AUTHORIZATION AND DELEGATION: AUMFS AND HISTORICAL PRACTICE

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The Constitution, by its plain text, provides Congress the sole authority to declare war.[1] Yet there is little consensus on when that power applies.[2] Modern war powers practice instead relies on broad authorizations combined with inherent Article II powers. This approach, however, is on a crash course with originalist thought, in that it does not honor historical war powers practice or the Constitution's vesting clauses. This Article relies on new originalist scholarship showing that, as a historical matter, Congressional approval was necessary before initiating hostilities against a sovereign.[3] This understanding, combined with the revived nondelegation debate, leads to the conclusion that Congress cannot delegate the "more important" subject of when offensive force may be used against a sovereign. At the same time, the historical justifications for the Congressional war power have less force where non-state actors are involved. As a result, broader authorizations in that context are less likely to offend the vesting clauses.

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[1] U.S. CONST. art. I, §8.

[2] Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2058 (2005).

[3] *See* Aaron Haviland, *Misreading the History of Presidential War Power, 1789-1860*, 24 TEX. REV. L. & POL. 481, 487 (2020).

INTRODUCTION

In January 2020, President Donald Trump authorized a kinetic strike on Iranian Major General Qasem Soleimani while Soleimani was in Iraq.[4] President Trump claimed that Major General Soleimani was plotting "imminent and sinister attacks," which seemed

[4] Elliot Setzer, *White House Releases Report Justifying Soleimani Strike*, LAWFARE (Feb. 14, 2020), https://www.lawfareblog.com/white-house-releases-report-justifying-soleimani-strike.

to justify the kinetic strike as a deterrence measure.[5] National news organizations followed the story for weeks, with a heavy focus on whether Trump had "declared war" on Iran with the strike.[6] A little more than a year later, President Joseph Biden, shortly after taking office, authorized an airstrike on a Syrian airbase, targeting "Iran-supported non-state militia groups."[7] And, although President Biden's failure to receive congressional authorization was scrutinized, a War Declaration debate of similar magnitude did not follow.[8] President Biden authorized a second set of strikes a few months later, this time with "Iraqi Prime Minister Mustafa al-Kadhimi criticiz[ing] the airstrikes as 'a blatant and unacceptable violation of Iraqi sovereignty and Iraqi national security.'"[9] This begged the question:

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[5] Zachary Cohen, *US Drone Strike Ordered by Trump Kills Top Iranian Commander in Baghdad*, CNN (Jan. 4, 2020), https://www.cnn.com/2020/01/02/middleeast/baghdad-airport-rockets/index.html.

[6] *See, e.g.*, *id.*; Charles W. Dunne, *The Killing of Iran's Top General, Qasem Soleimani, Means America Has Declared War*, NBC NEWS (Jan. 3, 2020), https://www.nbcnews.com/think/opinion/death-iran-s-top-general-qassem-soleimani-means-america-has-ncna1110306; Tim Lister & Eve Bower, *Growing Doubts on Legality of US Strike that Killed Iranian General*, CNN (Jan. 6, 2020), https://www.cnn.com/2020/01/06/middleeast/soleimani-strike-legality-doubts-us-iran-intl/index.html ("You can't take aim at an official inside a government and say that is not a war.").

[7] *A Letter to the Speaker of the House and President Pro Tempore of the Senate Consistent with the War Powers Resolution*, THE WHITE HOUSE (Feb. 27, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/27/a-letter-to-the-speaker-of-the-house-and-president-pro-tempore-of-the-senate-consistent-with-the-war-powers-resolution/ [hereinafter *The Letter*]; *see also* John Bellinger, *President Biden's Inaugural War Powers Report*, LAWFARE (March 1, 2021), https://www.lawfareblog.com/president-bidens-inaugural-war-powers-report.

[8] *See* Helene Cooper & Eric Schmitt, *U.S. Airstrikes in Syria Target Iran-Backed Militias That Rocketed American Troops in Iraq*, N.Y. TIMES (Feb. 25, 2021), https://www.nytimes.com/2021/02/25/us/politics/biden-syria-airstrike-iran.html; Dan De Luce & Carol E. Lee, *Biden Called Off Strike Against Second Target in Syria to Avoid Killing Civilians, Say Officials*, NBC NEWS (March 4, 2021), https://www.nbcnews.com/news/military/biden-called-strike-against-second-target-syria-avoid-killing-civilians-n1259680; Christian Nunley, *Democrats Criticize Biden's Decision to Launch Airstrikes in Syria Without Consulting Congress*, NBC NEWS (Feb. 26, 2021), https://www.cnbc.com/2021/02/26/lawmakers-react-to-biden-in-syria.html.

