to "Degrade" ISIS Not Just Protect Americans or Support Iraqi Forces*, DAILY MAIL (Sept. 10, 2014), <http://www.dailymail.co.uk/news/article-2750436/Obama-ready-authoriz-.against-ISIS-Syria-prepares-open-new-battle-defeat-terror-group.html>; Roberta Rampton, *Obama Ramps up Special Forces Mission in Syria Against ISIS*, HUFFINGTON POST (Apr. 25, 2016), http://www.huffingtonpost.com/entry/obama-ramps-up-special-forces-syria_us_571e2ccfe4b0d0042da9b58c; Mark Thompson, *Can the U.S. Military Train the Iraqi Army to Victory Over ISIS?*, TIME (June 10, 2015), <http://time.com/3916866/isis-iraqi-army-training>.

6. John Kerry, Sec'y of State, U.S. State Dep't, Opening Remarks Before the House Foreign Affairs Comm. (2013) (stating that, "[w]e all agree there will be no American boots on the ground").

An interactive dialogue between the two political branches of government determined the United States' role in both episodes. This dialogue is the constitutional duty, both textually and structurally, of the two branches. Unlike the usual exercise of constitutional powers, the dialogue does not follow a regular, orderly, well-structured pattern.⁸ Instead, it is a messy and, sometimes, disorderly process.⁹ But it is precisely this dialogue that enables the public to participate in decision-making about the exercise of the nation's war powers.

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

In this Article, we examine the process of inter-branch dialogue rather than focusing only on the endpoint of that dialogue: whether a resulting military action has been authorized by the Constitution.¹⁰ We believe that an overly abstract and formal analyses focused purely on that binary determination fails to consider how the political branches actually interact and influence each other prior to war. We analyze the elected branches' dynamic interactions, their proposals and responses, and how interim and partial steps play a key role in informing Congress and the people. This process has significance even where Congress does not formally enact legislation.

The process is a dialogue, as factions within Congress and the Executive Branch talk back and forth, push competing stances, propose interim actions, and exchange signals while gauging the evolving public reaction. Through this process, the government as a whole makes legitimate and democratic progress. It is "legitimate" because it gives both of the branches the opportunity to play a role as the Framers intended.¹¹ It is "democratic" because when the broader public and elected representatives have truthful information about the interests at stake and the available options, the dialogue can incorporate the truthfully-informed preferences of the broad population.¹² The process often involves disorganization, miscommunication, and zig-zagging stances and actions, but progresses nonetheless toward a

7. See Louis Jacobson, *Hillary Clinton Wrong to Say She's Only Candidate to Lay Out a "Specific Plan" to Fight ISIS*, POLITIFACT (Jan. 27, 2016), <http://www.politifact.com/truth-o-meter/statements/2016/jan/27/hillary-clinton/hillary-clinton-wrong-say-shes-only-candidate-lay>.

8. See Geoffrey Corn & Eric T. Jensen, *The Political Balance of Power Over the Military: Rethinking the Relationship Between the Armed Forces, the President, and Congress*, 44 HOUS. L. REV. 553, 563 (2007) (illustrating the lack of clarity regarding the relationship between the Congress and the Executive).

9. See *id.*

10. Perhaps another way to view this is the difference between knowing a box score and understanding the strategic decisions that a manager made during the game.

11. Jide Nzelibe, *Are Congressionally Authorized Wars Perverse?*, 59 STAN. L. REV. 907, 916 (2007).

12. Douglas Kriner, *Accountability Without Deliberation? Separation of Powers in Times of War*, 95 B.U. L. REV. 1275, 1288-89 (2015).

course of action or inaction.¹³

Part I discusses the model of war powers dialogue. Among other things, it discusses how a model focusing on the dynamic interaction between Congress and the President describes and explains so much more than a simple binary question of whether military action was “authorized” or “not authorized.” Part II addresses the U.S. response to President Assad’s use of chemical weapons in Syria in 2013, and notes that the dialogue shifted from a possible unilateral Presidential action to a period when Congress considered whether to deny the requested authorization. Part III addresses the U.S. response to ISIS’s occupation of Iraqi territory from 2014 to 2016.¹⁴ The ultimate decision to use air strikes, military training, and Special Forces missions, but not ground combat units, resulted from both Executive intention and Congressional deliberation.¹⁵ The Conclusion highlights the importance of understanding the interactive process that underlies the use of the United States’ war powers.

This Article refers to this process as a “dialogue” because the participants sometimes have a literal dialogue with each other. For example, at Congressional hearings, Executive Branch witnesses confront Senators or Representatives.¹⁶ Sometimes they engage in another kind of dialogue, such as when the President announces executive actions and Congressional leaders propose legislation that would support the action or oppose it.¹⁷ Sometimes the interaction is more of a “dance,” such as when the President takes a series of steps and stances, and Congress takes its own distinct series of steps and stances.¹⁸

I. The War Powers Dialogue

One can identify two contrasting models regarding the exercise of war powers.¹⁹ Under one model, the “presidency [is] shorn of controls,” and the President has “broad and exclusive executive power in the national

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

14. For prior treatment, see Olivia Gonzalez, Comment, *The Pen and the Sword: Legal Justifications for the United States’ Engagement Against the Islamic State of Iraq and Syria (ISIS)*, 39 FORDHAM INT’L L.J. 133, 159–60 (2015).

15. See Am. Soc’y. of Int’l. L., *President Obama Seeks Statutory Authorization for the Use of Military Force Against ISIL*, 109 AM. J. INT’L L. 429, 430–32 (Kristina Daugirdas & Julian Davis Mortenson eds., 2015).

16. See CHRISTOPHER M. BLANCHARD & CARLA E. HUMUD, CONG. RESEARCH SERV., R43612, *THE ISLAMIC STATE AND U.S. POLICY* 10–11 (2016) (discussing Congress hearing on ISIS in 2015); Julia L. Chen, Note, *Restoring Constitutional Balance: Accommodating the Evolution of War*, 53 B.C. L. REV. 1767, 1793–94 (2012) (discussing Congressional hearings on Libya in 2011).

17. See *infra* text accompanying note 307 (discussing Congressional authorizations for 1991 Persian Gulf war and 2003 invasion of Iraq).

18. See generally RICHARD F. GRIMMETT, FOREIGN POLICY ROLES OF THE PRESIDENT AND CONGRESS (June 1, 1999) (illustrating how the President and Congress support or seek to change each other’s policies respectively).

19. See generally HAROLD BRUFF, UNTRIDDEN GROUND: HOW PRESIDENTS INTERPRET THE CONSTITUTION (2015).

security realm.”²⁰ This model can explain or justify the 2011 Libyan airstrikes,²¹ and could have been invoked to justify presidentially authorized airstrikes in response to Syria’s use of chemical weapons as well as air strikes in response to ISIS.²²

The second model focuses on Congress’s ability to constrain or deny required authorization for Presidential action.²³ This model suggests that President Obama should have congressional authorization for any response to ISIS rather than relying on unilateral assertions of executive power.²⁴ Even so, under this model, President Obama would have been criticized for both his strained interpretation of an outdated Congressional authorization, and, perhaps, for the late-2015 enlargement of the mandated mission by engaging Special Forces against ISIS in Syria.²⁵

These two approaches stand in tension with each other. The first (the “pro-Executive approach”) contends that the President has unilateral authority under the Constitution.²⁶ The second (the “pro-Congressional approach”) contends that Congress can rein in the President’s exercise of war powers.²⁷ But they are both binary in the sense that they focus on the question of whether or not the exercise of war powers was authorized.

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

20. *Id.* at 5.

21. Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2082–83 (2005); Chen, *supra* note 16, at 1793.

22. Kenneth R. Mayer, *Executive Power in the Obama Administration and the Decision to Seek Congressional Authorization for a Military Attack Against Syria: Implications for Theories of Unilateral Action*, 2014 UTAH L. REV. 821, 827; John Yoo, *Like It or Not, Constitution Allows President to Strike Syria Without Congressional Approval*, FOX NEWS (Aug. 30, 2013), <http://www.foxnews.com/opinion/2013/08/30/constitution-allows-obama-to-strike-syria-without-congressional-approval.html>.

23. Charles Tiefer, *Can Appropriation Riders Speed Our Exit from Iraq?*, 42 STAN. J. INT’L L. 291, 297–98 (2006) [hereinafter Tiefer, *Appropriation Riders*] (discussing Congress’s history of placing legislative restrictions on foreign aid, and concluding that such congressional efforts to remain involved in war policy is important to democracy). See generally David J. Barron & Martin S. Lederman, *The Commander-in-Chief at the Lowest Ebb: A Constitutional History*, 121 HARV. L. REV. 944, 941–1112 (2008) (chronicling the history of presidential war powers, and arguing that Congress has been an active participant in determining war policy).

24. Barron & Lederman, *supra* note 23, at 1101 (arguing that Presidents in the past have understood that their wartime powers are constrained by legislatively-imposed restrictions).

25. There is a new analysis that Presidents may well make strained interpretations as a better alternative to battling on constitutional powers and issues. Peter Shane, *The Presidential Statutory Stretch*, 87 COLO. L. REV. 1231, 1234 (2016) (asserting that “it turns out that legal arguments based on a statutory stretch are more facilitative of the rule of law than would be bolder claims of exclusive executive authority under Article II”).

26. See BRUFF, *supra* note 19, at 5 (describing the belief that the President is not subject to congressional controls).

27. Barron & Lederman, *supra* note 23, at 692–93; Jules Lobel, *Conflicts Between the Commander in Chief and Congress: Concurrent Power Over the Conduct of War*, 69 OHIO ST. L.J. 391, 393, 395 (2008).

precedents to expand upon provisions in the Constitution that were themselves without explicit original war-making significance, such as the clauses for “executive power” and “Commander in Chief.”²⁸ The pro-Congressional approach refers back to the Framers’ original consignment of war powers to Congress in the clause about “declaring war,” and the uses of legislative and appropriation provisions about war powers.²⁹

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

A different model is found in Professor Bruff’s recent work, *Untrodden Ground: How Presidents Interpret the Constitution*.³⁰ Professor Bruff deals with a variety of subjects, including, importantly, war powers. He traces the lineage of the war powers doctrine from George Washington to Barack Obama.³¹ The focus is not on whether particular war powers actions were authorized, although that does get some attention.³² Rather, the focus is on the dynamic process of war power initiation and conduct, and the variety of factors bearing upon that process.³³ This Article uses an analogous approach.

This approach does not fit the current war powers episodes into the previously elaborated system of thought that focuses on the authority of one branch over the other. By contrast, it pays specific attention to newly emerging, current practices, working up, from an analysis of the steps and stances in the process rather than down, from a historically-framed system.³⁴

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

28. The issues are analyzed, unsympathetically to executive positions, in Barron & Lederman, *supra* note 24, at 1106–07.

29. *Id.* at 1008, 1108.

30. BRUFF, *supra* note 19. A somewhat similar distinction has been made by political scientists operating on the subject also studied by the legal scholars. Peter M. Shane, *Constitutionalism and War Making*, 92 TEX. L. REV. 689, 690 (2014) (reviewing MARIAH ZEISBERG, *WAR POWERS: THE POLITICS OF CONSTITUTIONAL AUTHORITY* (2013) and STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* (2013)). An article entirely focused on war powers following, roughly, this model, is Christopher A. Ford, *War Powers as We Live Them: Congressional-Executive Bargaining Under the Shadow of the War Powers Resolution*, 11 J.L. & POL. 609, 609–708 (1995).

31. See Bruff, *supra* note 19, at 401–55.

32. *Id.* at 413–45.

33. Ford, *supra* note 30, at 614, traces the approach that some kinds of law are as much or more about process rather than formal standards back to the “New Haven School” of international law.

