

The Constitutional Objector: How Servicemembers Can Restore the Constitutional Separation of War Powers

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ABSTRACT

The Constitution entrusts Congress with the power to declare war and renders the President the Commander in Chief of the Armed Forces. The Founders designed the separation of war powers to prevent the President from obtaining monarchical powers by ensuring congressional deliberation before engaging in hostilities, while simultaneously empowering the President to repel attacks against the United States. In the modern era, declarations of war became archaic and were replaced with congressional authorizations that serve the same function. Since World War II, Presidents successfully aggrandized the executive branch's ability to make war at the expense of Congress. By enacting broad Authorizations of Military Force that described rather than identified the enemy in response to the September 11 terrorist attacks, which permitted the President to claim the power to take the country to war against enemies that did not exist in 2001, Congress contributed to the distortion of the Founders' design. The questionable legality of the war against the Islamic State led Army Captain Nathan Smith to take President Obama and President Trump to court to resolve the legality of that conflict. The doctrines of standing and political question have thus far prevented judicial adjudication of the merits of the case. This Note argues that Congress should grant to servicemembers the ability to claim "constitutional objector" status, which would permit members of the Armed Services to voluntarily refrain from conflicts of dubious legality and that, if a critical mass of soldiers took advantage of this offer, the political branches would be forced to restore the separation of war powers as designed by the Founders.

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INTRODUCTION

On May 4, 2016, U.S. Army intelligence officer Captain Nathan Michael Smith sued the President of the United States, challenging the legality of the Obama Administration’s military actions against the Islamic State.¹ Captain Smith claimed that America’s military effort against the Islamic State was an illegal war not authorized by Congress and that obeying his orders under “Operation Inherent Resolve” required him to violate his constitutional oath.² By November, a United States district court had dismissed the case on the grounds that Captain Smith lacked standing and his complaint presented a non-justiciable political question.³

Despite the judiciary’s quick dispatch of Captain Smith’s complaint, leaders in the political branches publicly expressed their desire for congressional action expressly authorizing hostilities against the Islamic State.⁴ President Obama requested a formal authorization⁵ and sent a draft authorization for the use of military force (AUMF) to Congress.⁶ In Congress, a bipartisan coalition called on

1. Louis Fisher, *A Challenge to Presidential Wars: Smith v. Obama*, 44 CONGRESS & THE PRESIDENCY, 259, 259 (2017).

2. Garrett Epps, *Can the Courts Make Congress Declare War?*, ATLANTIC (June 1, 2016) <https://www.theatlantic.com/politics/archive/2016/06/war-powers-irresolution/485021/> [<https://perma.cc/572R-SDRZ>].

3. Judge Colleen Kollar-Kotelly wrote that Captain Smith failed to allege an injury-in-fact sufficient to establish Article III standing, and that the court would not determine whether the President Obama’s interpretation of the 2001 and 2002 AUMFs as justifications for military operations against the Islamic State was correct. *Smith v. Obama*, 217 F. Supp. 3d 283, 297, 299–300 (D.D.C. 2016).

4. President Obama called on Congress to authorize the war against the Islamic State. In response, the Republican and Democratic leadership in the United States House of Representatives expressed a willingness to support a new AUMF, with caveats. See 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/index.html> [<https://perma.cc/4PJV-WCMH>].

5. Message to the Congress on Submitting Proposed Legislation To Authorize the Use of Military Force Against the Islamic State of Iraq and the Levant (ISIL) Terrorist Organization, 2015 DAILY COMP. PRES. DOC. 201500093 (Feb. 11, 2015).

6. Acosta & Diamond, *supra* note 4.

Speaker of the House Paul Ryan to permit debate on whether a new congressional authorization was required to continue military action against the Islamic State.⁷

Congress did not enact President Obama's proposal or any other express authorization against the Islamic State.⁸ Still, the Commander in Chief ordered the United States Armed Forces to take military action against the Islamic State.⁹ What is a soldier to do?¹⁰

Captain Smith sought adjudication by the courts,¹¹ so he appealed the district court's dismissal. Captain Smith argued in the appellate court that he had standing because being forced to either disobey an order and face military sanctions or obey the order and violate his oath was an injury in fact.¹² Additionally, he argued that the political question doctrine did not bar adjudication of his case because courts may determine whether the President exceeds the scope of the AUMFs and whether he is complying with the War Powers Resolution.¹³ The government argued that Congress ratified the President's interpretation of the 2001 and 2002 AUMFs to cover action against the Islamic State by appropriating billions of dollars for the effort.¹⁴ At oral argument, the government argued that the legality of wars are off-limits to court review, even if the wars have not been authorized by Congress.¹⁵

But, the contested legality of the war against the Islamic State stems exactly from the lack of express congressional authorization for this particular war, even if former AUMFs properly authorized military engagement against other enemies.¹⁶ The Constitution grants Congress the power to declare war and

7. Rebecca Shabad, *Bipartisan Group of 46 Lawmakers Call on Paul Ryan To Revive AUMF Debate*, CBS NEWS (Apr. 28, 2017), <https://www.cbsnews.com/news/bipartisan-group-of-46-lawmakers-call-on-paul-ryan-to-revive-aumf-debate/> [<https://perma.cc/4JQH-NLNU>].

8. Charles Trier & Kathleen Clark, *Congressional and Presidential War Power as a Dialogue: Analysis of the Syrian and ISIS Conflicts*, 49 CORNELL INT'L L.J. 683, 710–12 (2016).

9. Helene Cooper, Mark Landler, & Alissa J. Rubin, *Obama Allows Limited Airstrikes on ISIS*, N.Y. TIMES, Aug. 7, 2014, <https://www.nytimes.com/2014/08/08/world/middleeast/obama-weighs-military-strikes-to-aid-trapped-iraqis-officials-say.html>.

10. See Fisher, *supra* note 1, at 259 (Smith asked “How could I honor my oath when I am fighting a war, even a good war, that the Constitution does not allow, or Congress has not approved.”).

11. UPDATE: Smith v. Obama: A Servicemember's Legal Challenge to the Campaign Against the Islamic State, CRS LEGAL SIDEBAR, <https://fas.org/sgp/crs/natsec/smith.pdf> (last visited Nov. 10, 2017) [<https://perma.cc/DC88-KUBQ>].

12. Reply Brief of Appellant at 3, Smith v. Trump, No. 16-5377 (D.C. Cir. argued Oct. 27, 2017).

13. Reply Brief of Appellant, *supra* note 12, at 7–10.

14. Defendant's Motion to Dismiss at 22–25, Smith v. Obama, 217 F. Supp. 3d 283 (D.D.C. 2016) (No. 16-843).

15. Steven Nelson, *Trump Justice Department: Wars Are Off Limited to Court Review*, WASH. EXAMINER (Oct. 27, 2017, 4:34 PM), <https://www.washingtonexaminer.com/trump-justice-department-wars-are-off-limits-to-court-review> [<https://perma.cc/6TAU-8S26>].