[9] *See* Michael Gordon & Jared Malsin, *Iran-Backed Militias Fire Rockets in New Attack Aimed at U.S. Forces*, WALL ST. J. (Jun. 28, 2021),

was there a meaningful difference between each administration's actions as a constitutional matter? More broadly, can the historical war powers framework keep up with the modern state of war? This is a pressing question in a world where ascertaining and applying the Constitution's original understanding is now a legitimate, though not universally accepted, legal framework.

I. ORIGINALIST TIDES CONVERGING

The rise of originalism as a viable legal theory has invited a wealth of scholarship on how contemporary readers understood the provisions the Founders enacted.[10] This is especially relevant to the war powers debate, where limited textual support for the division of powers invites a range of plausible interpretations.[11] Relying on "text, structure, intent, and early historical practice," originalist scholarship seeks "to ascertain the likely original meaning, or the range of plausible meanings, of a particular constitutional provision."[12] Meanwhile, the Supreme Court's recent interest in the nondelegation doctrine has invited a bevy of separation of powers scholarship from all angles.[13] These new insights mean that "originalists will have to contend with the wealth of new data from early practice,"[14] including the relationship between war powers and delegation.

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https://www.wsj.com/articles/iran-backed-militias-threaten-revenge-after-u-s-airstrikes-in-iraq-syria-11624877977.

[10] Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1498–1500 (2021).

[11] *See* M. Andrew Campanelli, Kai Draper & Jack Stucker, *The Original Understanding of the Declare War Clause*, 24 J.L. & POL. 49, 49–50 (2008).

[12] Wurman, *supra* note 10, at 1499. Whether intent is a proper originalist consideration is also a matter of debate. Suffice to say, "[i]n the event of a genuine conflict among sources, . . . the text itself ultimately controls." *Id.* at 1556 n.37.

[13] *See, e.g.*, *id.*; Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021); F. Andrew Hessick & Carissa Byrne Hessick, *Nondelegation and Criminal Law*, 107 VA. L. REV. 281 (2021); Note, *Nondelegation's Unprincipled Foreign Affairs Exceptionalism*, 134 HARV. L. REV. 1132 (2021); Stephen I. Vladeck, *The Separation of National Security Powers: Lessons from the Second Congress*, 129 YALE L.J. F. 610 (2020).

[14] Wurman, *supra* note 10, at 1556.

A. Early Writings and Historical Practice Show the Congressional War Power Was More Than a Formality

1. The Text

National security authority is split between two provisions of the Constitution. The first, Article I, Section 8, assigns Congress seven national security powers.[15] This includes, as a direct matter, the power to declare war and, as an indirect matter, the power "to lay and collect taxes . . . and provide for the common defen[s]e."[16] The second source of authority is found in Article II, Section 2, which states the President shall be Commander-in-Chief of the Army and Navy of the United States, and the Militia of the several States, when called into the actual Service of the United States.[17] Due to minimal primary authority for a complex topic, there is substantial debate over how these two clauses should interact. Scholars generally fall into one of two camps: the "Congressionalists," who view an active role for Congress in national security, and the "Presidentialists," who see inherent authority under Article II as rendering congressional intervention moot.[18] Presidentialists argue that the Founders understood the need for a strong executive and sought to give almost plenary power for military affairs—subject only to appropriation and impeachment control.[19] Congressionalists, on the other hand, argue the text should be read to confer on Congress the dominant role in this field.[20]

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[15] *See* U.S. CONST. art. I (these include the power "to declare war; to grant letters of Marque and make rules concerning Captures on Land and Water; to raise and support armies; to define and punish Piracies and Felonies committed on the high seas, and offences against the law of nations; and to provide and maintain a navy and militia").

[16] *Id.* at cl. 1.

[17] U.S. CONST. art. II, § 2.

[18] Roy E. Brownell II, *The Coexistence of United States v. Curtiss-Wright and Youngstown Sheet & Tube v. Sawyer in National Security Jurisprudence*, 16 J. L. & Pol. 1, 9 (2000).

[19] Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1563–64 (2002) (citing John C. Yoo, *The Continuation of Politics by Other means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996)).

[20] Harold Koh, THE NATIONAL SECURITY CONSTITUTION 75–76 (Yale. Univ. Press ed., 1990).

While the exact contours of the executive's role have been the center of debate since its inception, this Article proceeds on the premise, accepted by both Presidentialists and Congressionalists, that Congress was intended to be involved in a role that is more than *de minimis*.[21] This stance is rooted in the observation that the Constitution's text seems to indicate some role for Congress in this arena through the provisions in Article I, Section 8. Because the text provides limited insight, what then do the "structure, intent, and early historical practice" show?