34. And, again, the approach does not produce a binary view of the war powers action as authorized or not. Rather, the focus concerns the dynamic interactions of the President and Congress, and the workings of the dialogue process, rather than to characterize and classify a few formal specifics for purposes of deciding authorization.

cess democratic and legitimate, regardless of how pro-executive or pro-congressional analysts would analyze them. For instance, President Obama engaged in genuine consultation with congressional leaders regarding Syria's use of chemical weapons in 2013, leading him to decide not to proceed unilaterally.³⁵ And in 2014, President Obama invited Congress to enact a legislative authorization for a U.S. military response to the conflict with ISIS, which Congress may well have turned into a vehicle for limitations or other expressions of its stance.³⁶ Other analytical approaches generally give only lip service to presidential consultation with Congress.³⁷ This may be for good reason. Often, genuine consultation does not occur at all, and when it does occur, it may be hard to objectively gauge how robust that consultation is. Informal methods of consultation do not easily fit into the binary analysis of whether or not military action was authorized. But in 2013 and 2014, meaningful consultation definitely occurred.³⁸

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

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

35. See Press Release, The White House, Statement by the President on Syria (Aug. 31, 2013), <https://www.whitehouse.gov/the-press-office/2013/08/31/statement-president-syria>.

36. Jim Acosta & Jeremy Diamond, *Obama ISIS Fight Request Sent to Congress*, CNN (Feb. 12, 2015), <http://www.cnn.com/2015/02/11/politics/isis-aumf-white-house-congress/>.

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

38. Press Release, The White House, *supra* note 35.

39. *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 635 (1952).

40. Robert Bejesky, *War Powers Pursuant to False Perceptions and Asymmetric Information in the "Zone of Twilight,"* 44 ST. MARY'S L.J. 1, 13-14 (2012).

41. *Youngstown*, 343 U.S. at 657-58.

42. *Id.* at 612.

43. *Id.* at 601, 613.

44. *Id.* at 579, 638-39.

power.⁴⁵ He cared much more about the actual interaction between the two political branches.⁴⁶ This “zone of twilight” analysis attended closely to a highly significant sequence of steps in which the President sought authorization and Congress vigorously rebuffed those requests (although Congress did not enact a law expressly prohibiting Presidential action).⁴⁷

The “dialogue” model—unlike other models—places great importance on whether the Executive provides truthful information to the public and to Congress, particularly at congressional hearings.⁴⁸ After all, once Congress has enacted a law, such as an authorization for war, the enactment is not rendered null just because the Executive misled Congress or engaged in prevarication.⁴⁹ Moreover, wars have often taken directions that were completely unexpected at the start, such as when U.S. authorization for entering World War I led to the U.S. army invading Russia to fight the Bolsheviks.⁵⁰

The “dialogue” approach includes a focus on the Executive’s provision of information because that is a large part of the interaction between Congress and the President.⁵¹ The act of providing information is less formal than the enactment of war authorization or a formal Presidential order for military action without Congressional authorization. But the nation’s exercise of particular war powers is more likely to be viewed as democratic and legitimate if the Executive has first candidly shared information with Congress.

Three war powers actions over the last half-century illustrate the importance of providing such truthful information. The 1964 Gulf of Tonkin Resolution was passed by both Houses and signed by the President, providing broad authority for military action in Vietnam.⁵² From the binary frame of whether the Vietnam War was authorized, the Gulf of Tonkin Resolution seems to provide such authority.⁵³ But the Johnson Administration was deceptive in obtaining that authorization.⁵⁴ President Johnson claimed his intent was limited to bombing North Vietnam and failed to disclose that he would use the resolution to justify a huge, bloody ground war.⁵⁵ The “dialogue” model includes in its frame consideration of the information that the Executive Branch provides to Congress, including

45. See *id.* at 635.

46. *Id.*

47. See *id.* at 657-58.

48. Lori Fisler Damrosch, Comment, *War and Uncertainty*, 114 YALE L.J. 1405, 1413 (2005).

49. See *id.* at 1407.

50. See Ernest Zitser, “Dirty Place for Americans to Be”: Images of the Russian Civil War in Siberia from the Robert L. Eichelberger Collection at the Duke University Libraries, SLAVIC & EAST EUR. INFO. RESOURCES 29, 30 (2009).

51. See Damrosch, *supra* note 48, at 1413.

52. See *id.* at 1409.

53. *Id.*

54. See Robert Bejesky, *Precedent Supporting the Constitutionality of Section 5(b) of the War Powers Resolution*, 49 WILLAMETTE L. REV. 1, 12-13 (2012).

55. See John Hart Ely, *The American War in Indochina, Part I: The (Troubled) Constitutionality of the War They Told Us About*, 42 STAN. L. REV. 877, 891 (1990).

whether that information was accurate.⁵⁶

In 1987, after the Iran-Contra Affair was disclosed in the press and the congressional investigation ensued, the Reagan Administration put forward formal justifications for its actions.⁵⁷ Although Congress had enacted the Boland Amendments prohibiting the executive branch from spending appropriations for logistical support of the Nicaraguan Contras, the Reagan Administration nevertheless provided the Contras with logistical support.⁵⁸ Supporters of President Reagan argued that the arms funding came not from appropriations but from foreign governments' contributions.⁵⁹ The model of expansive executive prerogative, focusing on the formal source of the money, would seem to support this view.

But during 1984-1986, the Reagan Administration's statements to Congress about the contras included multiple falsehoods.⁶⁰ Much of the Iran-Contra investigations focused on those falsehoods.⁶¹ The simple binary models, with their limited focus on legal authorization, do not capture a critical aspect of constitutional war-making: whether the executive branch's communications to Congress and the public are truthful.

For the Iraq War that started in 2003, the Bush Administration had obtained an authorization, passed in 2002 by both Houses and signed by the President. Congress authorized that war more than six months before the U.S. invasion began.⁶² Formally, the war had congressional authorization. Yet the Bush Administration presented to Congress and the public a highly misleading case that Iraq had weapons of mass destruction ("WMD").⁶³ The "dialogue" model captures the illegitimacy of this war in ways that the binary model does not: the fact that a key predicate for congressional authorization was the executive branch's inaccurate assertions to Congress and the public that Saddam Hussein had ready-for-action WMD.

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

56. See, e.g., *id.* at 888-89 (describing the factually inaccurate information that the Administration gave to Congress about what happened in the Tonkin Gulf).

57. See Robert E. Gilbert, *The Politics of Presidential Illness: Ronald Reagan and the Iran-Contra Scandal*, 33 POL. & LIFE SCI. 58, 71 (2014).

58. See Bejesky, *supra* note 54, at 24.

59. H.R. Rep. No. 100-433, pt. 1, at 18-19 (1987).

60. See Charles Tiefer, *The Specially Investigated President*, 5 U. CHI. L. SCH. ROUND-TABLE 143, 151 (1998).

61. *Id.*; see *In re Abrams*, 689 A.2d 6, 6-7 (D.C. 1997) (censuring former Assistant Secretary of State Elliott Abrams for deceiving Congress).

62. A vigorous argument was made that Congress had only authorized a limited war, and that President Bush had improperly escalated it beyond the Congressional mandate. Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447, 459, 464 (2011).

63. See James P. Pfiffner, *Did President Bush Mislead the Country in His Arguments for War with Iraq?*, 34 PRESIDENTIAL STUD. Q. 25, 28 (2004).

to respond.⁶⁴ A binary model, focused only on authorization, does not take hearings seriously, denigrating them as mere talk rather than formal legislative action.

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

II. Syria 2013: The Dialogue in Action

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

A. Air Strikes Considered

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

President Obama took seriously the need to consult Congress. There

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

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

66. See *Syria Chemical Attack: What We Know*, BBC NEWS (Sept. 24, 2013), <http://www.bbc.com/news/world-middle-east-23927399>.

67. Matthew C. Waxman, *Syria, Threats of Force, and Constitutional War Powers*, 123 YALE L.J. ONLINE 297, 297 (2013).

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

69. But see Mark Landler, *On Syria, a Drumbeat with Some Echoes of Iraq*, N.Y. TIMES (Aug. 28, 2013), <http://www.nytimes.com/2013/08/29/world/middleeast/on-syria-a-drumbeat-with-some-echoes-of-iraq.html> (suggesting that the Obama administration would pursue missile strikes, but not a sustained air campaign).

70. See Chris Edelson & Donna G. Starr-Deelen, *Libya, Syria, ISIS, and the Case against the Energetic Executive*, 45 PRESIDENTIAL STUD. Q. 581, 581–82 (2015).

71. See Jake Miller, *Obama Seeks Syria Strike with Congress' Approval*, CBS NEWS (Aug. 31, 2013), <http://www.cbsnews.com/news/obama-seeks-syria-strike-with-congress-approval/> (President Obama announced on August 31, 2013 that Congress would schedule and debate and a vote “as soon as Congress comes back into session”).

were rapid developments in the last week of August.⁷² Speaker of the House John Boehner sent the President a letter asking for a legal justification for use of force.⁷³ Obama spoke directly and substantively twice with Speaker Boehner, and kept in touch with Boehner through his national security officials.⁷⁴ He also spoke with House Minority Leader Nancy Pelosi, and the Senate majority and minority leaders.⁷⁵ All of the leaders apparently wanted a congressional vote instead of unilateral executive action.⁷⁶

The consultation was not, as had happened so often in the past,⁷⁷ mere notification. Boehner apparently had strong misgivings about proceeding with military action without a vote,⁷⁸ and promised to provide a vote if the President sought one.⁷⁹ Moreover, the procedure for the vote would not be manipulated in a partisan way; instead, it would be what is known as an “up or down” vote in which the President’s proposition would be put before the representatives and they would have a simple, clear, straightforward vote on it.⁸⁰ Normally the Speaker has no obligation to provide this, and his own majority party members may well prefer some ingeniously arranged vote to give the President little chance.⁸¹

The President could have claimed unilateral executive authority for a military strike against Syria on one of two grounds. One would be the less likely—but honest—ground of humanitarian intervention. Recent precedents for humanitarian intervention include the 2000 air campaign against Serbia (regarding Kosovo) and the 2011 air campaign against Qaddafi’s government in Libya.⁸² But both of those air campaigns had additional

72. See, e.g., Edelson & Starr-Deelen, *supra* note 70, at 595.

73. See Ashley Parker, *Legislators Push for Vote before Strike*, N.Y. TIMES (Aug. 28, 2013), <http://www.nytimes.com/2013/08/29/world/middleeast/legislators-push-for-vote-before-strike.html>.

74. See John Bresnahan, *Hill Leaders Weigh Tough Syria Vote*, POLITICO (Aug. 31, 2013), <http://www.politico.com/story/2013/08/syria-vote-congress-leaders-096132>; Brett Logiurato, *Obama and Congress Are Having a Big Meeting on Syria Today*, BUS. INSIDER (Aug. 29, 2013), <http://www.businessinsider.com/syria-obama-congress-briefing-authorization-2013-8>.

75. See Michael A. Memoli, *Obama Meets with Congressional Leaders on Islamic State Strategy*, L.A. TIMES (Sept. 9, 2014), <http://www.latimes.com/nation/nationnow/la-na-nn-obama-meeting-congress-20140909-story.html>.

76. See Press Release, The White House, *supra* note 35.

77. See Eileen Burgin, *Where’s the Consultation? The War Powers Resolution and Libya*, 12 U.N.H. L. REV. 175, 194, 197–98 (2014) (chronicling a history of mere notification from presidents to Congress).

78. See Parker, *supra* note 73.

79. See Dave Boyer, *In Reversal, Obama to Seek Congressional OK for Syria Strike*, WASH. TIMES (Aug. 31, 2013), <http://www.washingtontimes.com/news/2013/aug/31/obama-set-speak-syria-white-house-115-pm-edt/>.

80. See William Safire, *Up-or-Down*, N.Y. TIMES MAG. (Aug. 14, 2005), http://www.nytimes.com/2005/08/14/magazine/upordown.html?_r=0 (describing the process of an up-or-down vote in Congress).

81. See Bresnahan, *supra* note 74 (discussing the difficulty Boehner will have convincing his fellow Republicans to follow suit).

82. RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RL33532, WAR POWERS RESOLUTION: PRESIDENTIAL COMPLIANCE 4-5, 11-12 (2012).

justification, including NATO's support for both campaigns.⁸³ The Obama Administration may have wanted to engage in unilateral humanitarian intervention in support of the "Arab Spring."⁸⁴ But the Republicans who controlled the House opposed this, and the public was skeptical.⁸⁵ The Executive recognized that it faced political resistance to its claim that it had broad power to use the military for humanitarian intervention.⁸⁶ Humanitarian problems occur all over the globe, including in places without strong American security interests. A worldwide program of presidential unilateral military interventions solely for humanitarian reasons would arouse congressional and public backlash.

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

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

83. *Id.* at 4, 12-13 (noting NATO's support for both the Serbia and Libya campaigns).

84. See Richard A.C. Alton & Jason Reed Struble, *The Constitutionality and Advancement of International Humanitarian Ideals in Libya by NATO and United States' Operations Odyssey Dawn and Unified Protector*, 13 TUL. J. INT'L & COMP. L. 1, 14 (1990).

85. Kevin Liptak & Tom Coehn, *Arab Spring Turmoil Evokes Political Response*, CNN (Sept. 12, 2012), <http://www.cnn.com/2012/09/12/politics/libya-egypt-fallout/index.html>.

86. Alton & Struble, *supra* note 84, at 14.

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

88. S. REP. NO. 104-33, at 241 (1993).

89. Margaret Sewell, *Freedom from Fear: Prosecuting the Iraqi Regime for the Use of Chemical Weapons*, 16 ST. THOMAS L. REV. 365, 390-91 (2004) (demonstrating relative U.S. concern for use of chemical weapons).

90. Robert J. Delahunty, *Warpowers Irresolution: The Obama Administration and the Libyan Intervention*, 12 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 122, 124-25 (2011).

91. Office of Legal Counsel, *Authority to Use Military Force in Libya*, 35 OPINIONS OFF. LEGAL COUNS. 1, 1, 4-6 (2001), <https://fas.org/irp/agency/doj/olc/libya.pdf>.

Kosovo) in 2000.⁹² The Libya opinion, in turn, served as an important precedent for military action against Syria.⁹³

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

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

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

On the other hand, the interests at stake were at least as much human-

92. *Id.* at 7, 12. There was another important opinion, that of the State Department's Legal Adviser. See *Libya and War Powers: Hearing Before the Sen. Comm. On Foreign Relations*, 112th Cong. 53–58 (2011) (statement of Harold Koh, Legal Advisor, U.S. Dep't of State).

93. Harold Hongju Koh, *Syria and the Law of Humanitarian Intervention (Part I: Political Miscues and U.S. Law)*, JUST SECURITY (Sept. 26, 2013), <http://www.justsecurity.org/1158/koh-syria/> [hereinafter Koh, *Syria and the Law of Humanitarian Intervention*] (“Ruemmler is plainly invoking Walter Dellinger’s OLC Opinion on Bosnia, which Acting Attorney General for OLC Caroline Krass followed in Libya in 2011.”).

94. *Id.* at 6 (stating that one of the criteria for the President to bypass the need for congressional approval for military action is “if the operations are not expected to be . . . ‘sufficiently extensive in ‘nature, scope, and duration’ to constitute war” (citations omitted)).

95. Syria (unlike Afghanistan in 2001) had a great many military targets. It also had air defenses, but the 1991 war with Iraq and the 2011 Libya campaign confirmed that the United States could degrade these air defenses using missiles and stealth planes, with a small risk of casualties. BLANCHARD & HUMUD, *supra* note 16, at 27.

96. John Bresnahan, *Obama Sends Syria Resolution to Hill*, POLITICO (Aug. 31, 2013), <http://www.politico.com/story/2013/08/obama-syria-aumf-resolution-096131>.

97. See *id.*

98. See *id.*

99. See Savage, *supra* note 1.

100. GRIMMETT, *supra* note 82, at 20.

101. *Id.* at 14. Libya is a good example. In the House, as to the Libyan operations, a resolution that would have disallowed the use of ground forces passed the House 268 to 145. Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 466 n.236 (2012).

itarian as security-related.¹⁰² There was time to ask Congress.¹⁰³ As a practical matter, the country was war-weary and more skeptical of the use of force than during the earlier conflicts.¹⁰⁴

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

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

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

B. President Obama Invites Congress to Decide

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

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

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

104. This was due both to the Iraq and Afghanistan wars. Charles M. Blow, Opinion, *War-Weariness*, N.Y. TIMES (Aug. 30, 2013), <http://www.nytimes.com/2013/08/31/opinion/blow-war-weariness.html> [hereinafter Blow, *War-Weariness*]. See generally Charles Tiefer, *Can the President and Congress Establish a Legislative Veto Mechanism for Jointly Drawing Down a Long and Controversial War?*, 6 J. NAT'L SECURITY L. & POL'Y 131, 131-66 (2012); Charles Tiefer, *The Iraq Debacle: The Rise and Fall of Procurement-Aided Unilateralism as a Paradigm of Foreign War*, 29 U. PA. J. INT'L L. 1, 1-59 (2007).

105. Jonathan A. Bush, *The Binding of Gulliver: Congress and Courts in an Era of Presidential Warmaking*, 80 VA. L. REV. 1723, 1738 (1994) (reviewing JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993)) (talking about the importance of congressional scrutiny for acts of war).

106. See Michael R. Gordon & Jackie Calmes, *President Seeks to Rally Support for Syria Strike*, N.Y. TIMES (Sept. 1, 2013), <http://nyti.ms/1dy0cih>.

107. See *id.*

108. See *id.*

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

110. See Gordon & Calmes, *supra* note 106.

111. Peter Baker & Jonathan Weisman, *Obama Seeks Approval by Congress for Strike in Syria*, N.Y. TIMES (Aug. 31, 2013), <http://www.nytimes.com/2013/09/01/world/middleeast/syria.html>.

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

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

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

And for President Obama, members of two different political parties

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

113. Aaron Blake, *Why Congress Could Reject Military Action in Syria*, WASH. POST (Aug. 31, 2013), <https://www.washingtonpost.com/news/the-fix/wp/2013/08/30/why-congress-could-reject-military-action-in-syria/>; Blow, *War-Weariness*, *supra* note 104.

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

115. Baker & Weisman, *supra* note 111.

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

117. *Id.* at 1724.

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

119. See Damrosch, *supra* note 118, at 133; Richard Morin, *Poll Shows Most Americans Want Negotiated Settlement*, WASH. POST, May 18, 1999, at A18.

120. Charles M. Blow, *Opinion, The Era of Disbelief*, N.Y. TIMES (Sept. 4, 2013), <http://www.nytimes.com/2013/09/05/opinion/blow-the-era-of-disbelief.html>; John Harwood & Jonathan Weisman, *House Republicans Say Voters Oppose Intervention* (Sept. 7, 2013), <http://www.nytimes.com/2013/09/07/us/politics/house-republicans-say-constituents-are-strongly-opposed-to-a-syria-strike.html> (describing the American public's resistance to getting involved in Syria due to the experience in Iraq).

combined to oppose presidential unilateralism:¹²¹ Republicans suspicious in general of President Obama, intensified by a degree of neo-isolationist attitude against getting involved based on humanitarian (rather than security) interests;¹²² and anti-war Democrats who looked at all U.S.-initiated wars through the skeptical perspective left by the Iraq War (and the earlier Vietnam War).¹²³

Interestingly, the relatively recent 2011 air campaign against Qaddafi's regime in Libya might have seemed a firm recent precedent for President Obama.¹²⁴ Although that action contributed to bringing down Qaddafi, the precedent did not seem to support Obama in forging ahead without congressional authorization in Syria because Syria involved an ongoing civil war that had already caused hundreds of thousands of deaths.¹²⁵

Another aspect concerns the personal war powers philosophy of the President himself. Presidents Reagan and George H.W. Bush may have preferred presidential unilateralism as a basic belief.¹²⁶ In contrast, President Obama acknowledged Congress's role in authorizing war as part of the constitutional order.¹²⁷ The Syrian episode demonstrates dramatically that a President may sometimes invite a congressional role.¹²⁸

During this same time frame, the British House of Commons defeated Prime Minister Cameron in a vote on the question of taking action against Syria.¹²⁹ In the British parliamentary government, it is unheard of for the party in power to repudiate its own party head, the Prime Minister.¹³⁰ No

121. Michael D. Shear, *History Aside, Obama Bets on Congress*, N.Y. TIMES (Sept. 1, 2013), <http://www.nytimes.com/2013/09/02/us/politics/in-syria-decision-obama-looks-to-an-old-opponent-congress.html>.

122. See Harwood & Weisman, *supra* note 120; Jonathan Martin, *Vote on Syria Sets Up Foreign Policy Clash Between 2 Wings of G.O.P.*, N.Y. TIMES (Sept. 2, 2013), <http://www.nytimes.com/2013/09/03/us/politics/syria-vote-sets-up-foreign-policy-clash-in-gop.html>.

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

124. Jordan J. Paust, *Constitutionality of U.S. Participation in the United Nations-Authorization War in Libya*, 26 EMORY INT'L L. REV. 43, 46 (2012).

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

126. While President George H.W. Bush (41st Administration) contended that he had unilateral authority for the first Persian Gulf War, he ultimately obtained formal Congressional authorization before the 1991 invasion of Iraq. See H.R.J. Res. 77, 102d Cong. (1991); *George Bush: The Persian Gulf War*, PROFILES U.S. PRESIDENTS, <http://www.presidentprofiles.com/KennedyBush/GeorgeBushThepersiangulfwar.html> (last visited Oct. 6, 2016).

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

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

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

130. See *id.*

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

In considering dynamic democratic processes, however, it is not surprising that the U.K. Parliament's vote against Syrian bombing would resonate in the United States. Parliament's vote against bombing reflected a powerful war-weariness after the Iraq War that the British shared with Americans.¹³¹ And the parliamentary vote also indicated that the normally strong loyalty to a party leader—a Prime Minister or a President—could be outweighed by war-weariness.

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

Once President Obama called for congressional authorization, the congressional process came to the forefront.¹³² Congressional process does not play a role when a President undertakes a sudden and purely unilateral action, such as President Reagan’s invasion of Grenada and bombing of Libya and George H.W. Bush’s invasion of Panama.¹³³ But in the Syrian chemical weapons matter, the engine of the democratic process for war powers fully cranked up.¹³⁴

Hearings are key to the democratic and legitimate exercise of war powers. This Article departs from most war powers scholarship, which usually ignore hearings.¹³⁵ Compared to presidential orders or congressional enactments, hearings may seem to be no more than just talk. Hearings are not conclusive in the rigid formal binary analysis of whether or not military action is authorized.

The relevant congressional committees conducted hearings on the

131. See Mark Landler, David E. Sanger & Thom Shanker, *Obama Set for Limited Strike on Syria as British Vote No*, N.Y. TIMES (Aug. 29, 2013), <http://www.nytimes.com/2013/08/30/us/politics/obamasyria.html>.

132. See Baker & Weisman, *supra* note 111.

133. See Ctr. for Civic Ed., *President Reagan as Commander in Chief*, RONALD REAGAN & EXECUTIVE POWER, <http://reagan.civiced.org/lessons/president-reagan-commander-chief> (last visited Oct. 6, 2016); Louis Fisher, Ryan Hendrickson & Stephen R. Weissman, Letter to the Editor, *Congress at War*, FOREIGN AFFAIRS (June 2008), <https://www.foreignaffairs.com/articles/united-states/2008-05-03/congress-war>; Michael J. Kelly, *The President Does Not Need Congressional Approval for Libya No-Fly Zone (Yet)*, JURIST (Mar. 22, 2011, 5:08 PM), <http://www.jurist.org/forum/2011/03/the-president-does-not-need-congressional-approval-for-libya-no-fly-zone-yet.php>.