16. Andrew Rudalevige, *Is the War Against the Islamic State Illegal? A New Lawsuit Should Prompt Congress To Decide*, WASH. POST (May 11, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/05/11/is-the-war-against-islamic-state-legal-heres-why-combat-deaths-and-a-lawsuit-should-prompt-congress-to-decide/?utm_term=.37535d2164cb [<https://perma.cc/8TUM-USQ6>].

empowers the President to wage wars as Commander in Chief.¹⁷ Although many legal scholars agree that the President can order the Armed Forces into action to defend against an actual or imminent attack,¹⁸ the Constitution prevents the President from unilaterally committing the nation to war.¹⁹

This Note will argue that AUMFs that describe, rather than identify, the enemy threaten the Founders' vision that Congress would deliberate before going to war. Such AUMFs also provide the opportunity for a President to stretch the language of the authorization to expand its coverage to enemies Congress did not intend to reach. Part I of this Note will argue that the Founders granted Congress the power to declare war to ensure the initiation of hostilities would be the result of collective wisdom. Additionally, the congressional power to declare war served as a method to prevent the President from assuming monarchical powers. Part II will discuss the nature of the commander-in-chief power and argue that the aggrandizing actions on the part of a series of presidents disrupted the careful separation of war powers designed by the Founders. Part III will argue that Congress has neither authorized nor ratified the conflict against the Islamic State. Part IV will suggest a method, albeit one with potentially severe consequences, by which servicemembers may seek to have an Article III court clarify the legality of the mission they are ordered to support. Finally, this Note proposes solutions to restore the constitutional separation of war powers as the Founders envisioned, namely: (1) Congress should create a "constitutional objector" status, akin to conscientious objector, that permits soldiers to refrain from participating in military efforts they believe to dishonor their oath to the Constitution of the United States, and (2) if a sufficient number of soldiers take constitutional objector status, the political branches would be provided with a useful metric that flags a defective authorization for military conflict, so those branches can rectify the situation by either expressly authorizing or ending the conflict.

I. CONSTITUTIONAL SEPARATION OF WAR POWERS: THE FOUNDERS INTENDED THE COLLECTIVE JUDGMENT OF CONGRESS TO PREVENT THE EMERGENCE OF AN AMERICAN MONARCH

As the Founders crafted the Constitution and debated its ratification, they consistently maintained that the decision to go to war was far too important to be

17. *Balance of U.S. War Powers*, COUNCIL ON FOREIGN RELATIONS, <https://www.cfr.org/backgrounder/balance-us-war-powers> (last visited Nov. 11, 2017) [<https://perma.cc/8XRQ-LVQH>].

18. *Id.*

19. See, e.g., James Madison, *Helvidius Number IV*, in *THE PACIFICUS-HELVIDIUS DEBATES OF 1793–1794: TOWARD THE COMPLETION OF THE AMERICAN FOUNDING* 91 (Morton J. Frish ed., 2007) ("In no part of the constitution is more wisdom to be found, than in the clause which confides the question of war or peace to the legislature, and not to the executive department . . . War is in fact the true nurse of executive aggrandizement. In war, a physical force is to be created; and it is the executive will, which is to direct it. In war, the public treasures are to be unlocked; and it is the executive hand which is to dispense them. In war, the honours and emoluments of office are to be multiplied; and it is the executive patronage under which they are to be enjoyed. It is in war, finally, that laurels are to be gathered, and it is the executive brow they are to encircle.").

trusted to one man, or even one man and the Senate.²⁰ The Constitution explicitly grants to Congress the power to “declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.”²¹ Before declaring war, the Founders expected Congress to deliberate and to ensure that war was in the interest of the nation, not just the project of a President seeking to aggrandize his own powers.²² At the Constitutional Convention, Charles Pinckney argued that uniting the war powers under a single executive would grant to the President monarchical powers.²³ At the Pennsylvania ratifying convention, James Wilson stated that the proposed Constitution would not allow one man, or even one body of men, to declare war.²⁴ *Federalist No. 4*, in which John Jay argued that a strong national union would better protect the United States against foreign aggression, expressed the view that absolute monarchs often take their nations to war solely for military glory and with no benefit to his people.²⁵ Alexander Hamilton explained in *Federalist No. 69* that the President would have reduced war powers relative to that of the British monarch and would be restricted to conducting the operations of the armies and navies, which Congress alone could raise and fund.²⁶ Federalist leaders, advocating on behalf of the Constitution, argued that the proposed charter gave Congress the exclusive power to commit the nation to hostilities.²⁷

The Founding Generation was largely united in the opinion that the President should not be bestowed with the monarchical power to initiate war unilaterally.

20. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE US CONSTITUTION* 75–76 (2d ed. 1996).

21. U.S. CONST. art. I, § 8, cl. 11.

22. Tom Ginsburg, *Chaining the Dog of War: Comparative Data*, 15 CHI. J. INT’L L. 138, 142 (2014).

23. FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, *TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW* 17 (1986).

24. Fisher, *supra* note 1, at 261.

25. THE FEDERALIST NO. 4, at 13 (John Jay) (George W. Carey & James McClellan eds., 2001) (“It is too true, however, disgraceful it may be to human nature, that nations in general will make war whenever they have a prospect of getting any thing by it; nay, absolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as the thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans. These, and a variety of motives, which affect only the mind of the sovereign, often lead him to engage in wars not sanctioned by justice or the voice and interests of his people.”).

26. THE FEDERALIST NO. 69, at 357 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) (“The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the DECLARING of war and to the RAISING and REGULATING of fleets and armies, all which, by the Constitution under consideration, would appertain to the legislature.”).

27. Professor Michael Ramsey states that the major Founders who believed the Constitution granted to the Congress the exclusive power to initiate hostilities included not only people with reservations about presidential power, such as James Madison and Thomas Jefferson, but also strong advocates of presidential prerogatives, such as George Washington and Alexander Hamilton. Michael Ramsey, *The Constitution and Libya*, OPINIO JURIS (Mar. 23, 2011, 6:44 PM), <http://opiniojuris.org/2011/03/23/the-constitution-and-libya/> [<https://perma.cc/87J7-REJL>].

Many assumed the capable George Washington would be the nation's first President, entrusted with the awesome commander-in-chief power. Still, anti-Federalists pleaded that the proposed constitution be read with an anti-Washington in mind.²⁸ At the Virginia ratifying convention, anti-Federalist leader Patrick Henry acknowledged that the Continental Congress established an American dictator in 1781 when it briefly granted expanded powers to General Washington, but Henry asked the delegates, "Shall we find a set of American presidents of such a breed? Will the American president come and lay prostrate at the feet of Congress his laurels? I fear there are few men who can be trusted on that head."²⁹ Rather than trust that all future chief executives would adhere to Washington's example, the Founders instituted checks by which to ensure that the nation would not be taken to war on the orders of the President alone.

The Constitution contains several provisions to prevent unilateral presidential control of the military. Congress has the power of the purse by which the legislature may check the President by defunding all or part of a military effort.³⁰ Only Congress can provide and maintain a navy,³¹ as well as raise and support armies.³² Congress alone can call up the state militias for national service.³³ In sum, the Commander in Chief has nothing to command except what Congress provides.

When Congress provides the President with military forces, Congress is empowered with additional checks to determine the conflict's scope. The Constitution prohibits appropriations for an army to last longer than two years.³⁴ This provision requires Congress periodically to enact new appropriations, and the provision enables Congress to end a conflict by allowing the appropriations to expire. Additionally, the power to grant letters of marque and reprisal³⁵ provides to Congress the ability to empower private citizens to seize and profit from enemy shipping.³⁶ The use of this authority allows Congress to seek redress—in a manner that is harsher than negotiation but less extreme than a declared war—from a foreign nation it believes has wronged the United States.³⁷ Thus, the Constitution

28. DAVID J. BARRON, *WAGING WAR: THE CLASH BETWEEN PRESIDENTS AND CONGRESS 1776 TO ISIS* 19 (2016).

29. *Id.* at 27.

30. *See* U.S. CONST. art. I, § 8, cl. 1.

31. U.S. CONST. art. I, § 8, cl. 13.

32. U.S. CONST. art. I, § 8, cl. 12.

33. U.S. CONST. art. I, § 8, cls. 14–15.

34. U.S. CONST. art. I, § 8, cl. 12.

35. Letters of marque were legal authorizations for private parties—privateers—to use force to harass or prey upon an enemy of the nation. Reprisal was the legally authorized act of securing redress for a debt incurred by a foreign government by forcibly taking the private property of its subjects. J. Gregory Sidak, *The Quasi War Cases—And Their Relevance To Whether "Letters of Marque and Reprisal" Constrain Presidential War Powers*, 28 HARV. J.L. & PUB. POL'Y 465, 468 (2005).

36. *See* U.S. CONST. art. I, § 8, cl. 11.

37. Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by "Declare War,"* 93 CORNELL L. REV. 45, 55 (2007).

not only grants to Congress the decision whether to initiate hostilities, but also the authority to determine its scope.

As the early Supreme Court understood the Constitution, Congress alone determines the scope of war.³⁸ In cases prompted by the undeclared Quasi-War with France at the end of the eighteenth century, the Court recognized the prerogative of Congress to formally declare war or enact statutes authorizing the scope of hostilities in an undeclared war.³⁹ In *Bas v. Tingy*, Justice Samuel Chase wrote, “Congress is empowered to declare a general war, or [C]ongress may wage a limited war . . . [C]ongress has authorized the hostilities on the high seas by certain persons in certain cases. There is no authority given to commit hostilities on land.”⁴⁰ In *Talbot v. Seeman*, Chief Justice John Marshall echoed this sentiment: “Congress have the power of declaring war. They may declare a general war, or a partial war.”⁴¹

In 1804, a unanimous Supreme Court underscored that Congress, not the President, had the final word on the scope of war. The Court, in *Little v. Barreme*, went so far as to hold that following orders from the Commander in Chief could not immunize servicemen from acting beyond the scope of congressional authorization.⁴² During the undeclared Quasi-War, Congress enacted restrictions on commerce with France and prohibited American vessels from sailing to French ports.⁴³ To enforce these restrictions, Congress authorized the Navy to stop any American ship reasonably suspected to be bound for France and conduct a search to confirm the ship’s destination.⁴⁴ A month after the law’s enactment, President Adams issued orders that expanded the limits of the congressional authorization by enlarging the kind of ships that could be stopped. Adam’s orders broadened the authorization to include foreign ships and ships sailing from French ports.⁴⁵ Following the presidential orders, U.S. Captain George Little captured a Danish ship sailing from a French port.⁴⁶ By “obeying his instructions from the President of the United States,” which violated the implicit congressional prohibition from seizing foreign ships sailing from French ports, the Court concluded that the orders were not strictly warranted by law and Captain Little was “answerable to any person injured by their execution.”⁴⁷ Thus, because Little’s actions contravened Congress’s will, he could be liable, even though his actions comported

38. Fisher, *supra* note 1, at 262.

39. *Id.*

40. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800).

41. *Talbot v. Seeman*, 4 U.S. (1 Cranch) 1, 28 (1801).

42. *See Little v. Barreme*, 6 U.S. (2 Cranch) 170, 178–179 (1804) (“I acquiesce in that of my brethren, which is, that the instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass.”).

43. Non-Intercourse Act, ch. 2, § 1, 3 Stat. 613 (1799) (expired 1800).

44. *Id.* § 5.

45. Michael J. Glennon, *Two Views of Foreign Affairs Power: Little v. Barreme or Curtiss-Wright*, 13 YALE J. INT’L L., 5, 7 (1988).

46. *Id.*

47. *Little*, 6 U.S. (2 Cranch) at 170.

with the President's command.⁴⁸ When the executive sought to expand congressional authorization, the Supreme Court spoke with clarity: the will of Congress prevails.⁴⁹

II. THE COMMANDER-IN-CHIEF POWER, THE EMERGENCY POWER TO REPEL ATTACKS, AND CONGRESSIONAL RATIFICATION

The Constitution provides that the President shall be the Commander in Chief of the Army and Navy and of the Militia when called into actual service of the United States.⁵⁰ The Commander in Chief Clause authorizes the President to control the Armed Forces in war and in peace.⁵¹ Of course, Congress can statutorily limit the President's control, and assuming such limits are constitutional, the President must take care that those laws are faithfully executed.⁵² But the delegates at the Constitutional Convention specifically chose the title of Commander in Chief to bestow upon the President—a title that the Founders did not invent, and one that had a history of which the Convention delegates were aware.⁵³

Historically, commanders in chief did not enjoy a right to wage war on their own terms.⁵⁴ Charles I introduced the term in English law when he appointed the Earl of Arundel Commander in Chief and instructed him to “withstand all Invasions, Tumults, Seditious Conspiracies,” and authorized the Earl to execute “the law martial.”⁵⁵ In seventeenth century England, Parliament appointed commanders in chief, which were expressly expected to obey the orders of Parliament.⁵⁶ Directly related to the American experience of war, George Washington, as Commander in Chief during the Revolution, obeyed the tactical commands of the Continental Congress.⁵⁷ Thus, the first American Commander in Chief adhered to the example provided by English history and complied with the legislature's direction.

The wartime experience of the Revolutionary generation, however, compelled the Founders to design a Commander in Chief that would be more powerful than its historical antecedents. Indeed, the expectation that General Washington would defer to the legislature's tactical orders during the Revolution was considered a

48. *Id.* at 179.

49. Glennon, *supra* note 45, at 10.

50. U.S. CONST. art. 2, § 2, cl. 1.

51. Prakash, *supra* note 37, at 57.

52. U.S. CONST. art. 2, § 3.

53. BARRON, *supra* note 28, at 24.

54. *Id.*

55. WORMUTH & FIRMAGE, *supra* note 23, at 107.

56. In 1645, during the English Civil War, Parliament appointed Thomas Fairfax “captaine general and commander in chief of the armies and forces raised and to be raised by authoritie of Parliament Granting to the said Thomas Lord Fairfax, full power and authorities to rule, govern, command, dispose, and employ the said armies and forces and to be subject and pursue such orders and directions as he hath received, or at any time shall receive from the Parliament or the counsell of state appointed by authoritie of Parliament.” 11 JOHN LINGARD, A HISTORY OF ENGLAND FROM THE FIRST INVASION BY THE ROMANS 447 (2d ed. 1829).

57. BARRON, *supra* note 28, at 24.

defect that was to be rectified by the Constitution.⁵⁸ As articulated by Samuel Chase, Congress was not fit to act as a council of war because “[t]hey are too large, too slow, and their Resolutions can never be kept secret.”⁵⁹ In *Federalist No. 74*, Hamilton explained that the President’s power to direct the conduct of war “implies the direction of common strength, and the power of directing and employing the common strength forms a usual and essential part in this definition of the executive authority.”⁶⁰ In his commentaries on the Constitution, Supreme Court Justice Joseph Story stated that the war-making power is one to be guided by a single hand and that unity of “plan, promptitude, activity, and decision, are indispensable to success; and these can scarcely exist, except when a single magistrate is entrusted exclusively with the power.”⁶¹ Thus, unlike the commanders in chief in English law, which were appointed by Parliament and expected to obey the orders of the legislature, the American Commander in Chief would be elected by the Electoral College, and would be independent of Congress.⁶² The independence of the Commander in Chief was crucial to ensure that, when Congress commits the nation to military hostilities, the President alone has supreme command and direction of the military forces.⁶³

The commander-in-chief power should be exercised not only in times of congressionally-declared war but also when an enemy suddenly attacks the nation. The President commands the Armed Forces when Congress raises them, and directs those forces during times of war and peace. The President commands the militia to suppress rebellions when the militia is called into the actual service of the United States. In addition, the delegates to the Constitutional Convention amended their proposed charter by striking the initial language that granted Congress the power to “make war” and replacing it with the power to “declare war”—so as to leave “to the Executive the power to repel sudden attacks.”⁶⁴ The presidential power to repel attacks was validated by the Supreme Court in the *Prize Cases* that arose from President Lincoln’s blockade during the American Civil War, holding that Lincoln’s military action was a constitutional response to the seceding states’ sudden act of war.⁶⁵ The Court elaborated that though the

58. *Deciding to Use Force Abroad: War Powers in a System of Checks and Balances*, THE CONSTITUTION PROJECT 15, http://constitutionproject.org/pdf/War_Powers_Deciding_To_Use_Force_Abroad1.pdf (last visited Feb. 19, 2018) [<https://perma.cc/V89B-K7QS>].