2. Constitutional Convention

Since the Constitutional Convention was held in secret, the Convention debates provide originalist material on both the Founders' intent and the original public meaning of the clauses.[22] George Mason of Virginia remarked that he was "against giving the power of war to the executive" because the President "is not safely to be trusted with it."[23] Only one delegate, Pierce Butler, advanced the power of the President to declare war.[24] He drew no votes in his favor and was "soundly condemned" for the proposition (so much that he and others referenced this "embarrassing" proposition in their letters home).[25] Mason stated the governmental structure was intended for "clogging rather than facilitating war, [thus] facilitating peace."[26] The committee settled on language indicating the legislature, not the

[21] *See* Schneider v. Kissinger, 412 F.3d 190, 194 (D.C. Cir. 2005) (noting "there could . . . be no doubt that decision-making in the fields of foreign policy and national security is textually committed to the political *branches* of government." (emphasis added)).

[22] Moore, Roberts and Turner, NATIONAL SECURITY LAW & POLICY 867 (Moore, Roberts, and Turner eds., 3rd ed. 2015).

[23] Campanelli et al., *supra* note 11, at 54 (quoting James Madison, Journal of the Constitutional Convention of 1787, reprinted in 4 The Writings of James Madison 227 (Gaillard Hunt ed., G.P. Putnam's Sons 1903)).

[24] MICHAEL A. GENOVESE, THE WAR POWER IN AN AGE OF TERRORISM: DEBATING PRESIDENTIAL POWER 86.

[25] *Id.*

[26] Campanelli et al., supra note 11, at 54 (quoting James Madison, Journal of the Constitutional Convention of 1787, reprinted in 4 The Writings of James Madison 227 (Gaillard Hunt ed., G.P. Putnam's Sons 1903)).

executive, has the power to "declare" war, not "make war."[27] Thus, Madison predicted that the adopted language would "leave to the [e]xecutive [only] the power to repel sudden attacks."[28]

3. The Federalist Papers

The Federalist Papers, which serve as an important source of evidence of the original understanding of the Constitution,[29] similarly reflect opposition to an unrestrained executive in the national security realm.[30] Although Hamilton is often relied on to support Presidentialist thinking,[31] he wrote that the power "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."[32] Article II powers, according to Hamilton, "would amount to nothing more than the supreme command and direction of the military . . . ."[33] Further, despite advocating for the utmost flexibility of the executive, Hamilton stated, "the President will have only the occasional command of such part of the militia of the nation *as by legislative provision* may be called into the actual service of the Union."[34] He acknowledged, "the power of the President would be inferior to that of either the monarch or the governor [of New York, who also enjoyed plenary military power] . . . [His] authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it."[35] This supreme

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[27] *Id.*

[28] *Id.*

[29] Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B.U. L. Rev. 801, 803 (2007).

[30] Campanelli et al., *supra* note 11, at 90–91.

[31] *See* John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 259 (1996).

[32] THE FEDERALIST NO. 23 (Alexander Hamilton).

[33] *Id.*

[34] THE FEDERALIST NO. 69 (Alexander Hamilton). Perhaps "provision" here can be read as coterminous with "appropriation," lending strength to the "purse only" view of Congressional control. Even then, Hamilton does not conflate flexibility with unfettered discretion.

[35] *Id.* In this debate, Hamilton was much more pro-executive power and large military establishments, which makes his exceptions to Executive war-making even more telling. Matthew Waxman, *What's So Great about the Declare War Clause?*,

command, however, was predicated upon congressional action, acting as Commander-in-Chief "[w]hen called into the actual service of the United States.'"[36]

Though lacking direct statements on the matter, Madison's contributions to the Federalist Papers, in context, show a similar understanding.[37] And, a few years after ratification, he wrote that, "[i]n 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."[38] This right, he contends, "includes the right of judging, whether the legislature be under obligations to make war or not . . ."[39] This reads like the congressional prerogative is one of substance and not merely form, especially when one considers Professor Gregory Sidak's observation that "[t]he transition from peace to war and back again fundamentally alters many legal relationships, whether they are privately ordered through contract or publicly ordered through statutes, common law doctrines, treaties, or even the Constitution."[40] Placing such a power in the legislature makes sense, then, and provides an important check on the executive's otherwise supreme command.