134. Baker & Weisman, *supra* note 111.

135. *But see* MARIAH ZEISBERG, WAR POWERS: THE POLITICS OF CONSTITUTIONAL AUTHORITY 37–38 (2013); Barron & Lederman, *supra* note 23, at 1041.

issue¹³⁶—most important of which were the Senate Foreign Relations Committee’s questioning of Secretary of State John Kerry.¹³⁷ These hearings performed several important functions: they clarified the Administration’s position regarding what military actions it would take; they unearthed the Administration’s knowledge of, and the others’ insights about, conditions in the sphere of fighting; and they engendered a public dialogue between Congress and the electorate, allowing them to jointly formulate their views.¹³⁸

In these hearings, the Obama Administration was questioned about whether it wanted the option to go beyond initial air strikes.¹³⁹ This inevitably engendered a negative reaction from a war-weary Congress and public.¹⁴⁰ These hearings unearthed the fact that even with air strikes suppressing Syrian resistance, ground intervention would be required to make sure that chemical weapons did not fall into dangerous hands.¹⁴¹ This led Congress and the public to look skeptically upon potential military intervention.

Through hearings and broader public debates over various military options, it quickly became apparent that the only proposals with a chance of passage would have a limited duration, would explicitly rule out ground combat units, and would focus the military response on Syria’s use of chemical weapons.¹⁴²

In recent decades, political debates over war powers authorization have drawn sharp distinctions between air strikes and deployment of

136. Michael R. Gordon & Thom Shanker, *In Hearing, House Panel Seems Split on Syria Strike*, N.Y. TIMES (Sept. 4, 2013) <http://www.nytimes.com/2013/09/05/world/middleeast/in-hearing-house-panel-seems-split-on-syria-strike.html>.

137. See Maureen Dowd, *Opinion, Shadow of a Doubt*, N.Y. TIMES (Sept. 3, 2013), <http://www.nytimes.com/2013/09/04/opinion/dowd-shadow-of-a-doubt.html> (describing the Senate Foreign Relations Committee questioning of Secretary of State Kerry).

138. Mayer, *supra* note 22, at 828–30 (detailing the events and results of the hearings about Syria).

139. See *The Authorization of the Use of Force in Syria: Hearing Before the S. Comm. On Foreign Rel.*, 113th Cong. 38 (2013) (in response to questioning, Secretary of State Kerry stated that “I know the administration has zero intention of putting troops on the ground”).

140. Scott Clement, *Opposition to Syria Airstrikes Rises as Republicans Shift Sharply Against Action*, WASH. POST (Sept. 9, 2013), <https://www.washingtonpost.com/news/the-fix/wp/2013/09/09/opposition-to-syria-airstrikes-rises-as-republicans-shift-sharply-against-action/>.

141. By one kind of estimation, some types of Syrian crisis could conceivably take 75,000 American troops on the ground for many months to secure, aid, and protect the inspection teams supervising a complete disposal of chemical weapons. CHRISTOPHER M. BLANCHARD & JEREMY M. SHARP, CONG. RESEARCH SERV., R43201, POSSIBLE U.S. INTERVENTION IN SYRIA: ISSUES FOR CONGRESS 21 (2013).

142. Ramsey Cox, *Reid Files Resolution to Authorize Force Against Syria*, HILL (Sept. 6, 2013), <http://thehill.com/blogs/floor-action/senate/320695-reid-files-use-of-force-resolution-against-syria>; Seung Min Kim, *Kerry Fumbles “Boots” Question*, POLITICO (Sept. 3, 2013), <http://www.politico.com/story/2013/09/senate-foreign-relations-committee-debates-syria-096215>; Manu Raju & John Bresnahan, *Senators Craft Syria Compromise*, POLITICO (Sept. 4, 2013), <http://www.politico.com/story/2013/09/senators-syria-compromise-096234>.

ground combat units.¹⁴³ The need for congressional authorization is clearer with respect to ground combat than with air strikes.¹⁴⁴ Ground combat may result in more American casualties, the danger of deepening involvement, greater need for supporting arms and logistics supply, less short-term flexibility, and a greater risk of long-term entanglement.¹⁴⁵ The differences between air strikes and ground combat puts a greater burden on the President to justify proceeding unilaterally with ground combat troops. Additionally, congressional proposals may draw a line authorizing air strikes but not ground combat.¹⁴⁶

The Senate Foreign Relations Committee reported out by a slim ten to seven margin a bipartisan authorization for action against Syria.¹⁴⁷ In the House, the leadership of both parties supported the authorization.¹⁴⁸ But both the House, measured in informal counts, and the public, measured in polls, were skeptical of or opposed the Administration position.¹⁴⁹ The *Washington Post* found Congress to be split into five groups: the “‘happy to debate the issue, reserving judgment’ caucus”; the “skeptical caucus”; the “anti-military action caucus”; the “‘do it now, already’ caucus”; and the “‘bigger military action’ caucus.”¹⁵⁰

Support seemed likely in the Senate.¹⁵¹ In the House, it could not be predicted.¹⁵² The key seemed to be which way liberal Democrats would vote.¹⁵³ Their constituents were torn between their continuing anger and

143. See Ilya Somin, *Unconstitutional War Against ISIS Expands to Include Ground Combat by US Forces*, WASH. POST (Oct. 30, 2015), <https://www.washingtonpost.com/news/voikh-conspiracy/wp/2015/10/30/unconstitutional-war-against-isis-expands-to-include-ground-combat-by-us-forces/> (detailing the distinction that Administrations have made between air strikes and deployment of ground combat units).

144. See *id.*

145. Alessandria Masi, *Does the US Need Ground Forces to Fight ISIS in Iraq, Syria? The Impact of Airstrikes vs. Combat Troops*, IBT (Sept. 17, 2014), <http://www.ibtimes.com/does-us-need-ground-forces-fight-isis-iraq-syria-impact-airstrikes-vs-combat-troops-1690915>.

146. See, e.g., Raju & Bresnahan, *supra* note 142.

147. Cox, *supra* note 142; Mark Landler, Jonathan Weisman & Michael R. Gordon, *Split Senate Panel Approves Giving Obama Limited Authority on Syria*, N.Y. TIMES (Sept. 4, 2013), <http://www.nytimes.com/2013/09/05/world/middleeast/divided-senate-panel-approves-resolution-on-syria-strike.html>.

148. Ginger Gibson, *Nancy Pelosi's Test*, POLITICO (Sept. 3, 2013), <http://www.politico.com/story/2013/09/nancy-pelosi-syria-096224>; *United States Involvement in Syria*, BALLOTPEdia, https://ballotpedia.org/United_States_involvement_in_Syria (last visited Oct. 6, 2016).

149. Andrew Dugan, *U.S. Support for Action in Syria is Low vs. Past Conflicts*, GALLUP (Sept. 6, 2013), <http://www.gallup.com/poll/164282/support-syria-action-lower-past-conflicts.aspx>; see also Gibson, *supra* note 148.

150. Ed O'Keefe, *The 5 Ways that Congress is Splitting on Syria*, WASH. POST (Sept. 1, 2013), <https://www.washingtonpost.com/news/the-fix/wp/2013/09/01/the-5-ways-that-congress-is-splitting-on-syria/>.

151. See *United States Involvement in Syria*, *supra* note 148.

152. See Gibson, *supra* note 148 (giving contradicting reports of support in the House).

153. See Jeremy W. Peters, *Obama Faces Barrier in His Own Party on Syria*, N.Y. TIMES (Sept. 5, 2013), <http://www.nytimes.com/2013/09/05/world/middleeast/obama-faces-barrier-in-his-own-party-on-syria.html>.

wariness from the Iraq War, and their general support for President Obama.¹⁵⁴ These representatives did not want to tip their hand until the last minute to avoid alienating part of their base.¹⁵⁵

Then an international solution emerged. Because it became public on September 9, 2013, a relatively late date, and because of the way it was arranged, there was a public misimpression that it was a wildly surprising and unexpected development. Later, however, it emerged that there had been many discussions on the subject between Secretary Kerry and his Russian counterpart, Sergei Lavrov.¹⁵⁶ Vladimir Putin raised it directly with Obama two days before (September 7th) Kerry took it to the public on September 9th.¹⁵⁷

Kerry made it public in the form of a seemingly offhand comment: "Sure, [Assad] could turn over every single bit of his chemical weapons to the international community in the next week. [B]ut he isn't about to do it, and it can't be done."¹⁵⁸ But his comment was well calculated.¹⁵⁹ His comment was a nuanced signal to the Russians that the United States would welcome Russian action as an alternative to American air strikes in Syria.¹⁶⁰ Immediately afterward, Kerry had a scheduled conversation with Lavrov, in which Lavrov said Russia planned to make a public proposal along Kerry's lines.¹⁶¹ Russia could prevent American military involvement in the Syrian civil war if Assad, on a Russian leash to assure his keeping his word, "agreed to have his poison gas placed under international control and ultimately destroyed."¹⁶²

Then Vladimir Putin, who had made his eagerness to stake a high-profile position on Syria clear, vocally made the Kerry/Lavrov proposal his own.¹⁶³ He obtained Assad's assent.¹⁶⁴ With Kerry having negotiated, in

154. *Id.*

155. *Id.*

156. It was reported that after Assad's use of poison gas on August 21, 2013, Kerry and Lavrov spoke nine times. Peter Baker & Michael R. Gordon, *An Unlikely Evolution, From Casual Proposal to Possible Resolution*, N.Y. TIMES (Sept. 10, 2013), <http://www.nytimes.com/2013/09/11/world/middleeast/Syria-An-Unlikely-Evolution.html>.

157. *Id.*

158. Arshad Mohammed & Andrew Osborn, *Kerry: Syrian Surrender of Chemical Arms Could Stop U.S. Attack*, REUTERS (Sept. 9, 2013), <http://www.reuters.com/article/us-syria-crisis-kerry-idUSBRE9880BV20130909>.

159. Baker & Gordon, *supra* note 64.

160. David M. Herszenhorn & Michael R. Gordon, *Behind Arms Deal, Veteran Diplomat Fond of Cigars, Whiskey and Outfoxing U.S.*, N.Y. TIMES (Sept. 16, 2013), <http://www.nytimes.com/2013/09/17/world/middleeast/veteran-diplomat-fond-of-cigars-whiskey-and-outfoxing-us.html>.

161. Observers give Lavrov much credit. *See id.*

162. *See* Bill Keller, Opinion, *Playing Chess with Putin*, N.Y. TIMES (Sept. 10, 2013), <http://keller.blogs.nytimes.com/2013/09/10/playing-chess-with-putin/>; *see also* Michael R. Gordon & Steven Lee Myers, *Obama Calls Russia Offer on Syria Possible 'Breakthrough'*, N.Y. TIMES (Sept. 9, 2013), <http://www.nytimes.com/2013/09/10/world/middleeast/kerry-says-syria-should-hand-over-all-chemical-arms.html>.

163. *See* Michael R. Gordon & Steven Lee Myers, *Kerry Insists That Syria Quickly Give Data on Arms*, N.Y. TIMES (Sept. 12, 2013), <http://www.nytimes.com/2013/09/13/world/middleeast/united-states-and-russia-far-apart-as-kerry-arrives-in-geneva-for-syria-talks.html>.

effect on two tracks—with the Senate Foreign Relations Committee and with the Russians—President Obama could demonstrate a cautious embrace of the solution.¹⁶⁵ Although a great deal of negotiation and implementation remained, the deal was struck right then.¹⁶⁶

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

C. Does the Dialogue Process Work?

In 2013, when President Obama called for Congress to vote on war authorization, reluctant members may have defeated him on that vote. Some commentators have maintained that the President hardly ever loses in war powers controversies.¹⁶⁷ In this view, the President has powers that overwhelm or outmaneuver the Congress. The President has the initiative on whether, where, when, and how to take military action.¹⁶⁸ He has the ability to alarm the public and a monopoly on intelligence resources—including the ability to deceptively manipulate the content of intelligence and conceal covert action, thereby shaping public knowledge.¹⁶⁹ In addition, he has the loyal support of his own party, and the opposing party is usually unwilling to attack the Commander in Chief.¹⁷⁰

Yet this time, President Obama may well have lost such a vote. The observation that the President hardly ever loses in war powers controversies may apply to some historic periods more than others. Presidents in some eras hit more resistance in their foreign initiatives, from the aftermath of World War I to the end of the Vietnam War.¹⁷¹ The Iran-Contra affair from 1984 to 1986 reflected the Reagan Administration's resort to misconduct so that it could provide aid to the Contras in Nicaragua even

164. *See id.*

165. *See* Michael D. Shear, Michael R. Gordon & Steven Lee Myers, *Obama Backs Idea for Syria to Cede Control of Arms*, N.Y. TIMES (Sept. 9, 2013), <http://www.nytimes.com/images/2013/09/10/nyfrontpage/scan.pdf>.