59. *LETTER FROM SAMUEL CHASE TO RICHARD HENRY LEE (MAY 17, 1776)*, IN *LETTER OF DELEGATES TO CONGRESS, MAY 16-AUGUST 15, 1776* 22 (P. Smith ed. 1979).

60. *THE FEDERALIST NO. 74*, at 385 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

61. JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES; WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION* 546–47 (1833).

62. *See* U.S. CONST. art. 2, § 2, cl. 3.

63. ANN VAN WYNEN THOMAS & A. J. THOMAS, JR., *THE WAR-MAKING POWERS OF THE PRESIDENT* 7 (1982).

64. *See* 2 MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 318 (1937) (Madison and Gerry).

65. WORMMUTH & FIRMAGE, *supra* note 23, at 13.

President “has no power to initiate or declare a war either against a foreign nation or a domestic state,”⁶⁶ if war comes to the United States, “the President is not only authorized but bound to resist by force.”⁶⁷ The Constitution thus provides a solution analogous to what emerged in English law; in times of tumult and invasion, the requirement for prior congressional authorization is suspended.⁶⁸

Though an emergency can suspend the requirement for prior congressional authorization, it does not absolve Congress from its constitutional role to authorize hostilities. During the Civil War, for example, Congress ratified President Lincoln’s emergency, military action—even though military action preceded any congressional authorization. In 1861, Confederate forces attacked Fort Sumter while Congress was in recess, and in response, President Lincoln ordered a blockade of southern ports.⁶⁹ When Lincoln addressed a special session of Congress on July 4, he argued that the national emergency required him to respond before Congress could act and—in an effort to preserve the Constitution—requested that Congress retroactively authorize the blockade.⁷⁰ Lincoln conceded that he was not simply asking Congress to rubber stamp his actions and lock the country into the path he chose. Rather, Lincoln convened both Houses of Congress “to consider and determine, such measures, as in *their* wisdom, the public safety, and interest may seem to demand.”⁷¹ Congress could have simply authorized Lincoln’s actions up to that date and dictated its own terms for future action. Or, if Congress disapproved of presidential action, it could have defunded the President’s orders, which would have abruptly taken the Union out of the war Lincoln felt he had no choice to fight. Instead, Congress acceded, wholly endorsing his course in a resolution: “all the acts, proclamations, and orders of the President . . . respecting the army and navy of the United States . . . are hereby approved and in all respects legalized as if they had been issued and done under the previous express authority and direction of the Congress of the United States.”⁷²

Absent an emergency, however, congressional ratification of unilateral presidential war making circumvents the careful architecture the Founders erected when they divided the war powers between the legislature and the executive.⁷³ From the constitutional text emerges a scheme by which the Founders insisted

66. Prize Cases, 67 U.S. (2 Black) 635, 668 (1863).

67. *Id.*

68. See WORMUTH & FIRMAGE, *supra* note 23, at 13.

69. Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2071 (2005).

70. President Lincoln acknowledged the need to act to repel the use of force against the United States without waiting for a congressional authorization when he stated in his message to Congress, “Are all the laws but one to go unexecuted and the Government itself go to pieces lest that one be violated?” JAMES D. RICHARDSON, 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 3226 (1897).

71. ABRAHAM LINCOLN, Proclamation Calling Militia and Convening Congress (Apr. 15, 1861) in SELECTED SPEECHES AND WRITINGS 284, 285–86 (Gore Vidal ed., 1992) (emphasis added).

72. David P. Currie, *The Civil War Congress*, 73 U. CHI. L. REV. 1131, 1140 (2006).

73. See WORMUTH & FIRMAGE, *supra* note 23, at 14–15.

upon congressional authorization before committing the nation to war while permitting the Commander in Chief the ability to conduct the war once Congress decided to engage in military hostilities, provided the tools of war making, and defined the scope of the conflict. To provide a solution to the potential need for urgency, the commander-in-chief power permits repelling sudden attacks and taking action in a true emergency without congressional authorization.⁷⁴ Congressional deliberation—particularly the involvement of the popularly and frequently-elected House of Representatives—ensured that America’s prolonged involvement in war was not the project of an executive seeking to aggrandize his own powers.

But the aggrandizing actions of a series of twentieth century executives undermined the Founders’ design of the Commander in Chief as the officer standing at the apex of the military hierarchy that acted pursuant to congressional authorization.⁷⁵ During a time in which the United States was officially at peace, President Franklin D. Roosevelt relied on the Commander in Chief Clause to station troops in Iceland, Greenland, and Dutch Guiana as well as provide naval support to the British in their fight against the Axis Powers. Roosevelt’s actions were among the first modern examples of a president using his military title to justify unilateral war making power.⁷⁶ When Roosevelt’s successor, President Harry Truman, entered the Korean War without congressional authorization, the State Department provided justification based upon the executive’s inherent commander-in-chief power.⁷⁷ The State Department asserted that the President has the power to employ the Armed Forces “without a declaration of war” because such orders are “within his authority as Commander in Chief.”⁷⁸ In 1966, the State Department made the same claim to justify President Lyndon Johnson’s prosecution of the war in Vietnam.⁷⁹

Fear of presidential aggrandizement during the Vietnam War ignited an attempt by Congress to reassert its Article I war powers. President Nixon’s orders to bomb Cambodia after a ceasefire was declared and American forces in Vietnam had withdrawn led congressional leaders to question the legality of the President’s actions.⁸⁰ As Congress sought to restore the Founders’ division of war powers, it found itself in a predicament analogous to that faced by the Constitutional Convention—preserving Congress’s power to declare war, to determine the scope of the hostilities, and to allocate resources to the war effort, while also retaining the President’s ability to respond to sudden threats and changing battlefield

74. Ginsburg, *supra* note 22, at 142.

75. Francis D. Wormuth, *The Nixon Theory of the War Power: A Critique*, 60 CAL. L. REV. 623, 634–35 (1972).

76. *See id.* at 635–36.

77. *Id.* at 636.

78. U.S. Dep’t of State, *Authority of the President to Repel the Attack in Korea*, 23 DEP’T STATE BULL. 177 (1950).

79. Wormuth, *supra* note 75, at 636.

80. John W. Finney, *Presidential Powers: Cambodia Becomes a Crucial Test*, N.Y. TIMES (Apr. 4, 1973), <http://www.nytimes.com/1973/04/04/archives/presidential-powers-cambodia-becomes-a-crucial-test.html> [<https://perma.cc/BL7F-TFPY>].

realities. The resulting War Powers Resolution was expressly enacted to ensure the collective judgment of the political branches in the decision to go to war.⁸¹ Section 5(b) of the War Powers Resolution provided the means for Congress to exercise its war powers: The President must withdraw forces sixty to ninety days after initiating hostilities, unless Congress (1) declared war or authorized the action, (2) extended the period by law, or (3) was physically unable to meet due to an attack on the United States.⁸²

But the teeth provided by 5(b) have since proven to be brittle. The war against the Islamic State raged for years, but none of the War Powers Resolution's three conditions were satisfied. Furthermore, with neither an explicit congressional authorization nor an attack on the United States to justify congressional ratification,⁸³ the conflict against the Islamic State is, at least at first glance, unconstitutional.

III. CONGRESS HAS NEITHER AUTHORIZED NOR RATIFIED THE CONFLICT AGAINST THE ISLAMIC STATE

Pertinent to resolving the question of whether Congress authorized or ratified the military actions against the Islamic State is an analysis of how America targeted additional belligerents or expanded the geographic area of conflict in two major twentieth century wars: World War II and Vietnam.⁸⁴

America's formal declarations of war in World War II are consistent with all previous formally declared wars in U.S. history. Every declaration of war included within it a provision authorizing the use of military force against an identified enemy.⁸⁵ The joint resolution concerning war with Nazi Germany not only stated that "the state of war between the United States and the Government of Germany . . . is formally declared," but also that "the President is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Government of Germany."⁸⁶ Identical language was used to declare war and authorize the use of force against the Imperial Government of Japan and Fascist Italy.⁸⁷ All told, Congress enacted six separate declarations of war against Japan,

81. War Powers Resolution, 50 U.S.C. § 1541 (1973).

82. *Id.* at § 1544(b).