4. Early War Powers Practice

As for the historical practice, new originalist scholarship provides detailed insights on the use of military force, both with or

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LAWFARE (Jan. 24, 2018, 7:00 AM), https://www.lawfareblog.com/whats-so-great-about-declare-war-clause-noah-feldmans-madison-war-powers-part-i. To be clear, though, Hamilton viewed military strategy as completely vested in one branch once authorization was received. "The direction of war most peculiarly demands . . . the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms a usual and essential part in the definition of the executive authority." THE FEDERALIST NO. 69 at 289 (Alexander Hamilton) (Bridwell ed., 2003).

[36] THE FEDERALIST NO. 74 (Alexander Hamilton).

[37] *See* Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by "Declare War"*, 93 Cornell L. Rev. 45, 88 (2007) (explaining how Madison's writings in the Federalist No. 44 and 41 indicate a substantive, as opposed to formal, understanding of Congress's War Power).

[38] James Madison, *"Helvidius" Number 4*, Sept. 14, 1793.

[39] Campanelli et al., *supra* note 11.

[40] J. Gregory Sidak, *To Declare War*, 41 Duke L.J. 27, 32 (1991).

without congressional authorization. In *Misreading the History of Presidential War Power, 1789-1860*, Aaron Haviland provides a substantial contribution to the historical debate with a detailed review of when war powers were exercised and the legal justification offered from the constitutional founding to the Civil War.[41] The piece followed President Trump's 2018 airstrike in Syria—which the President executed without seeking congressional approval.[42] In the mandatory report to Congress, the Office of Legal Counsel claimed that using "military forces in limited engagements without seeking the prior authorization of Congress" is a "deeply rooted historical practice."[43] Haviland questions that conclusion by looking at the historical basis for the claim. In doing so, he separates early actions between authorized (or disavowed) actions, actions within Article II authority, and nonauthorized actions outside of Article II.[44] His research shows that, from 1789-1860, there were only two formal war declarations: against Britain in the War of 1812 and against Mexico in 1846.[45] As for military authorizations, Congress issued them against French warships in the Quasi-War,[46] while permitting force against Tripoli and the Algiers in response to hostilities.[47] Offensive measures were authorized against Paraguay, as well, if treaty negotiations fell through.[48] Furthermore, many of the uses of force in this period were against pirates which were more analogous to enforcing criminal codes over war powers, as Haviland explains.[49] Meanwhile, the use of force related to disputed territories offers minimal analogous support but, in any event, seemingly had Congressional approval each time.[50] Taken together, Haviland concludes that "OLC's expansive view of presidential war power rests on the claim that American history is

[41] *See generally* Haviland, *supra* note 3.
[42] *Id.* at 482.
[43] *Id.* at 484 (quoting April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. 1 (2018), at 1).
[44] *Id.* at 490.
[45] *Id.* at 495–96.
[46] *Id.* at 497.
[47] Haviland, *supra* note 3, at 498–99.
[48] *Id.*
[49] *Id.* at 491–92.
[50] *Id.* at 501–02.

'replete' with instances of military conflicts that were not authorized by Congress . . . does not hold up."[51]

Part of Haviland's research examines the use of war powers against non-state actors. He identifies eleven incidents in this category, nine of which involved native African or Polynesian tribes.[52] Haviland notes that it is debatable whether the Declare War Clause would apply in these situations but, to the extent it does, the entities might not have been considered "civilized" states who would be treated as sovereign.[53] The remaining two were against smugglers and bandits who did not statutorily qualify as pirates.[54] Native Americans, meanwhile, were treated as quasi-sovereign states, which might explain why President George Washington believed congressional authorization was necessary before using force against them.[55] Under that logic, "if a non-state actor does not possess some minimum threshold of political organization, then there is no group against which the United States can declare war."[56] It seems, then, that the ability to conduct diplomatic relations prior to force counseled towards Congressional approval before force authorization.

Beginning with fifty-nine incidents in the relevant time frame, he narrows "the master 'list of wars' . . . used in OLC's analysis [catalogs]" to justify unauthorized offensive force as follows: eleven were authorized by either a formal declaration of war or a statute; five were authorized by anti-piracy laws; five were disavowed; twenty "clearly fall within the President's narrow [Article II] authority;"

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[51] *Id.* at 519.

[52] *Id.* at 511.

[53] Haviland, *supra* note 3, at 512–13 ("Rightly or wrongly, the tribes in Polynesia and Africa were not viewed as state actors with whom the United States would conduct diplomatic relation.").

[54] *Id.* at 512.