166. *See id.*

167. *See, e.g.*, Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1320 (1988) [hereinafter Koh, *Why the President (Almost) Always Wins*].

168. *See id.* at 1292–93 n.169 (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936)).

169. *See id.* at 1289 (describing, as an example, the conduct of the Reagan administration during the Iran-Contra Affair).

170. *See id.* at 1311.

171. The Senate that defeated the Treaty of Versailles in 1919, the isolationist Congresses that limited American involvement in the first two years of World War II, and the Congress barring further involvement in Indochina and enacting the War Powers Resolution in 1974, suggest that the President does sometimes lose. *See id.* at 1293.

though Congress barred such aid.¹⁷²

In 2013, after the long wars in Iraq and Afghanistan, the public and Congress were suffering from severe war fatigue.¹⁷³ While the opposition party in Congress may ordinarily trust a President's description of Middle Eastern threats, that willingness to trust was reduced by President Bush's action in 2002 and 2003.¹⁷⁴ Having been gulled into fearing Saddam Hussein's non-existent WMD in that earlier era, most Americans did not fear that Assad's chemical weapons would threaten the United States.¹⁷⁵ Instead, they viewed Assad's use of chemical weapons as just one more awful thing Assad did in an awful civil war that the United States should not get involved in.¹⁷⁶

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

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

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

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

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

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

172. See *id.* at 1302-03.

173. See Blow, *War-Weariness*, *supra* note 104.

174. Robert Bejesky, *The SSCI Investigation of the Iraq War: Part II: Politicization of Intelligence*, 40 S.U. L. REV. 243, 279 n.142 (2013) (describing criticisms that the Bush Administration manipulated the public's trust).

175. See *id.* at 245 n.7, 256; see also Mark Thompson, *The U.S. Military: Sidelined by a Fatigued Nation*, TIME (May 13, 2014), <http://time.com/98310/the-u-s-military-sidelined-by-a-fatigued-nation/>.

176. Blow, *War-Weariness*, *supra* note 104.

177. See *Last of Syria's Chemical Weapons Shipped Out*, BBC (June 23, 2014), <http://www.bbc.com/news/world-middle-east-27974379>.

178. *Remarks by the President in Address to the Nation on Syria*, WHITE HOUSE (Sept. 10, 2013), <https://www.whitehouse.gov/the-press-office/2013/09/10/remarks-president-address-nation-syria>.

territory in Syria and Iraq.¹⁷⁹ In early June 2014, ISIS seized Mosul, the second largest city in Iraq.¹⁸⁰ This signaled that Iraqi forces could not resist ISIS.¹⁸¹ In early August, ISIS forces set out to slaughter a large ethnic minority in Iraq, the Yazidis.¹⁸² President Obama responded, in a national address, by authorizing air strikes coupled with air drops of humanitarian supplies.¹⁸³ In September, the President began explaining to the press his authority to institute these actions.¹⁸⁴ The President's justifications to Congress for these actions cited Article II of the Constitution, the 2001 Authorization for Use of Military Force (AUMF) for al Qaeda and Afghanistan, and the 2002 AUMF against Iraq.¹⁸⁵ The White House comments to the press, including background "talking points" explaining legal theories, went into more detail.¹⁸⁶ Secretary of State John Kerry defended the policy at a hearing of the Senate Foreign Relations Committee.¹⁸⁷

Each of these justifications, taken separately, was debated.¹⁸⁸ The Administration argued that in addition to humanitarian concerns, the scale and operations of ISIS threatened strategic U.S. interests in Iraq.¹⁸⁹ But similar arguments could be made about terrorist groups that controlled territory in other countries, from al-Shabaab in Somalia and Kenya to Boko

179. Ian Fisher, *In Rise of ISIS, No Single Missed Key but Many Strands of Blame*, N.Y. TIMES (Nov. 18, 2015), <http://www.nytimes.com/2015/11/19/world/middleeast/in-rise-of-isis-no-single-missed-key-but-many-strands-of-blame.html>.

180. Suad Al-Salhy & Tim Arango, *Sunni Militants Drive Iraqi Army Out of Mosul*, N.Y. TIMES (June 10, 2014), <http://www.nytimes.com/2014/06/11/world/middleeast/militants-in-mosul.html>.

181. See *id.* (describing how the Iraqi army "crumbled" in the face of the ISIS attack).

182. See generally Human Rights Council, *"They Came to Destroy": ISIS Crimes Against the Yazidis*, U.N. Doc. A/HRC/32/CRP.2 (June 15, 2016).

183. Helene Cooper, Mark Landler & Alissa J. Rubin, *Obama Allows Airstrikes Against Iraq Rebels*, N.Y. TIMES, Aug. 8, 2014, at A1, A9.

184. Press Release, White House, Background Conference Call on the President's Address to the Nation (Sept. 10, 2014), <https://www.whitehouse.gov/the-press-office/2014/09/10/background-conference-call-presidents-address-nation>.

185. Charlie Savage, *White House Invites Congress to Approve ISIS Strikes, but Says It Isn't Necessary*, N.Y. TIMES, Sept. 11, 2014, at A10; Email from Obama Administration, to The New York Times (Sept. 12, 2014), [186. Email from Obama Administration, *supra* note 185; Gene Healy, *Obama's Illegal War on ISIS*, NAT'L INT. \(Aug. 14, 2015\), <http://nationalinterest.org/feature/obamas-illegal-war-isis-13579>.](https://www.documentcloud.org/documents/1301198-is-; Jack Goldsmith, The Administration Has Violated the War Powers Resolution Unless It Is Right About the Applicability of the AUMFs to the Islamic State, LAWFARE (Oct. 8, 2014), https://www.lawfareblog.com/administration-has-violated-war-powers-resolution-unless-it-right-about-applicability-aumfs-islamic; Ryan Lizza, What Is a New War Authorization Worth?, NEW YORKER (Feb. 13, 2015), http://www.newyorker.com/news/news-desk/new-war-authorization-worth.</p>
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187. Susan Jones, *Kerry: Obama Administration Listening to 'Good Lawyers' Rather Than Congress*, CNS NEWS (Sept. 18, 2014), <http://www.cnsnews.com/news/article/susan-jones/kerry-obama-administration-listening-good-lawyers-rather-congress>.

188. Goldsmith, *supra* note 185. For the parallel issue as to Syria, see John Yoo, *Like It or Not, Constitution Allows President to Strike Syria Without Congressional Approval*, FOX NEWS (Aug. 30, 2013), <http://www.foxnews.com/opinion/2013/08/30/constitution-allows-obama-to-strike-syria-without-congressional-approval.html>.

189. Anthony H. Cordesman, *Iraqi Stability and the "ISIS War,"* CTR. FOR STRATEGIC & INT'L STUD., Aug. 12, 2005, at 1, 2-3, https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/150812_Iraq_Stability_and_the_War_on_ISIS.pdf.

Haram in Nigeria. It would be a very broad claim for the President to argue that he could unilaterally make war against any terrorist group he might feel like, without obtaining any approval from Congress.

The 2001 AUMF seemed stretched to reach ISIS.¹⁹⁰ It had been drafted to reach Afghanistan, not Iraq or Syria some thirteen years later.¹⁹¹ It addressed al Qaeda, which had launched the 9/11 strike.¹⁹² But the lineal descendant of al Qaeda was not ISIS, but al-Nusra.¹⁹³ Using the 2001 AUMF as authorization for war-fighting in a different country thirteen years later against a terrorist group that was not tied to al Qaeda raised questions about how many countries, and for how many years, the President could engage in war-making.¹⁹⁴

The 2002 AUMF served as the basis for the long war by the United States against the Saddam Hussein regime and, later, the insurgency against the U.S. occupation, and the United States eventually declared that it had made peace in Iraq.¹⁹⁵ It was a strain to construe an old authorization for war against Iraq as authorization for airstrikes or other military action against Syria.¹⁹⁶

In 2014, ISIS beheaded American journalists and posted videos of the beheadings on the Internet.¹⁹⁷ The public had taken these videos as, in effect, ISIS's declaration of war on the United States, and deemed presidential retaliation tit-for-tat.¹⁹⁸ The President's action had broad public support.¹⁹⁹

Mosul's fall cut the ground out from under the argument that Iraq could manage ISIS without more help from the American military.²⁰⁰ In

190. Ryan Goodman, *White House Relies on 2002 Iraq Authorization—But What's the Theory?*, JUST SECURITY (Sept. 13, 2014), <https://www.justsecurity.org/14980/white-house-relies-2002-iraq-authorization-but-whats-theory/>; see also Shane, *The Presidential Statutory Stretch*, *supra* note 25, at 1245–46.

191. Gonzalez, *supra* note 14, at 163.

192. Stephen W. Preston, General Counsel, Dep't of Def., Speech at the Annual Meeting of the American Society of International Law: The Legal Framework for the United States' Use of Military Force Since 9/11 (Apr. 10, 2015).

193. Gregory A. Wagner, *Warheads on Foreheads: The Applicability of the 9/11 AUMF to the Threat of ISIL*, 46 U. MEM. L. REV. 235, 255 (2015); Ray Sanchez & Paul Cruikshank, *Syria's al-Nusra rebrands and cuts ties with al Qaeda*, CNN (Aug. 1, 2016), <http://www.cnn.com/2016/07/28/middleeast/al-nusra-al-qaeda-split/>.

194. Brett LoGiurato & Hunter Walker, *Congressman: Obama's Expansion of His Campaign is 'Illegal'*, BUS. INSIDER (Sept. 24, 2014), <http://www.businessinsider.com/obama-is-legal-aumf-congress-2014-9>.

195. See Shailagh Murray & Jonathan Weisman, *Democrats Seek to Repeal 2002 War Authorization*, WASH. POST (Feb. 23, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/22/AR2007022201743.html> (describing how Congress announced plans to withdraw combat troops in Iraq).

196. Goodman, *supra* note 190.

197. Elizabeth Schumacher, *Islamic State: A Chronology of Key Developments*, DW (Sept. 14, 2014), <http://www.dw.com/en/islamic-state-a-chronology-of-key-developments/a-17920159>.

198. Mark Mazetti, Eric Schmitt & Mark Handler, *Struggling to Gauge Threat, Even as U.S. Prepares to Act*, N.Y. TIMES, Sept. 11, 2014 at A1, A8.

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

200. The unchallenged nature of the operation resembled Grenada and Panama in that the lack of domestic dispute owed to its popularity, rather than to Congressional

August 2014, President Obama wrote Congress, explaining that the ISIS threat had grown and required American countermeasures.²⁰¹ Over time, the Administration increased the commitment, pursuing air strikes in Syria and increasing the U.S. military presence in Iraq beyond 3,700 troops on missions like training and base security, with Special Forces missions in both countries.²⁰²

B. Presidential Invitation to Congress

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

Congressional hearings occurred on December 9th and 10th, but that was during a lame duck period before control of the Senate shifted from the Democratic Party to the Republican Party.²⁰⁵ At the Senate Foreign Relations Committee hearing on December 9th, Secretary Kerry stated the Administration’s views that the AUMF should provide flexibility, should not limit operations to Iraq and Syria, and should not completely preclude

concurrence in virtually ceremonial pronouncements of legal justification. See Al-Salhy & Arango, *supra* note 180.