83. President Obama cited the AUMFs, not an attack on the United States or its troops overseas, to justify deploying 3,100 troops against ISIS and began bombing ISIS targets in the summer of 2014. Kristina Wong, *Aides: War Powers Request This Week*, HILL (Feb. 9, 2015, 4:54 PM), <http://thehill.com/policy/defense/232215-aides-war-powers-request-coming-this-week> [<https://perma.cc/2LPW-73XV>].

84. The Korean War must be excluded from this analysis. President Truman sought authority from the United Nations Security Council and insisted that the United States was not at war in Korea, but referred to the conflict as a "police action." No congressional authorization of force was ever enacted to justify American military engagement in Korea. Fisher, *supra* note 1, at 269–70.

85. Bradley & Goldsmith, *supra* note 69, at 2062.

86. DEP'T OF STATE, PEACE AND WAR: UNITED STATES FOREIGN POLICY, 1931–1941 849 (1943).

87. *Id.* at 841, 850.

Germany, Italy, Bulgaria, Hungary, and Rumania in World War II.⁸⁸

Though Vichy France was not identified in any of the American World War II declarations of war, the United States attacked the Vichy regime's possessions in North Africa during Operation Torch.⁸⁹ The congressional identification of enemies is not necessarily exhaustive and does not place the chief executive in a straitjacket: Presidents retain discretion to expand the conflict to entities with a nexus to a named adversary.⁹⁰ So, when the United States was confronted with further aggression in the form of Vichy France, the Allies determined that Vichy France had an alliance with Germany, was under German influence, and engaged in battles against Great Britain.⁹¹ Although Congress never declared war on Vichy France, American hostilities against it were legitimate because the Vichy regime was a puppet of Nazi Germany, a declared enemy of the United States,⁹² and aligned with other Axis belligerents.⁹³

Breaking with the traditional declarations of war like those issued during World War II, the Gulf of Tonkin Resolution authorized the use of force in southeast Asia⁹⁴ and, rather than specify an enemy, it granted broad authority to the President to determine what resources may be used against any entities he determined to be an enemy. The Gulf of Tonkin Resolution mentions "the Communist regime in Vietnam" only in the whereas clauses⁹⁵ and states that "Congress approves and supports the determination of the President, as Commander in Chief, to repel any armed attack against the forces of the United States and to prevent further aggression."⁹⁶ Additionally, like the World War II declarations of war, the Gulf of Tonkin Resolution authorized the President to use all necessary measures—without limiting resources, without restricting the method of force, and without constraining authorized targets, except that the targets must have attacked the United States or threatened further aggression.⁹⁷ Thus, by allowing the President to determine what enemies may be covered by the authorization and with little to no restriction on the use of resources, the Gulf of Tonkin Resolution

88. *Official Declarations of War by Congress*, U.S. SENATE, https://www.senate.gov/pagelayout/history/h_multi_sections_and_teasers/WarDeclarationsbyCongress.htm (last visited November 12, 2017) [<https://perma.cc/8KY6-BPXV>].

89. See David A. Walker, *OSS and Operation Torch*, 22 J. CONTEMP. HIST. 667, 667 (Oct. 1987).

90. Bradley & Goldsmith, *supra* note 69, at 2111.

91. *Id.* at 2111–12.

92. See *Official Declarations of War by Congress*, *supra* note 88.

93. See Bradley & Goldsmith, *supra* note 69, at 2112.

94. *U.S. Involvement in the Vietnam War: the Gulf of Tonkin and Escalation, 1964*, UNITED STATES DEPARTMENT OF STATE OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1961-1968/gulf-of-tonkin> [<https://perma.cc/8KY6-BPXV>].

95. Whereas clauses usually have no legal effect and are merely preliminary statements providing introductory background before the binding language. BRYAN GARNER, A DICTIONARY OF MODERN LEGAL USAGE 929 (2d ed. 1995). By identifying "the Communist regime in Vietnam" only in a whereas clause, Congress did not legally express that the Communist regime in Vietnam was the targeted enemy of the United States in the Vietnam War.

96. Joint resolution to promote the maintenance of international peace and security in southeast Asia, H.J. Res. 1145, Pub. L. No. 88–408 (1964) (repealed 1970).

97. Bradley & Goldsmith, *supra* note 69, at 2061, 2075.

provides a broader authorization of force than the collective World War II declarations that identified specific enemies.⁹⁸

Broad authorizations of force, reminiscent of the Vietnam War era, would be employed by Congress when considering how to confront America's enemies in the War on Terror. By largely deferring to the President to identify enemies, both the 2001 AUMF and the 2002 AUMF have more in common with the Vietnam model than with formal declarations of war in which Congress identifies the enemy. After the September 11 terrorist attacks, Congress adopted the 2001 AUMF, which apparently provides the President *cart blanche* to fight terrorism:

That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or person, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.⁹⁹

The 2001 AUMF confers upon the President the authorization to direct force against targets that he “determines” to be an enemy, so long as the target must be sufficiently connected to the September 11 attacks. Like the Gulf of Tonkin Resolution, but unlike traditional declarations of war, the 2001 AUMF states its purpose is to prevent future aggression and describes, rather than identifies, its target. Congress adopted the 2002 AUMF to authorize hostilities against Iraq, so Congress directly identified Iraq as a target.¹⁰⁰ Yet, the text makes no mention of a “government” as was common in formal declarations of war. And, similar to the Gulf of Tonkin Resolution and its 2001 counterpart, the 2002 AUMF does not identify a particular enemy force but rather authorizes the President to defend the United States against the “continued threat” of Iraq.¹⁰¹ As America entered a new century and faced new, amorphous threats, Congress provided the President with broad authority to determine what forces will be considered an enemy.

Nearly two decades later, the application of the 2001 and 2002 AUMFs to new organizations becomes increasingly attenuated. As the confirmed perpetrator of the September 11 attacks, al Qaeda is covered, but the President must consider the extent to which a terrorist organization is affiliated with al Qaeda.¹⁰² Even before the war against the Islamic State, al Qaeda morphed from a hierarchical and centralized organization into a global confederacy of allied terrorist groups.¹⁰³ The AUMF recognizes that the enemy will necessarily change, and the

98. *See id.* at 2075–76.

99. Authorization for Use of Military Force, Pub. L. No. 107–40, § 2(a), 115 Stat. 224, 224 (2001).

100. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107–243, 116 Stat. 1498 (2002).

101. *Id.*

102. Bradley & Goldsmith, *supra* note 69, at 2109.

103. *Id.*

authorization was designed to permit the President flexibility in determining which targets shall receive the brunt of American military might in retaliation for the September 11 attacks. But, as new terrorist organizations emerge, the nexus to al Qaeda or the September 11 attacks become increasingly more difficult to establish.

Though the passage of time renders coverage by the AUMF more and more challenging, the AUMF was designed to prevent enterprising terrorist organization from easily escaping the scope of the authorizations. The drafters of the AUMFs understood that the organizations covered by the 2001 AUMF can fluctuate. Just as an individual could join al Qaeda after September 11 and be covered by the AUMF, organizations that join al Qaeda after September 11 would be covered by the AUMF's purpose to prevent any future acts of international terrorism against the United States.¹⁰⁴ Reading the language too narrowly would allow organizations that fit within the purpose of the AUMF to break off from al Qaeda or merely change their names and/or organizational structures to escape the coverage of the AUMF.¹⁰⁵ Such a narrow reading would defeat the explicit design of the 2001 AUMF.

Presidents Obama's and Trump's reading of the AUMF covers the Islamic State. The Obama Administration also argued that Congress ratified the President's interpretation of the AUMF to cover the Islamic State. Congress, the executive branch argued, "through joint participation and an unbroken stream of appropriations," demonstrated that there was no conflict between the political branches, but rather that they were in harmony with one another.¹⁰⁶ Two presidential administrations of differing parties believed that, even as time might reduce the force of the AUMFs, congressional appropriations ratified the executive's actions.