[55] *Id.*

[56] *Id.* at 494; *see also id.* at 512 ("Rightly or wrongly, the tribes in Polynesia and Africa were not viewed as state actors with whom the United States would conduct diplomatic relations."). After reviewing the relevant material, the author notes that "[t]here is little guidance on whether the President can initiate hostilities against a non-piratical, non-state actor" but that the answer did not undermine his thesis that offensive action against sovereignties required Congressional authorization. *Id.* at 494.

thirteen, though possibly offensive, did not rise to the level of military force; two were non-combat intrusions; and eleven were conflicts with non-state actors.[57] The remaining five, which qualify as military action against a foreign state, can similarly be discounted as OLC support because they were justified as self-defense, mischaracterized as attacking pirates or criminals, or declared illegal by a federal circuit court.[58] All told, "[i]n the conflicts that most support OLC's thesis, the President never asserted the inherent authority to attack a sovereign state without authorization from Congress."[59]

Although most actions are now taken pursuant to the War Powers Resolution of 1973, the Resolution explicitly states that the law is not "intended to alter constitutional authority" or "grant 'any authority to the President with respect to the introduction of United States Armed Forces into hostilities' which he would otherwise not have had."[60] That leads the inquiry back to constitutional war powers as originally understood. His detailed analysis persuasively shows that, per historical practice, "the President does not have the inherent power to initiate hostilities--large or small--against a foreign state without authorization from Congress."[61]

So, what can we glean from the "text, structure, intent, and early historical practice[?]"[62] As far as the war power is concerned, there is plenty of evidence that Congress is supposed to have a meaningful role.[63] The Constitution's text requires Congress to declare war. The Federalist Papers and convention debates indicate this clause is intended to have a functional, as opposed to merely formal, role. And the lion's share of historical evidence shows executive branches saw congressional approval as necessary before initiating hostilities against a foreign state. This all constitutes

[57] *Id.* at 519.

[58] *Id.* at 520.

[59] Haviland, *supra* note 3, at 520.

[60] *Id.* at 521 (quoting 50 U.S.C. § 1547(d)).

[61] *Id.*

[62] Wurman, *supra* note 10, at 1499.

[63] *See also* Sidak, *supra* note 40 ("The transition from peace to war and back again fundamentally alters many legal relationships, whether they are privately ordered through contract or publicly ordered through statutes, common law doctrines, treaties, or even the Constitution.").

evidence that originalists would find "admissible," and would give full weight to, in the war powers debate.

B. The Revived Delegation Debate Highlights Congress's Limited Ability to Transfer Legislative Functions

A second wave underlying originalist thought is the potential for a revived nondelegation doctrine. The idea behind the nondelegation doctrine is simple: we have a fine-tuned system of checks and balances predicated upon each branch being vested with specific and limited authority.[64] Where the Framers contemplated the sharing of powers, such exceptions are spelled out in the text.[65] This system assumes each branch only exercises authority enumerated in the Constitution and, when a branch transfers its responsibilities, the system does not work.[66] While such a doctrine seems fundamental, "almost primal,"[67] its efficacy has not stood the test of time.[68] The Supreme Court recently revived the debate in *United States v. Gundy*. Although a majority rejected the nondelegation challenge there, Justice Alito's concurrence expressed a willingness to revisit the Court's nondelegation precedents.[69] *Gundy* was decided before Justices Kavanaugh and Barrett, who have both entertained nondelegation arguments, joined the Court.[70]

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[64] Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 388–89 (2017).

[65] *Id.* at 389.

[66] *See* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 336–37 (2002) (outlining the "first principles" of enumeration and limited government).

[67] *Id.* at 332.

[68] *Cf.* Jason Iuliano, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619 (2017) (arguing that the nondelegation doctrine persists in state governments despite its demise in the federal scheme); *see also* Lawson, *supra* note 66, at 329 ("In 1989, in *Mistretta v. United States*, the Court . . . unanimously declar[ed] the nondelegation doctrine to be effectively a dead letter.").

[69] Gundy v. United States, 139 S. Ct. 2116, 2130–31 (2019) (Alito, J., concurring) ("If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment.").

[70] Wurman, *supra* note 10, at 1498, n. 28.

1. Originalist Support for Nondelegation

Professor Ilan Wurman, responding to scholarship rejecting nondelegation principles as an originalist matter, stakes a claim that the Founders understood a nondelegation principle existed in the Constitution.[71] Following *Gundy*, Professors Mortenson and Bagley opened the pro-delegation debate with their piece, *Delegation at the Founding*, which contends that the entire nondelegation premise is not supported by historical evidence.[72] Wurman's article attempts to rebut this claim by looking to explicit and implicit evidence available at the Founding.[73] Perhaps the strongest evidence Wurman identifies is the Nondelegation Amendment, which stated:

> The powers delegated by this Constitution are appropriated to the departments to which they are respectively distributed: so that the [l]egislative [d]epartment shall never exercise the powers vested in the [e]xecutive or [j]udicial, nor the [e]xecutive exercise the powers vested in the [l]egislative or [j]udicial, nor the [j]udicial exercise the powers vested in the [l]egislative or [e]xecutive [d]epartments.[74]

The amendment, introduced by James Madison, was objected to by one delegate as "altogether unnecessary."[75] The amendment carried in the House but was struck in the Senate. Though Wurman concedes this evidence is hardly dispositive, it is evidence that—contrary to Mortenson and Bagley's conclusion—nondelegation concerns were, at a minimum, contemplated in the founding era.