201. Gonzalez, *supra* note 14, at 149–50.

202. Dan Lamothe & Loveday Morris, *Pentagon Will Send Hundreds More Troops to Iraq Following Seizure of Key Airfield*, WASH. POST (July 11, 2016), <https://www.washingtonpost.com/news/checkpoint/wp/2016/07/11/seizure-of-key-air-base-near-mosul-raises-prospect-of-u-s-escalation-against-isis/>; Michael S. Schmidt & Helene Cooper, *More is Needed to Beat ISIS, Pentagon Officials Conclude*, N.Y. TIMES (Jan. 28, 2016), <http://www.nytimes.com/2016/01/29/world/middleeast/more-is-needed-to-beat-isis-us-military-concludes.html>.

203. Mark Landler & David E. Sanger, *Obama to Seek Congressional Backing for Military Campaign Against ISIS*, N.Y. TIMES (Nov. 5, 2014), <http://www.nytimes.com/2014/11/06/world/middleeast/obama-to-seek-congressional-backing-for-military-campaign-against-isis.html>.

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

205. *Congressional Hearings on an ISIL AUMF*, CTR. NAT’L SEC. STUDIES, <http://cnss.org/pages/congressional-hearings-on-an-isil-aumf.html> (last visited Sept. 9, 2016). The prior Congress had a Republican-majority House and a Democratic-majority Senate. The new Congress starting in 2015 would have a Republican-majority House and a Republican-majority Senate. The Republicans would not want war authority to be resolved by a Democratic-majority Senate when it could instead be left for a Republican-majority Senate starting in 2015. Jonathan Weisman & Ashley Parker, *Riding Wave of Discontent, G.O.P Takes Senate*, N.Y. TIMES (Nov. 4, 2014), <http://www.nytimes.com/2014/11/05/us/politics/midterm-elections.html>.

a role for ground combat forces.²⁰⁶ The Senate Foreign Relations Committee reported out a new authorization with a three-year sunset and heavy restrictions on the use of ground forces.²⁰⁷

President Obama mentioned the issue during his State of the Union Address in 2015.²⁰⁸ To clarify his position, President Obama provided a draft proposal for a new AUMF in February of 2015.²⁰⁹

The President's invitation is an unusual stance and action in war powers. To be sure, Presidents have asked Congress for support or war-fighting authorization in the past. However, generally, these requests have fallen into two categories. Some, like the area support resolutions in the 1950s, were pro forma requests for non-controversial support that received comprehensive Congressional approval. More importantly, others were genuine authorizations of war overcoming some legislative resistance, like the arming of merchant ships on the eve of American involvement in World War I or the Persian Gulf War of 1991.²¹⁰

Although the public accepted air strikes on ISIS, the resolution sought here was not an entirely non-controversial statement of support. Nor was it a declaration of a new full-scale war. By this point, the United States had engaged in air strikes and other activities for many months using asserted authority from Article II and the 2001 and 2002 AUMFs, and was virtually unchallenged in domestic politics.²¹¹

206. Jeremy W. Peters & Michael R. Gordon, *Kerry Warns Senate Against Curbs on Fighting ISIS*, N.Y. TIMES (Dec. 10, 2014), <http://www.nytimes.com/2014/12/10/us/politics/kerry-warns-senate-against-curbs-on-fighting-isis.html>.

207. Jeremy W. Peters, *Senate Panel Approves Limited Fight Against ISIS, Reopening War Powers Debate*, N.Y. TIMES (Dec. 11, 2014), <http://www.nytimes.com/2014/12/12/us/politics/senate-panel-approves-limited-fight-against-isis-reopening-war-powers-debate.html>.

208. Wagner, *supra* note 193, at 260.

209. President Barack Obama, *Letter from the President - Authorization for the Use of United States Armed Forces in connection with the Islamic State of Iraq and the Levant*, WHITE HOUSE (Feb. 11, 2015), <https://www.whitehouse.gov/the-press-office/2015/02/11/letter-president-authorization-use-united-states-armed-forces-connection>; see also Geoff Dyer, *Obama Asks Congress to Back War on Isis*, FIN. TIMES (Feb. 11, 2015), <http://www.ft.com/cms/s/0/61c039b8-b208-11e4-b380-00144feab7de.html#axzz4JJ1727Ty> (noting that the proposal was the first time since 2002 that a President had asked Congress to "vote on the fight against Jihadi terrorists").

210. See, e.g., JOHN F. KENNEDY, *George Norris*, in PROFILES IN COURAGE (1956); see also Sara Fritz & William J. Eaton, *Congress Authorizes Gulf War: Historic Act: The Vote in Both Houses, Supporting Bush and Freeing Troops to Attack Iraq, is Decisive and Bipartisan. It Is the Strongest Move Since Tonkin Gulf*, L.A. TIMES (Jan. 13, 1991), http://articles.latimes.com/1991-01-13/news/mn-374_1_persian-gulf.

211. Jack Goldsmith, *The Obama Administration's Legal Justification for Strikes Against the Islamic State in Syria*, LAWFARE (Sept. 23, 2014), <https://www.lawfareblog.com/obama-administrations-legal-justification-strikes-against-islamic-state-syria>; Charlie Savage, *Obama Sees Iraq Resolution as a Legal Basis for Airstrikes, Official Says*, N.Y. TIMES (Sept. 12, 2014), <http://www.nytimes.com/2014/09/13/world/americas/obama-sees-iraq-resolution-as-a-legal-basis-for-airstrikes-official-says.html>; see Cristina Marcos, *House Kills Measure to Force Debate on Military Force Against ISIS*, HILL (June 11, 2015), <http://thehill.com/blogs/floor-action/house/244704-house-kills-vote-to-force-debate-on-authorizing-troops-against-isis> (suggesting that Congress is not particularly motivated to move away from the Obama Administration's employment of the 2001 and 2002 AUMFs as justification for the airstrikes against ISIS).

Earlier Presidents had gotten away with claims of unilateral Article II authority for military operations, but those were generally short-term operations, such as the invasions of Grenada and Panama and airstrikes in Bosnia and Libya.²¹² The military action against ISIS would become a long-term operation, and the President's invitation to Congress could be seen as an attempt to bolster his previously asserted Article II authority with statutory support.²¹³

Over the long term, something questionable or controversial would likely occur in the war. If the public mood were to shift strongly against the war with ISIS, the President's tenuous claim of authority without a fresh congressional enactment might cause the war's unpopularity to fall only on the President.²¹⁴ Congressional critics could attack the President for failing to seek congressional authorization.²¹⁵ It would be more difficult for members of Congress to criticize the President's war-making choices if they were on the record as authorizing the war. Those potential critics likely preferred not to take a public position on whether they wanted a more limited, or a more vigorous, intervention.

President Obama's invitation shows a striking acceptance that Congress has a necessary role in saying yea or nay to war-fighting. Obama's invitation contrasts sharply with the efforts of prior Presidents to minimize Congress's role. Since the enactment of the War Powers Resolution over President Nixon's veto in 1973, Presidents have consistently taken the position that it was unconstitutional.²¹⁶ President Obama's refusal to acknowledge that the 2011 Libya air strikes were "hostilities" reflected that struggle.²¹⁷ The previous President, President Bush, vetoed Congress's

212. Office of Legal Counsel, *Proposed Deployment of United States Armed Forces into Bosnia*, 19 OPINIONS OFF. LEGAL COUNS. 327, 327 (1995); Eric Posner, Opinion, *Obama Can Bomb Pretty Much Anything He Wants To*, SLATE (Sept. 23, 2014), http://www.slate.com/articles/news_and_politics/view_from_chicago/2014/09/war_against_isis_in_syria_obama_s_legal_and_political_justifications.html.

213. See Jack Goldsmith, Opinion, *Why President Obama Should Seek Formal Congressional Support If He Ramps Up Force Against the Islamic State After Paris*, LAWFARE (Nov. 14, 2015), <https://www.lawfareblog.com/why-president-obama-should-seek-formal-congressional-support-if-he-ramps-force-against-islamic-state>.

214. Vice President Biden acknowledged this dynamic when he explained President Obama's decision to seek authorization from Congress in connection with Syria.

It matters to have Congress with you, in terms of your ability to sustain what you set out to do," he said. Obama "knew that if he was going to do anything, he better damn well have the public with him, or it would be a very short ride. . . .

You need the support of the American people.

Goldberg, *supra* note 112.

215. Peter Baker & Ashley Parker, *Congress Shows a Lack of Enthusiasm for Giving Obama War Powers to Fight ISIS*, N.Y. TIMES (Feb. 12, 2015), <http://www.nytimes.com/2015/02/13/us/congress-shows-a-lack-of-enthusiasm-for-giving-obama-war-powers-to-fight-isis.html>.

216. Damrosch, *supra* note 118, at 127.

217. Charlie Savage & Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation*, N.Y. TIMES (June 15, 2011), <http://www.nytimes.com/2011/06/16/us/politics/16powers.html>.

effort in 2007 to stop the Iraq War.²¹⁸ Congress enacted war-ending provisions in a supplemental appropriations bill, which Bush vetoed and won the override fight on—a vivid battle between the branches.²¹⁹ Going further back, in 1999, Congress denied President Clinton a clear authorization for his Serbian war, although the supportive votes on different propositions in each chamber were arguably akin to partial support.²²⁰ President Obama's invitation stood out against the background of that struggle.

The presidential invitation to Congress operated in many ways to adjust the climate of war powers.²²¹ It replaced struggle between the branches with trust that Congress would act in the national interest.²²² It pushed aside the apparent need for a President to claim expansive Article II powers, instead turning to Article I.²²³ Finally, it reflected a willingness to accept Congress's tendency to put conditions or limits on grants of authority.

The invitation created a precedent for the rest of the Obama years and for future Presidents because a Democratic President made concessions to a Republican Congress.²²⁴ This resembled the way that President Bush in late 1990 asked a Democratic Congress to authorize the Persian Gulf War, and, after a robust congressional debate, obtained authorization in January 1991, with a close Senate vote of fifty-two to forty-seven.²²⁵ Presidents Bush and Obama demonstrated that a President may seek and accept the authorization votes from a Congress controlled by the opposition party.

C. Congress Skeptical About Acting

In the wake of President Obama's invitation, the Republican-controlled Congress did give some consideration to the issue.²²⁶ However, as the *New York Times* put it, "President Obama's formal request for congressional authorization to fight the Islamic State—once framed by lawmakers as a matter of great constitutional import—is now seriously imperiled because Republicans think it does too little and Democrats think it does

218. Charles Tiefer, *Can Congress Make a President Step Up a War?*, 71 LA. L. REV. 391, 441-42 (2011) [hereinafter Tiefer, *Can Congress Make a President*].

219. *Id.*

220. GRIMMETT, *supra* note 82, at 4-5.

221. See Wagner, *supra* note 193, at 259-60 (describing President Obama's goal to unify the branches in the face of war).

222. See *id.* (describing President Obama's goal to unify the branches and the importance of the proposed legislation).

223. See JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 205, 207 (2007).

224. See Eric Pianin, *Why Congress Is Neglecting the War on ISIS*, FISCAL TIMES (Aug. 6, 2015), <http://www.thefiscaltimes.com/2015/08/06/Why-Congress-Neglecting-War-ISIS> (describing the interactions between President Obama and the Republican Congress).

225. CHARLES TIEFER, *THE SEMI-SOVEREIGN PRESIDENCY: THE BUSH ADMINISTRATION'S STRATEGY FOR GOVERNING WITHOUT CONGRESS* 130-33 (Westview Press 1994).

226. See generally Peters & Gordon, *supra* note 206.

too much.”²²⁷

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

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

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

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

227. Ashley Parker, *Impasse with Congress Imperils Authorization to Combat ISIS*, N.Y. TIMES (Mar. 11, 2015), http://www.nytimes.com/2015/03/12/us/politics/a-rift-imperils-authorization-to-combat-isis.html?_r=0.