In the War Powers Resolution, however, Congress anticipatorily rejected claims by a future President that appropriations could serve as ratification for an unauthorized conflict. Section 8(a)(1) of the War Powers Resolution states that authority for hostilities "shall not be inferred from any provision of law . . . , including any provision contained in any appropriation Act, unless such provision specifically authorizes" use of the Armed Forces.¹⁰⁷ Further, as court cases from the Vietnam-era noted, appropriations do not carry the same weight as an authorization for hostilities, because concern for the safety of soldiers in the field—no approval of military action—may serve as the impetus for the provision of appropriations.¹⁰⁸ In fact, no congressional appropriation "specifically authorizes" use

104. *Id.* at 2110–11.

105. *Id.* at 2111.

106. Lyle Denniston, *Constitutional Check: Does Spending on War Amount To a Declaration of War?*, NAT'L CONSTITUTION CTR.: CONSTITUTION DAILY (July 19, 2016), <https://constitutioncenter.org/blog/constitution-check-does-spending-on-war-amount-to-declaration-of-war> [<https://perma.cc/K3BM-7J2N>].

107. War Powers Resolution, 50 U.S.C. § 1547(a).

108. Early Vietnam-era courts treated appropriations as authorizations. *See* *Massachusetts v. Laird*, 451 F.2d 26 (1st Cir. 1971); *Mora v. McNamara*, 387 F.2d 862 (D.C. Cir. 1967); *Orlando v. Laird*, 317

of force against the Islamic State. Contrary to the executive branch's theory, appropriations cannot justify fighting the Islamic State, so the AUMFs provide the only potential leg for the executive branch to stand upon in claiming congressional authorization.

But doubt that the 2001 and 2002 AUMFs can apply to the Islamic State remains. Indeed, for either AUMF to cover an organization that did not exist at the time of its enactment strikes some as a dubious.¹⁰⁹ Some members of Congress express doubt about the war's legality and believe that a new AUMF is needed to cover the war against the Islamic State.¹¹⁰ Additionally, the Obama Administration sent a letter to House Speaker John Boehner in 2012 stating that “[w]ith American combat troops having completed their withdrawal from Iraq on December 18, 2011, the Iraq AUMF is no longer used for any U.S. government activities and the Administration fully supports its repeal.”¹¹¹ If the President can determine that an AUMF is no longer needed and then change his mind, then arguably the President can turn an AUMF on and off as he pleases. Concern over unilateral power to switch between war and peace originally led Congress to enact the War Powers Resolution.¹¹² But after passing broad AUMFs, Congress once again finds itself excluded from the decision to engage new enemies.

IV. DISOBEYING THE COMMANDER IN CHIEF TO BRING A SEPARATION OF POWERS CASE TO AN ARTICLE III COURT

The judiciary has thus far refused to decide whether the President has exceeded his constitutional authority by militarily engaging the Islamic State. Modern courts have erected jurisdictional barricades around constitutional questions related to America's counterterrorism policies—including the standing and

F. Supp. 1013 (E.D.N.Y. 1970); *Berk v. Laird*, 317 F. Supp. 715 (E.D.N.Y. 1970). Later cases found that support for the troops in the field of battle may motivate Congress to appropriate funds for actions it does not approve. *See, e.g., Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973); *Holtzman v. Schlesinger*, 361 F. Supp. 553 (E.D.N.Y. 1973), *rev'd for lack of standing*, *Holtzman v. Schlesinger* 484 F.2d 1307 (2d Cir. 1973).

109. Mary Louise Kelly, *When the U.S. Military Strikes, White House Points To a 2001 Measure*, NPR. (Sept. 6, 2016, 4:30 PM), <https://www.npr.org/sections/parallels/2016/09/06/492857888/when-the-u-s-military-strikes-white-house-points-to-a-2001-measure> [<https://perma.cc/H8KQ-X3PN>].

110. *See, e.g., Tammy Duckworth, Our Troops Need a New War Resolution From Congress*, WALL ST. J. (Sept. 26, 2017, 6:13 PM), <https://www.wsj.com/articles/our-troops-need-a-new-war-resolution-from-congress-1506463999> [<https://perma.cc/LTZ3-3QQG>] (“I couldn’t have imagined that both AUMFs would still be in place more than 15 years later, used to justify a seemingly endless war, without recent public debate about America’s objectives or what we’re still asking of those we’ve sent into harm’s way. U.S. troops downrange need to know they have the moral support—and legal backing—of their country. Congress hasn’t given them that. That’s why this month I joined a bipartisan group of 36 senators supporting Kentucky Republican Rand Paul’s amendment to the defense authorization bill that would gradually repeal the current AUMFs and provide Congress with an opportunity to debate a new authorization of military force against today’s enemies.”).

111. Adam Kredo, *White House Wants Repeal of Iraq War Authorization*, WASH. FREE BEACON (Jul. 25, 2014, 3:43 PM), <http://freebeacon.com/national-security/white-house-wants-repeal-of-iraq-war-authorization/> [<https://perma.cc/U6UT-DYFE>]. The full text of the letter is available at <http://freebeacon.com/wp-content/uploads/2014/07/3989-Boehner.pdf> [<https://perma.cc/2NPN-2MN3>].

112. *See Finney, supra* note 80.

political question doctrines.¹¹³ The constitutional separation of war powers may be lost partly because the courts emphatically refuse to say what the law is.¹¹⁴

Within this opaque legal environment, members of the U.S. Armed Forces are potentially positioned to restore the Founders' vision of war powers because their oath to uphold the Constitution may allow them to overcome doctrinal roadblocks to judicial adjudication. The United States Code requires each person joining a service to take the enlistment oath, which reads:

I, ____, do solemn swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the order of the President of the United States and the orders of the officers appointed over me, according to the regulations and the Uniform Code of Military Justice. So help me God.¹¹⁵

The oath is silent on any recognized duty of a servicemember to disobey an order, but a recognized duty to disobey is found in the context of the *jus in bello*, the laws governing conduct during war.¹¹⁶ *United States v. Calley*, a case arising out of the My Lai Massacre during the Vietnam War, is illustrative. There, the Court of Appeals for the Fifth Circuit held that an order to kill unresisting civilians would be an illegal order, and if the officer who allegedly received such an order knew that the order was illegal or should have known that it was illegal, obedience to such an order would not be a valid defense to murder prosecution.¹¹⁷ No such corresponding legal duty to disobey exists in the context of *jus ad bellum*, the laws governing the initiation of armed conflict.¹¹⁸ A soldier may not second-guess the government's decision to wage war.¹¹⁹ Simply put, a servicemember may not unilaterally decide to disobey orders based on his statutory or constitutional interpretation of the scope of the authorization of force, even though he is duty-bound to refuse orders that are clearly war crimes.

Rather than disobey orders, Captain Smith sought to challenge the legality of the war against the Islamic State in court, but he encountered a roadblock—standing.¹²⁰ To satisfy the constitutional standing requirements, a plaintiff must allege that he has suffered or will imminently suffer an injury, the injury must be traceable to the defendant's conduct, and the plaintiff must allege that a court can

113. Stephen I. Vladeck, *The Demise of Merits-Based Adjudication in Post-9/11 National Security Legislation*, 64 DRAKE L. REV. 1035, 1037–76 (2016).

114. See Gerhard Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 42 U. CHI. L. REV. 463, 471 (1976).

115. 10 U.S.C. 502.

116. Keith Petty, *A Duty to Disobey?*, JUST SECURITY (Nov. 28, 2016, 8:40 AM), <https://www.justsecurity.org/34612/duty-disobey/> [https://perma.cc/XEC8-Y9FE].

117. *Calley v. Callaway*, 519 F.2d 184, 193–94 (5th Cir. 1975).