Next, Wurman identifies multiple nondelegation objections made to early legislation.[76] He argues that the Post-Roads Debate, which Mortenson and Bagley rely on to prove a permissive delegation

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[71] *See id.* at 1495–97.
[72] Mortenson & Bagley, *supra* note 13.
[73] Wurman, *supra* note 10, at 1494–95.
[74] *Id.* at 1504.
[75] *Id.*
[76] *See id.* at 1509–15.

regime, actually support the existence of the nondelegation doctrine.[77] Article I says "Congress shall have Power . . . [t]o establish Post Offices and post roads[.]"[78] The Second Congress introduced a bill identifying where the roads will go.[79] One member moved to amend the Bill to say roads will be built "by such route as the President of the United States shall, from time to time, cause to be established."[80] The member was rebuked with a handful of responses alluding to nondelegation concerns.[81] The final bill listed "[the] post roads quite precisely"[82] but delegated the authority "to establish such *other* roads as post roads, as to [the Postmaster General] may seem necessary."[83] As Wurman notes, however, the delegated power was to "enter into contracts, for a term not exceeding eight years, for extending the line of posts . . . and the roads, therein designated, shall, during the continuance of such contract, be deemed and considered as post roads."[84] Taken together, Wurman notes that this episode supports nondelegation principles because Congress decided which regions would receive the economic boon of a post road while the Postmaster General could *extend* those roads as necessary (and only for a limited duration).[85]

Wurman also finds implicit support for nondelegation principles among influential philosophers as well as institutional considerations.[86] John Locke, whose influence over the Founders is widely accepted, wrote that

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[77] *Compare id.* at 1506–10 (examining the post roads debate and concluding "it is certainly possible, even sensible, to take these statements for the proposition that many believed Congress could not delegate away its power") *with* Mortenson & Bagley, *supra* note 13, at 349–56 (examining the post roads debate and concluding that "call[ing] the post-roads debate a thin reed would be a vast overstatement. It is no reed at all.").

[78] Wurman, *supra* note 10, at 1506 (quoting U.S. CONST. art. I, § 8, cl. 7).

[79] *Id.*

[80] *Id.* (quoting 3 ANNALS OF CONG. 229 (1791)).

[81] *Id.* at 1506–10.

[82] *Id.* at 1510.

[83] *Id.* (quoting 3 ANNALS OF CONG. 230 (1791)).

[84] Wurman, *supra* note 10, at 1510.

[85] *Id.*

[86] *See id.* at 1518–26.

> The *legislative cannot transfer the power of making laws* to any other hands, for it being but a *delegated* power from the people, they who have it, cannot pass it over to others . . . [it] can have no power to *transfer* their authority of making laws, and place it in other hands.[87]

Mortenson and Bagley rely on Locke's writings and similar evidence to distinguish between alienation, which they argue is prohibited, and delegation, which is permitted.[88] Mortenson and Bagley argue that delegation—defined as any transfer that can be withdrawn—was widely accepted.[89] Responding, Wurman first shows that early writings used the terms delegation and alienation interchangeably.[90] Second, he argues that, under that logic, Congress could delegate the power to "carry[] into effect any of the powers vested in Congress in Article I, Section 8" as long as it technically retained the authority the withdraw the delegation.[91] Finally, he argues that, as a practical matter, delegation can quickly become alienation due to the veto power.[92] As for institutional concerns, he argues that "the Framers created three distinct institutions to exercise three distinct kinds of powers . . . because they believed the structure of each institution would make that institution uniquely suited to its particular task."[93] Applying basic separation of powers assumptions, he observes that "no branch could delegate its own power, nor could Congress reassign any powers, without defeating the whole purpose of designing the three national institutions in their particular ways."[94] Summoning Chief Justice Marshall's nondelegation formulation, Wurman concludes that some delegations are permitted as an original

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[87] *Id.* at 1518 (quoting JOHN LOCKE, SECOND TREATISE OF GOVERNMENT: AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT AND END OF CIVIL GOVERNMENT § 141, at 87 (Richard H. Cox ed., 1982) (1690)).