228. Peters & Gordon, *supra* note 206.

229. Kristina Wong, *Kerry Talk Deepens Dem Unease on ISIS War Powers*, HILL (Feb. 27, 2015), <http://thehill.com/policy/defense/234046-afghan-war-powers-how-long-is-enduring> (emphasis added).

230. Obama, *supra* note 209.

231. Wong, *supra* note 229.

232. Wagner, *supra* note 193, at 267.

233. *See id.*

234. The hopes for the Iraqi forces to retake Mosul faded. ISIS took other cities, notably Ramadi. American training seemed unable to stand up the Iraqi army. Shiite militias could do some fighting against ISIS, but they alienated the Iraqi Sunni community. Robert Burns, *US Strategy in Question After Iraq’s Stalemate in Ramadi*, BUS. INSIDER (Sept. 28, 2015), <http://www.businessinsider.com/ap-us-strategy-in-question-after-iraqs-stalemate-in-ramadi-2015-9>.

235. *See* Peters & Gordon, *supra* note 206 (detailing such debates).

236. Tiefer, *Can Congress Make a President*, *supra* note 218, at 448.

237. *See* KENNETH KATZMAN ET AL., CONG. RESEARCH SERV., R43612, THE “ISLAMIC STATE” CRISIS AND POLICY 28–31 (2015).

went, Congress still did not act, for reasons beyond those involved in alternative drafts of the authorization.²³⁸ Although there were partisan differences about what to say in the authorization, Senators Tim Kaine (D-Va.) and Jeff Flake (R-Ar.) developed a bipartisan draft in June 2015, but it went nowhere.²³⁹

In January 2016, the Senate Republican Majority Leader, Senator McConnell, set the stage for Senate consideration of an authorization for the war with ISIS.²⁴⁰ The House and Senate continued to consider bipartisan action in 2016.²⁴¹ Still, Republicans did not see the advantage in a vote.²⁴² At the time, it seemed necessary for the American effort to continue. Since President Obama lacked fresh congressional authorization, he continued to assert that Congress authorized the current military actions when it passed the 2001 and 2002 AUMFs. Republicans were likely to be glad not to have their fingerprints on an authorization, giving them a clear field to blame Obama for a failed strategy.²⁴³

In terms of war powers, this brought up a new variation on an old issue: does Article I give Congress constitutional duties along with the constitutional powers it provided?²⁴⁴ Congress chose to keep itself on the sidelines even though the President invited it to act.²⁴⁵ Would Congress find itself vulnerable to criticism for failing to vote on a war question, and for dereliction of its constitutional duty? Although some Members tried to get such a vote, the desire not to commit seemed bipartisan and bicam-

238. See Jennifer Bendery, *One Year In, Congress Still Hasn't Authorized the War Against Isis*, HUFFINGTON POST (Aug. 6, 2015), http://www.huffingtonpost.com/entry/congress-aumf-isis_us_55c2482be4b0138b0bf4bca4; Eric Pianin, *Why Congress Is Neglecting the War on ISIS*, FISCAL TIMES (Aug. 16, 2015), <http://www.thefiscaltimes.com/2015/08/06/Why-Congress-Neglecting-War-ISIS>.

239. Eric Pianin, *Congress Lets Obama Go It Alone to Fight ISIS*, FISCAL TIMES (Apr. 23, 2015), <http://www.thefiscaltimes.com/2015/04/23/Congress-Lets-Obama-Go-It-Alone-Fight-ISIS>; Josh Rogin, *Islamic State War Authorization Goes Nowhere, Again*, BLOOMBERG VIEW (June 9, 2015), <http://www.bloombergview.com/articles/2015-06-09/islamic-state-war-authorization-goes-nowhere-again>.

240. Herszenhorn, *supra* note 4.

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

242. Peter Beinart, *Why Won't the GOP Declare War on ISIS?*, ATLANTIC (May 28, 2015), <http://www.theatlantic.com/politics/archive/2015/05/congress-aumf-isis-war/394268>.

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

244. See Peter D. Coffman, *Power and Duty: The Language of the War Power*, 80 CORNELL L. REV. 1236, 1246-48, 1262-63 (1995) (reviewing JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993)).

245. Bruce Ackerman, *Can the Supreme Court Force Congress to Own the War on ISIS?*, ATLANTIC (Aug. 25, 2015), <http://www.theatlantic.com/politics/archive/2015/08/supreme-court-and-isis/402155>.

eral.²⁴⁶ It is extraordinary that Congress would stay silent on whether to authorize war, especially when the party opposite the President controls both chambers.

IV. How the War Powers Process Worked Democratically and Legitimately

The tradition in studying war powers is to focus on whether the President had sufficient authority for the war powers action he has taken.²⁴⁷ Put baldly, the question is whether the President or, alternatively, the Congress, prevailed. The pro-executive side insists that the President may exercise war powers without formal congressional authorization—thus, the President “wins.” For example, President Reagan “won” by invading Grenada, and President George H.W. Bush “won” by invading Panama.²⁴⁸ Some think the President almost always wins.²⁴⁹

The pro-Congress side urges that when Congress insists on a meaningful authorization vote and obtains a relatively honest exposition from the President about what is going on and what he wants to do, Congress “wins.” For example, when President George H.W. Bush sought and obtained congressional authorization before invading Iraq in the first Persian Gulf War, Congress “won.”²⁵⁰ And when President Obama (along with NATO allies) imposed a no-fly zone on Libya in 2011 without specific congressional authorization, Congress “lost.”²⁵¹

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

A purely formal and binary analysis of the Syrian episode in 2013 would suggest that the President “lost.”²⁵² Some traditional pro-executive critics would denigrate President Obama for his failure to assert unilateral executive authority. He started out asserting the power to make war decisions on his own, but then “backed down” and went to Congress.²⁵³ Those who value unilateral Presidential power would classify this episode as a Presidential “loss.”²⁵⁴

246. Bendery, *supra* note 238; Matt Fuller, *Why Won't Congress Declare War on ISIS?*, HUFFINGTON POST (Dec. 15, 2015), http://www.huffingtonpost.com/entry/congress-isis-war_us_566f47cae4b0fccee16f938b.

247. See, e.g., Coffman, *supra* note 244.

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

249. Koh, *Why the President (Almost) Always Wins*, *supra* note 167.

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

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

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

253. *Id.*

254. Burgin, *supra* note 77, at 214-15; Kriner, *supra* note 243, at 314.

Instead of merely classifying war powers battles as presidential or congressional “wins” or “losses,” the approach taken in this Article examines the process of the interaction between the branches. In 2013, Syrian President Assad’s use of chemical weapons against Syrian citizens created a novel challenge for U.S. policymakers.²⁵⁵ The American public and Congress were split on how to respond.²⁵⁶ Should the United States steer clear of the Syrian conflict despite Assad’s use of chemical weapons?²⁵⁷

Facing this, President Obama and Congress consulted relatively closely.²⁵⁸ In the past, Presidents have given lip service to consulting without any sign they paid heed.²⁵⁹ This time, President Obama sought a congressional vote in part because the Speaker of the House, John Boehner, advised putting it to a congressional vote, and promised to provide an opportunity for a vote on a straightforward basis.²⁶⁰ This action was not knee-jerk or ideological on either side. The two leaders attempted to craft a legislative process so that the outcome would have democratic legitimacy.²⁶¹

The President and congressional leaders sought full congressional consideration, including congressional hearings.²⁶² Those hearings and the press coverage brought out the public’s preferences concerning the issue.²⁶³ This was not a matter of a simple partisan split. Both parties split internally.²⁶⁴ In both parties, the party leaders backed President Obama, while many of the rank-and-file did not.²⁶⁵ The swing undeclared

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

256. *Public Opinion Runs Against Syrian Airstrikes*, PEW RES. CTR. (Sept. 3, 2013), <http://www.people-press.org/2013/09/03/public-opinion-runs-against-syrian-air-strikes/>.

257. Koh, *Syria and the Law of Humanitarian Intervention*, *supra* note 93.

258. Press Release, President Barack Obama, Statement by the President (Aug. 28, 2014), <https://www.whitehouse.gov/the-press-office/2014/08/28/statement-president>; Ashley Parker, *Legislators Push for Vote Before Strike*, N.Y. TIMES (Aug. 28, 2013), <http://www.nytimes.com/2013/08/29/world/middleeast/legislators-push-for-vote-before-strike.html>.

259. For example, President Reagan disastrously sent Marines into Lebanon in 1983, without consulting with Congressional leaders who would have warned him that it was no place for ground troops. Ford, *supra* note 30, at 638.

260. Deidre Walsh, *Boehner Might Bring Congress Back for Syria Debate After All*, CNN (Sept. 30, 2014, 8:57 AM), <http://www.cnn.com/2014/09/29/politics/john-boehner-mixed-messages/>.

261. See Press Release, *supra* note 258; Walsh, *supra* note 260.

262. Letter from John Boehner, Speaker of the House of Representatives, to President Barack Obama (Aug. 28, 2013), <http://www.speaker.gov/press-release/boehner-seeks-answers-president-obama-syria>; Press Release, President Barack Obama, Remarks by the President in Address to the Nation on Syria (Sept. 10, 2013), <http://www.whitehouse.gov/the-press-office/2013/09/10/remarks-president-address-nation-syria>.

263. See *Public Opinion Runs Against Syrian Airstrikes*, *supra* note 256 (describing public opinion on Syrian airstrikes).

264. Molly Ball, *How the Syria Debate is Splitting Both Parties*, ATLANTIC (Sept. 3, 2013), www.theatlantic.com/politics/archive/2013/09/how-the-syria-debate-is-splitting-both-parties/279301/.

265. *Id.*

bloc consisted of House Democrats from anti-war districts.²⁶⁶

There are different ways to view the final outcome, with Russia brokering a deal under which Syria surrendered—and international authorities destroyed—Syria’s chemical weapons, avoiding any U.S. military action.²⁶⁷ Commentators who favor unilateral executive power would say that President Obama “lost” because he unnecessarily sought congressional authorization, risked defeat at the hands of Congress, and was bailed out by the Russians.²⁶⁸

A process analysis, however, reveals a legitimate and democratic process through which the political branches deliberated on, and came to a successful resolution on, the possible exercise of war powers.²⁶⁹ There was robust interaction between the President and Congress on the issue, and the resulting decision reflected the democratic will.

The war powers process can move fast, as with the near instant congressional responses to the Pearl Harbor attack in 1941 and to the 9/11 attack in 2001.²⁷⁰ The process can also move slowly, delaying a rush to war. The Syrian chemical weapons incident demonstrates that in the absence of an attack, the President and Congress can take the time to evaluate, consult, debate, and consider options, producing a democratic and legitimate outcome.

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

—In 1915, while World War I was raging on the European continent, but before the United States entered the war, a German submarine sank the *Lusitania*.²⁷¹ President Wilson may have considered war, but Congress was not yet unified in favor of war, and the President sent diplomatic warnings to Germany.²⁷² Germany agreed to back away from unrestricted submarine warfare, which it did until 1917, where its actions ultimately brought the

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

267. Michael Gordon, *U.S. and Russia Reach Deal to Destroy Syria’s Chemical Arms*, N.Y. TIMES (Sept. 14, 2013), <http://www.nytimes.com/2013/09/15/world/middleeast/syria-talks.html>.

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

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

270. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (passed 7 days after 9/11); Frank Kluckhohn, *U.S. Declares War, Pacific Battle Widens; Manila Area Bombed; 1,500 Dead in Hawaii, Hostile Planes Sighted at San Francisco*, N.Y. TIMES, Dec 8, 1941, at A1.

271. Laura K. Donohue, *The Limits of National Security*, 48 AM. CRIM. L. REV. 1573, 1640 (2011).

272. *Id.* at 1641.