118. Petty, *supra* note 116.

119. *United States v. Huet-Vaugh*, 43 M.J. 105, 114 (C.A.A.F. 1995).

120. Petty, *supra* note 116.

redress the injury.¹²¹ A servicemember *can* suffer injury sufficient to satisfy standing requirements—as the Second Circuit explained in *Berk v. Laird*, a case remarkably similar to that brought by Captain Smith. There, Private Malcom Berk alleged that the executive branch exceeded its constitutional authority by ordering him to South Vietnam or Cambodia to fight in a conflict not properly authorized by Congress.¹²² The Second Circuit stated that, since orders to fight must be issued in accordance with proper authorization, military officers are under a threshold constitutional duty, which can be judicially identified and its breach judicially determined.¹²³ But, the court found for the government, not because Berk lacked standing, but because he did not show sufficient probability of success on the merits.¹²⁴ Thus, *Berk* demonstrates a general prohibition on servicemember standing does not exist and a servicemember can have the merits of a case challenging the legality of a hostility adjudicated by an Article III court. But, Captain Smith had not yet suffered a particularized injury, a condition he would have to satisfy for a court to hear the merits of his case.

Captain Smith could potentially satisfy the injury element of standing by simply disobeying his Commander in Chief. By disobeying an order from the President, Captain Smith would run the risk of violating Article 92 of the Uniform Code of Military Justice (UCMJ).¹²⁵ The punishment for a violation of Article 92 may include confinement for two years.¹²⁶ To establish standing and open the door to an Article III court, Smith would have to be court-martialed, be imprisoned, and exhaust military remedies before seeking relief in federal court.¹²⁷ If Smith disobeys a presidential order, is charged with violating Article 92, is imprisoned, and exhausts all military remedies, he would arguably satisfy Article III's case-or-controversy requirement because, as *Bond v. United States* held, the conviction and incarceration constitute concrete injuries and are redressable by invalidation of the conviction.¹²⁸

If Smith's case is focused on how the violation of the separation of powers caused his injury, rather than challenging the President on statutory interpretation, the political question doctrine should not preclude the court from hearing the merits, as the Supreme Court has long held. In *Little v. Barreme*, the Court

121. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

122. *Berk v. Laird*, 429 F.2d 302, 304 (2d Cir. 1970).

123. *Id.* at 305.

124. *Id.* at 302.

125. Any person subject to the UCMJ who violates or fails to obey any lawful general order or regulation; having knowledge of any other lawful order issued by a member of the Armed Forces, which it is his duty to obey, fails to obey the order; or is derelict in the performance of his duties; shall be punished as a court-martial may direct. 10 U.S.C. § 892.

126. Rod Powers, *Punitive Articles of the UCMJ*, BALANCE (Jul. 1, 2017), <https://www.thebalancecareers.com/punitive-articles-of-the-ucmj-3356858> [<https://perma.cc/6R2D-B2QV>].

127. *Davis v. Marsh*, 876 F.2d 1446, 1449 (9th Cir. 1989) (citing *Gusik v. Schilder*, 340 U.S. 128, 131–32 (1950)).

128. *Bond v. United States*, 564 U.S. 211, 217 (2011) (quoting *Spencer v. Kemna*, 523 U.S. 1, 7 (1998)).

held that the executive could not expand the scope of congressional authorization for the use of force by presidential command. Chief Justice Marshall, writing for the Court, declined to allow the political question doctrine from preventing adjudication of the case,¹²⁹ even though Marshall himself articulated the basis for the political question doctrine in *Marbury v. Madison*.¹³⁰ The *Little* Court reached this holding in deciding whether a member of the U.S. Armed Services could be held liable for damages caused by following a presidential order that exceeded the authorization provided by Congress. In the event that Captain Smith actually disobeys his Commander in Chief, the case would focus on whether Captain Smith could face punishment for disobeying a presidential order to engage in a theater of war, which, arguably, was not authorized by Congress. Like the defendant in *Little*, Smith must decide whether to obey his oath or his Commander in Chief, a choice that would risk a judicially-imposed punishment. The imposition of such a punishment, assuming Captain Smith acts to disobey orders, should preclude courts from dismissing the case on political question grounds.

Though Captain Smith can theoretically thread the needle to overcome justiciability doctrines, doing so poses serious personal risk, threatens military order, and provides no guarantee that an Article III court will reach the substance of Captain Smith's argument. Requiring those who have sworn to uphold the Constitution to participate in hostilities that Congress has neither authorized nor ratified forces servicemembers to choose between two, undesirable alternatives: obey the Commander in Chief and violate the constitutional oath, on the one hand, or support the Constitution by refusing to fight in an unconstitutional war and face imprisonment, on the other. Asking a servicemember to disobey his Commander in Chief and risk imprisonment and dishonor is simply asking too much, especially given that he has no guarantee that an Article III court will hear the merits of his separation-of-war-powers argument.

V. THE CONSTITUTIONAL OBJECTOR

Congress's historical desire to satisfy the needs of servicemembers should motivate the legislature to act where the judiciary may not. Traditionally, Congress has endeavored to meet the troops' physical needs—even appropriating money for wars it disapproves.¹³¹ What is more, Congress has protected the military's psychological and spiritual needs by allowing for certain conscientious objections to fighting.¹³² Indeed, the Selective Service Act states that the government shall not require any person to participate in the Armed Forces of the United States when that person, by reason of religious training and belief, is conscientiously

129. *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804).

130. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

131. D. A. Jeremy Telman, *A Truism That Isn't True? The Tenth Amendment and Executive War Power*, 51 CATH. U. L. REV. 135, 155–56 (2001).

132. Historically, full conscientious objection—in which the individual is unwilling to take part in any war—has been recognized more than selective objection—in which the individual objects to a particular conflict. Petty, *supra* note 116.

opposed to participation in war in any form.¹³³ Congress should again act to satisfy servicemembers' consciences.

To grant servicemembers the ability to honor their oath to the Constitution, Congress should recognize a new class of conscientious objectors—to excuse soldiers that demonstrate a deeply held and good faith belief that participating in a particular mission would violate their enlistment oath.¹³⁴ Such an offer of constitutional objector status would be consistent with Congress's historical concern with servicemember wellbeing. Currently, the Select Service Act states that the term “‘religious training and belief,’ does not include essentially political, sociological, or philosophical views, or a merely personal moral code.”¹³⁵ But adding protection for a “constitutional objector” who refuses to act in a manner that violates his oath is warranted because, as Army Doctrine Reference Publication 6–22 explains, an essential foundation for Army leaders is character—a person's moral and ethical qualities that help an individual determine what actions are appropriate.¹³⁶

Additionally, by providing constitutional objector status, Congress would provide servicemembers with an alternative to insubordination and trial. Those servicemembers who accept constitutional objector status would no longer have a personal injury that could sustain standing, and thus would forgo suit in an Article III court. But, in offering constitutional objector status, the political branches would have a metric—or a warning light—to determine when military engagement is constitutionally dubious. The warning light, when triggered, might pressure Congress to authorize or end the fight or encourage the President to withdraw from it entirely.

The number of servicemembers who accept constitutional objector status would directly impact how the political branches address going to, or remaining in, war. During the first four years of the wars initiated by the AUMFs, the Armed Forces processed 425 applications for conscientious objector status, a number very small relative to the total force of 2.3 million servicemembers.¹³⁷ If the number of constitutional objectors reached similar levels, the insignificance of the population would likely have little impact on the political branches of

133. 50 U.S.C. § 3806(j).

134. All components of the Armed Forces follow the same basic steps to administer their conscientious objector application processes. Generally, the servicemember submits an application for conscientious objector status, the commanding officer or authorized official assigns a military chaplain and a psychiatrist to conduct required interviews, and, after an informal hearing, the investigating officer makes a recommendation to approve or deny the application to the commanding officer, who, in turn, renders a final decision. U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-1196, MILITARY PERSONNEL: NUMBER OF FORMALLY REPORTED APPLICATIONS FOR CONSCIENTIOUS OBJECTORS IS SMALL RELATIVE TO THE TOTAL SIZE OF THE ARMED FORCES 4 (2007). The constitutional objector variant could follow the same basic steps but make modifications to better assess the constitutional, rather than religious, objection to a given conflict. For example, interviews could be conducted by a member of the Judge Advocate General's Corps, rather than a chaplain.