[88] *Id.*

[89] *Id.* at 1518-21.

[90] Wurman, *supra* note 10, at 1519 ("Even if this distinction were valid for Locke--something that is not entirely clear--it is not a distinction that the Founding generation appears to have used.").

[91] *Id.* at 1556.

[92] *Id.* at 1521.

[93] *Id.* at 1523.

[94] *Id.*

matter and a true originalist delegation doctrine focuses on "important subjects" and not private conduct vel non.[95]

2. Public v. Private Rights

Wurman caveats that there may be more latitude to delegate in the realm of public rights—patents and veterans' pensions, for example—than private rights.[96] But, he notes, "it would be . . . impermissible to delegate authority to the President to decide *whether* the national government should grant patents, or *whether* the national government should provide pensions to veterans."[97] On this front, he concludes that "Congress cannot delegate to the President the decision whether to establish a pension system—that is too important . . . ."[98] War declaration, if akin to a public right, would still be covered by Wurman's claim that "Congress cannot delegate to the President the decision whether to [exercise the Article I power at all]."[99] Accordingly, the ability to declare war in the first place cannot be delegated completely. Furthermore, even if it a public right, the war power seems to be an "important subject" in light of the original material examined in Section II.a.

3. Nonexclusive Powers

Another strain of the delegation debate turns on the concept of "exclusive" versus "nonexclusive" power.[100] Under one view, the Founders considered power to be "relational" and permitted each branch to perform duties that could be characterized as outside of their function.[101] Following this model, the executive could reasonably engage in rulemaking even if it were legislative by nature. Even taking

[95] *Id.* at 1534–35, 1556.

[96] Wurman, *supra* note 10, at 1548–49. In a footnote on this topic, he also notes that foreign affairs could be privy to much broader delegations. *Id.* at 1549 n. 322 (citing Michael McConnell, THE PRESIDENT WHO WOULD NOT BE KING 328-35 (2020)).

[97] *Id.* at 1548.

[98] *Id.*

[99] *Id.* That is not to say that it is a "right" at all. It is merely to say that even accepting that more delegation is permitted in the absence of private rights, the authority to make the decision cannot itself be delegated.

[100] *Id.* at 1533.

[101] *Id.* at 1532–33.

as true that the executive can perform "legislative" functions, that does not answer the question about what level of rulemaking would violate the Constitution.[102] Further, he notes that multiple constitutional features qualify as "nonexclusive," including legislative power in the executive (for example, the veto power and, arguably, treatymaking); judicial power to the legislature (impeachment); and some executive power to the Senate (appointments).[103] "The existence of nonexclusive powers," he reasons, "does not mean that every exercise of governmental power is nonexclusive."[104] Chief Justice Marshall's nondelegation test, Wurman observes, "assumed there was a difference between exclusive legislative power that Congress could not delegate and nonexclusive legislative power that Congress could either exercise or delegate."[105] Framing the issue as one of the exclusive or nonexclusive powers, then, does not resolve the debate as an originalist matter.[106] In that vein, even if the Declare War Clause was "executive" in nature, the Constitution puts a ceiling on what level can be delegated away from the legislature. Meaning that the executive could conduct operations that do not rise to the level of war.

Because aspects of the war power reside in both Articles I and II, the question is whether that division permits less room to delegate or more. On one hand, the division of power can be read as an explicit check on executive authority to make war (the gatekeeping theory).[107] On the other hand, one can argue that the power is collaborative and therefore permits broad delegation.[108] For example, a recent Harvard

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[102] Wurman, *supra* note 10, at 1534 ("The question is whether there are certain *kinds* of rulemakings that *have* to be done by Congress, even if there are many other kinds of rulemaking that can be done by either.").

[103] *Id.* at 1526 n. 189.

[104] *Id.* at 1534.

[105] *Id.*

[106] *Id.* at 1538 ("Mortenson and Bagley . . . have not shown that the Founders believed that all power was nonexclusive, nor have they demonstrated that all exercises of government power are in fact nonexclusive.").

[107] Saikrishna Prakash, *The Sweeping Domestic War Powers of Congress*, 113 MICH. L. REV., 1337, 1341 (2015).

[108] *Nondelegation's Unprincipled Foreign Affairs Exceptionalism*, 134 HARV. L. REV. 1132, 1155 (2021) ("[T]he Constitution itself makes the President Commander in Chief and that the unpredictable course of hostilities makes it imperative that that officer enjoy great flexibility in deploying his forces once war has been declared."