United States into the war.²⁷³ The U.S. entry into the war was postponed for two years, allowing the country to become more unified before joining the terrible conflict.²⁷⁴

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

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

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

273. *Id.* at 1642-43.

274. *Id.*

275. See Tiefer, *Can Congress Make a President*, *supra* note 218, at 433.

276. Cody K. Carlson, *This Week in History: China Enters the Korean War*, DESERET NEWS (Nov. 26, 2014), <http://www.deseretnews.com/article/865616489/This-week-in-history-China-enters-the-Korean-War.html?pg=all>; see Mark Perry, *Rethinking Douglas MacArthur*, POLITICO (May 25, 2014), <http://www.politico.com/magazine/story/2014/05/rethinking-douglas-macarthur-106397> (noting that MacArthur was "so popular that mothers named their children for him").

277. Tiefer, *Can Congress Make a President*, *supra* note 218, at 433; see H.W. Brands, *The Redacted Testimony that Fully Explains Why General MacArthur Was Fired*, SMITHSONIAN MAG. (Sept. 28, 2016), <http://www.smithsonianmag.com/history/redacted-testimony-fully-explains-why-general-macarthur-was-fired-180960622/> (noting that at these hearings, the Joint Chiefs of staff opined that MacArthur's approach would "involve us in the wrong war, in the wrong place, at the wrong time and with the wrong enemy").

278. Tiefer, *Can Congress Make a President*, *supra* note 218, at 433-34.

279. John Kerry, *supra* note 6.

280. See Gonzalez, *supra* note 14, at 163.

281. *Id.* The 9/11 resolution was over a decade old and had always been directed at al Qaeda; from a time and cause that long preceded the very existence of ISIS. It did not help that, years before, Obama himself had considered that 2001 9/11 measure as better repealed. Derek Tsang, *To Justify ISIS Airstrikes, Obama Using Legislation He Wants Repealed*, POLITIFACT (Sept. 18, 2014), <http://www.politifact.com/punditfact/statements/2014/sep/18/julie-pace/justify-airstrikes-against-islamic-state-obama-usi/>.

President Obama was attempting to have it both ways. He asserted that he already had enough authority under those two AUMFs without further congressional action, but also sought explicit congressional authorization for action against ISIS. Lawyers are used to “arguing in the alternative,” but from a pro-congressional perspective, President Obama did not actually defer to Congress because he initially took action without seeking explicit congressional authorization.

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

President Obama did not commit to end military engagement against ISIS even in the event that Congress formally rejected his request.²⁸² Moreover, starting in late 2015, he unilaterally authorized the deployment of Special Forces missions in Syria.²⁸³ But by formally making his authorization request to Congress, he gave the impression that he would act in accordance with Congress’s wishes. By basing his own action on the 2001 authorization, Obama set the stage to accept that as a reason to reduce American involvement in the event that Congress repealed or limited the 2001 authorization.²⁸⁴

Conversely, Congress had ample room—if it chose—to ask for a ratcheted-up war effort. The President passed the ball to Congress and gave it room to decide its role. From the beginning of 2015 until 2016, Congress has so far decided not to decide.²⁸⁵

With regard to the ISIS conflict starting in 2014, the President’s interactions with Congress constitute a novel process to address a complex war powers situation. This is a situation where all relevant actors—the President, the Congress, and the public—are highly ambivalent.²⁸⁶ Few want to get dragged into a land war in Syria.²⁸⁷ Even fewer want the United States to lose more lives and treasure on top of so much already lost in that region. No one had a strategy that could definitively promise complete

282. Baker & Parker, *supra* note 215.

283. *Syria Conflict: Obama To Send Special Forces To Fight ISIS*, BBC (Oct. 30, 2015), <http://www.bbc.com/news/world-us-canada-34681648>.

284. MATTHEW C. WEED, CONG. RESEARCH SERV., R43983, 2001 AUTHORIZATION FOR USE OF MILITARY FORCE: ISSUES CONCERNING ITS CONTINUED APPLICATION 2, 7 (2015).

285. Jack Goldsmith, *Why the AUMF for the Islamic State Has Stalled*, LAWFARE (Mar. 20, 2015), <https://www.lawfareblog.com/why-aumf-islamic-state-has-stalled>; Ryan Lucas, *Common Defense: A Silent Majority in Congress on War*, CQ MAG. (Nov. 9, 2015), <http://library.cqpress.com/cqweekly/document.php?id=weeklyreport114-000004786305>.

286. Uri Friedman, *No One’s War*, ATLANTIC (Jan. 21, 2015), <http://www.theatlantic.com/international/archive/2015/01/obama-war-isis-state-of-the-union/384700/>.

287. John Kerry, *supra* note 6 (“We all agree there will be not American boots on the ground.”); Peters & Gordon, *supra* note 206.

victory at an acceptable cost.²⁸⁸

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

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

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

V. New and Positive Developments in Domestic War Powers Debates

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

288. The only local force that could fight ISIS (putting aside the Kurds, who were not national in size) consisted of Shia militia. These were closely tied to Iran, and hated and feared by Iraqi Sunnis. A war by the United States with regular ground combat units could repeat the sectarian strife of 2003-2007. Hugh Naylor & Mustafa Salim, *In Fighting ISIS, Iraq's Shiite Militias Could Ignite a Sectarian Mess*, WASH. POST (June 3, 2016), https://www.washingtonpost.com/world/middle_east/in-fighting-isis-iraqs-shiite-militias-threaten-to-ignite-a-sectarian-mess/2016/06/02/1eb8b1a0-28d5-11e6-8329-6104954928d2_story.html.

289. Jim Muir, *Islamic State Group: The Full Story*, BBC (June 20, 2016), <http://www.bbc.com/news/world-middle-east-35695648>.

290. Leigh Ann Caldwell, *As Obama Prepares for ISIS Fight, Where Are the Doves?*, CNN (Sept. 10, 2014), <http://www.cnn.com/2014/09/10/politics/obama-isis-doves/>.

291. See Russell Berman, *The War Against ISIS Will Go Undeclared*, ATLANTIC (Apr. 15, 2015), <http://www.theatlantic.com/politics/archive/2015/04/the-war-against-isis-will-go-undeclared/390618/>. On the one hand, Democrats knew that a "yes" vote in support of the Iraq War in Iraq had not looked so good later on. On the other hand, Congressmembers either knew, or understood without knowing, that a "no" vote for the 1990 Iraq had not looked so good later on. It was dangerous to make a commitment either way on controversial wars.

292. Baker & Weisman, *supra* note 111.

293. See Berman, *supra* note 291.

294. Baker & Weisman, *supra* note 111.

include a President's initiation of military action, congressional authorizations and appropriations, the occasional judicial opinion, and even those of international organs, such as UN Security Council resolutions.²⁹⁵ In addition to the few contemporary court cases addressing war authorization disputes between the President and Congress, scholars also examine the Justice Department's legal opinions addressing presidential authority, such as the Justice Department opinion on the Libyan no-fly zone of 2011.²⁹⁶

This Article takes a different approach, focusing less on formal authority and more on the process through which Congress and the President interact in the run-up to the exercise of war powers. Formal questions of authority do matter.²⁹⁷ But an under-examined aspect of the war powers debate is this interactive inter-branch process. The steps, stances, and actions of participants are expressed in many ways that do not necessarily produce formal legal instruments. What is most interesting in the contemporary development of war powers is the evolution of how politico-legal institutions interact in the run-up to war.

In this regard, for the 2013–2016 time frame, one of the most striking aspects has been how the President twice invited Congress to enact explicit authorization for military action. The first invitation, regarding Syrian use of chemical weapons, stunned observers who had taken it for granted that Presidents decide on war unilaterally.²⁹⁸ Later, President Obama invited Congress to enact explicit authorization for military action against ISIS.²⁹⁹ He was prepared to deem U.S. involvement to be authorized in the conflict in any case, but there was no serious doubt as to the sincerity of the invitation.³⁰⁰

As a matter of formality, there is no obvious textual predicate or historical precedent for such an invitation (in contrast to the requirement that the President submit his proposed treaties and nominations to Senate for ratification and confirmation).³⁰¹ The constitutional text does not say anything about invitations in the Declaration of War Clause or the Commander in Chief Clause.³⁰² In the nineteenth century, two wars, the War of 1812 and the Spanish American War of 1898, were largely instigated by the hawks in Congress rather than the President (Madison and McKin-

295. Matthew C. Waxman, *The Power to Threaten War*, 123 YALE L.J. 1626, 1626, 1629, 1631 (2014).

296. See, e.g., Arthur H. Garrison, *The History of Executive Branch Legal Opinions on the Power of the President as Commander-in-Chief from Washington to Obama*, 43 CUMB. L. REV. 375, 468 (2013).

297. Robert S. Summers, *How Law is Formal and Why It Matters*, 82 CORNELL L. REV. 1165, 1204–07 (1997).

298. See Baker & Weisman, *supra* note 111 (describing the invitation as “one of the riskiest gambles of [Obama’s] presidency”).

299. See Berman, *supra* note 291.

300. *Id.*

301. Joe Barnes, *Obama’s AUMF Is Largely Meaningless, But a Good Idea Anyway*, HILL (Feb. 25, 2015), <http://thehill.com/blogs/pundits-blog/defense/233747-obamas-aumf-is-largely-meaningless-but-a-good-idea-anyway> (noting that the invitation “marks progress” in the war powers struggle between Congress and the President).

302. U.S. CONST. art. I, § 8, cl. 11; *id.* art. II, § 2, cl. 1.

ley).³⁰³ In the twentieth century, Congress attempted to end or block military conflict several times, such as during the end of the Indochina War in 1974 and the Boland Amendments of 1984–1986, with Presidents vehemently objecting.³⁰⁴

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

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

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

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

303. Tiefer, *Can Congress Make a President*, *supra* note 218, at 410.

304. *Id.* at 414.

305. Ackerman & Hathaway, *supra* note 62, at 458.

306. President Obama was criticized for continuing the 2011 Libyan air strikes beyond the statutory sixty-day period of the War Powers Resolution for “hostilities.” Charlie Savage, *Attack Renews Debate Over Congressional Consent*, N.Y. TIMES (Mar. 21, 2011), <http://nytimes.com/2011/03/22/world/Africa/22powers.html>; Savage & Landler, *supra* note 217.

307. See Tiefer, *Can Congress Make a President*, *supra* note 218, at 408–09 (discussing the long-standing Supreme Court law establishing the meaningfulness of limitations in war authorizations). The wording of war authorizations has the full indicia of formal potency—judicial opinions, and, inscription on the formal instrument by which Congress authorizes war.

308. Savage, *supra* note 185.

309. See CHARLES TIEFER, *VEERING RIGHT: HOW THE BUSH ADMINISTRATION SUBVERTS THE LAW FOR CONSERVATIVE CAUSES* 258–59 (University of California Press 2004).

310. See *id.*

2013 and has not enacted one in connection with ISIS since 2014.³¹¹ From a formal perspective, nothing happened. But during both periods, Congress considered and rejected proposed authorizations.³¹² It was clear that congressional consideration of those proposals focused on whether to prohibit regular units of ground combat troops. Congress's consideration and rejection of the proposals suggest—even without formal enactment—that Congress meant to bar such units, and that President Obama should listen.

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

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

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

311. See Kevin Liptak, *How Obama Came to Launch Strikes in Syria*, CNN (Sept. 23, 2014), <http://www.cnn.com/2014/09/23/politics/Obama-syria-strikes-policy/> (noting that President Obama sought authorization from Congress in both cases).

312. Berman, *supra* note 291.

313. Tiefer, *Can Congress Make a President*, *supra* note 218, at 408–09. Congress has authorized and funded an army, a navy, and an air force, and has specified an enemy. The President is the Commander-in-Chief of all the forces, and, it is argued, it is up to the President whether to use one, two, or all three. *Id.*

314. Tiefer, *Appropriation Riders*, *supra* note 23, at 291–92, 342.

315. Ackerman & Hathaway, *supra* note 62, at 447, 485.

Conclusion

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

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

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