135. 50 U.S.C. § 3806(j).

136. Petty, *supra* note 117.

137. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 134, at 3–4.

government. But, if a significantly high number of servicemembers objected to the constitutional justification of the war, the political branches would likely address the needs of the conscientious soldiers, because insufficient support for troop needs can easily become an election issue.¹³⁸ Americans have given their military the highest confidence rating of any institution in American society for nearly two decades,¹³⁹ and hold the Armed Forces in high regard.¹⁴⁰ Politicians ignore the needs of the military at their peril. If sufficient numbers of soldiers constitutionally object to a given conflict, their action signifies to the public and the media that the members of such a revered institution are not satisfied with the leadership of the political branches and need the legislature and the executive to authorize or end the conflict. But, forcing the political branches to act is possible only after sustained advocacy efforts both within and outside the military to convince servicemembers of the need to accept the offer of constitutional objector status.

Lobbying efforts by fellow servicemembers and veterans directed towards convincing a significant number of active soldiers to become constitutional objectors may present the greatest inducement for the political branches to address the constitutionality of a given conflict. In fact, the infrastructure for such lobbying efforts already exists, following servicemembers' frustration with recent military engagements. In 2007, the Council on Foreign Relations cited to a *Military Times* poll of over 900 active-duty servicemembers that found that forty-one percent believed the United States was justified in going into Iraq and thirteen percent favored a complete withdrawal.¹⁴¹ Although the Council on Foreign Relations stated that troop morale remained high and the reasons for troop disapproval of the war were unrelated to constitutional questions, growing dissatisfaction among servicemembers led to the creation of blogs and grassroots political groups within the Armed Forces.¹⁴²

These activist servicemembers openly and regularly voice their opinions of the merits of America's foreign policy. In 2006, Iraq Veterans Against the War, Veterans for Peace, and Military Families Speak Out sponsored a petition to

138. In 2004, the re-election campaign of President George W. Bush accused Democratic challenger Senator John Kerry of being insufficiently supportive of the troops when Kerry voted against an \$87 billion supplemental appropriations bill, which funded, among other things, extra body armor and higher combat pay for soldiers. Daniel Klaidman, *GOP: Naysaying Kerry's Nay*, NEWSWEEK (Mar. 28, 2004, 7:00 PM), <http://www.newsweek.com/gop-naysaying-kerrys-nay-123987> [<https://perma.cc/SL8T-KJQV>].

139. *U.S. Confidence in Military Reflects Perceived Competency*, GALLUP (July 27, 2017), <https://news.gallup.com/poll/214511/high-confidence-military-reflects-perceived-competency.aspx> [<https://perma.cc/DH3B-RUVK>].

140. *Public Esteem for Military Still High*, PEW RES. CTR. (July 13, 2013), <http://www.pewforum.org/2013/07/11/public-esteem-for-military-still-high/#strong-consensus-about-military> [<https://perma.cc/FM3R-Y6A8>].

141. Lionel Beehner, *Is US Troop Morale Slipping?*, COUNCIL ON FOREIGN RELATIONS (June 14, 2007), <https://www.cfr.org/backgrounder/us-troop-morale-slipping> [<https://perma.cc/F642-DVZD>].

142. *Id.*

Congress by servicemembers supporting the withdrawal from Iraq.¹⁴³ As recently as 2017, Major Danny Sjrursen, a U.S. Army strategist and former history instructor at West Point, wrote in *The Nation* that he believes the justifications for conflicts in which American soldiers are fighting and dying in the Middle East are increasingly difficult to identify. The next time U.S. troops are put to battle, he demanded, “there had better be a damn good reason for it, a vital tangible national interest at stake.”¹⁴⁴ If the United States becomes involved in conflicts that servicemembers do not believe serve the national interest, their activism would encourage Congress to either authorize or end those conflicts.

But the soldiery is not the fourth branch of government, and the Constitution does not empower the military to determine what wars are and are not in the national interest. Civilian control of the military is vital to our republican system of government. No one elected Captain Smith to anything, so why should he, and his fellow soldiers—who also have not been democratically chosen to serve in the political branches—get a veto over military decisions made by the Commander in Chief? After all, the enlistment oath requires servicemembers to “obey the orders of the President of the United States.”¹⁴⁵ Additionally, the text of the enlistment oath does not simply require troops to defend the Constitution, but specifically to “defend the Constitution *against all enemies, foreign and domestic . . .*”¹⁴⁶ Should the Commander in Chief be considered a domestic enemy? The Constitution, written and ratified during a time of near universal suspicion of standing armies, simply makes no provision for soldiers to save the day when the legislature and the judiciary refuse to provide a check on the executive.

Rather than serve as an unelected arbiter of foreign policy decisions, the use of the constitutional objector status would at most compel Congress to act, not impose any particular decision on the nation. The precedent established in *Little v. Barreme* demonstrates that the President should not be considered an enemy of the Constitution, but the President is powerless to unilaterally expand the scope of a congressional authorization. When a president, at least plausibly, broadens the scope of an authorization, the soldiers are inevitably caught in the conflict. The constitutional objector status allows servicemembers to adhere to their oaths without a crisis of conscience.

By simply authorizing the conflict in question, Congress could, of course, end any potential controversies caused by the servicemembers claiming constitutional objector status. And by drafting particularized authorizations of military force, Congress would deliberate and, thus, spare constitutionally scrupulous

143. Ann Scott Tyson, *Grass-Roots Group of Troops Petitions Congress for Pullout From Iraq*, WASH. POST (Oct. 25, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/24/AR2006102401154.html> [<https://perma.cc/MKT2-DU89>].

144. Danny Sjrursen, *What Are American Soldiers Actually Dying For?*, THE NATION (Sept. 7, 2017), <https://www.thenation.com/article/what-are-american-soldiers-actually-dying-for/> [<https://perma.cc/8EEP-3F3Q>].

145. 10 U.S.C. § 502.

146. *Id.* (emphasis added).

servicemembers from fearing they are violating their oath and forcing them to disobey orders to test the war's legality. Additionally, authorizations that identify, rather than describe, enemies contain the benefit of providing a stronger guide for determining what entities may be covered in an authorization, as the case of American military efforts against Vichy France demonstrates. And, obviously, a congressional action that expressly authorizes a conflict would immediately dissolve any claim for constitutional objector status. If Congress refused to authorize the conflict, presumably the conflict would continue, but a clear signal would be sent to the American public that the war lacks sufficient constitutional sanction, which might, in turn, be resolved by future elections or additional pressure to either authorize or end hostilities.

VI. CONCLUSION

Presidential aggrandizement and congressional abdication of the power to initiate hostilities forces servicemembers into combat of questionable constitutionality. To force Congress to clarify whether it authorized a particular conflict, servicemembers could simply disobey their orders. However, such action would come at great personal sacrifice and dishonor to the servicemember as well as intolerable insubordination to the military. To reconcile the needs of the President to respond to modern threats, of Congress to deliberate before war, and of servicemen to adhere to their constitutional oath, this Note proposes permitting soldiers to claim constitutional objector status. Should a critical mass of soldiers claim this status, Congress should identify enemies with specificity in future authorizations of military force.

When soldiers like Captain Smith challenge the legality of a mission because he believes complying with his orders will conflict with his sworn oath to the Constitution, he is demonstrating exactly the values the Army seeks to instill in its leaders.¹⁴⁷ Offering constitutional objector status would not excuse the servicemember from the duties he signed up for; it would allow him to serve his nation with the confidence that he is supporting and defending the Constitution of the United States.

147. Petty, *supra* note 116.