Law Review article—which argues that courts apply an unprincipled "foreign affairs exception" to nondelegation—states:

> The interlinking claim makes sense in formalist terms when the Constitution suggests a particular relationship between a power allocated to Congress and an independent presidential power. This is clearest in the case of war powers, which are constitutionally divided between the branches; the Constitution plainly contemplates that when Congress declares war, the President plays a role as Commander in Chief in executing that war. The interdependency of the powers not only permits but even requires broader delegation.[109]

This assertion is flawed for two reasons. First, it conflates the inherent war power of Article II, triggered by defensive needs, with the war execution power, which follows congressional authorization. If the "broader delegation" only follows the "independent power" then the broad delegation would not apply absent a defensive response—which would not need an authorization in the first place. Second, it assumes broader delegation discretion in the war power space than the foreign affairs power space because the power is explicitly shared. But the diplomacy power, which exists unilaterally in the President, would seemingly provide a much broader basis for executive discretion than a textually divided war power.[110]

(quoting DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801-1829, 125 at n. 15 (2001)).

[109] *Id.* at 1155.

[110] *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936) (referring to the diplomacy power as the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress"); *see also* Josh Blackman, *The Travel Ban, Article II, and Nondelegation Doctrine*, LAWFARE (February 22, 2018), https://www.lawfareblog.com/travel-ban-article-ii-and-nondelegation-doctrine ("*Curtiss-Wright* still stands for the proposition that courts should read delegations in the foreign-policy context in a generous fashion.").

4. Delegation Applied

The contemporary debate provides us with a few key insights. First, there is a strong case that nondelegation principles were present at the founding. Whatever debates there are to be had about federal regulation of private conduct, the delegation question, if present, would plainly apply to an explicit power identified in Article I, Section 8. Due to the unique nature of overlapping authority in the war power context, the question is whether this arrangement permits broader or narrower delegations. Given the historical evidence showing that the Declare War Clause was viewed as a substantive check on executive authority, Congress should either have the same—or less—room to transfer the authority.

Taking it from theory to applied, Professors Jonathan Adler and Chris Walker add to the nondelegation discussion by providing a practical explanation of the harmful effects of broad delegations over time.[111] As they point out, "when decades pass between the enactment of statutes delegating authority . . . there is a risk that the delegated authority will be used for purposes or concerns that the enacting Congress never considered."[112] This aspect of broad legislation and delegation violates the assumptions underpinning democratic governance, and ultimately, "can be viewed as a threat to deliberative democracy" itself.[113] If one accepts the nondelegation premise, the point is that the consequences grow as a function of time.

With originalist scholarship expanding our understanding of key constitutional provisions and principles, two originalist tides seem to be converging. From one direction, the growing evidence that war declaration was substantive, not formal, and necessary before offensive action against a sovereign. From the other, a wealth of evidence that nondelegation principles applied in some contexts. These originalist tides converge to show a historical respect for a key

[111] Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1939–40 (2020).
[112] *Id.* at 1945.
[113] *Id.* at 1940.

separation of powers principles that was honored by the executive in all but a few situations.

II. AN APPLIED THEORY OF CONSTITUTIONAL AUTHORIZATIONS

The "text, structure, intent, and early historical practice" of the Declare War Clause constrain the executive's ability to unilaterally initiate hostilities against a sovereign nation. This is why Haviland argues that the strikes on Libya in 2011 and Syria in 2017 violated the Declare War Clause. And yet each administration claimed its use of force was supported by a congressional authorization. Because authorizations of force have supplanted formal declarations of war, the question is whether the authorizations meaningfully identified any sovereigns that could have hostilities against them, thereby constraining the executive's authority. A revived nondelegation principle would force the legislature to make decisions about the "important subjects" before leaving the matters of "less interest" to executive discretion. One pair of national security scholars explained that if Congress permits offensive actions against sovereigns, it must be more "precise" about which sovereigns can have force used against them.[114] By inference, then, the delegation question has merit when the self-defense rationale is absent. This inference gains further traction in light of Wurman's conclusion that even nonexclusive powers have a limit before their exercise becomes a vesting issue.

A. *Congress Cannot Delegate the Power to Initiate Hostilities Against a Sovereign*

1. A Theory

A sustainable originalist theory respects the President's inherent defense power under Article II while requiring Congress to approve offensive action against foreign sovereigns. Per Haviland's research, each legitimate hostility against a sovereign was authorized in early practice. This practice comported with the attempt to give a sovereign fair warning to change its course or negotiate the conflict. It also complies with the rationale that authorizations and declarations

[114] *See* Bradley & Goldsmith, *supra* note 2, at 2100.

change the legal relationship of each sovereign, which arguably, would apply with less force if there is no formal representative or structure to negotiate with. Applying delegation principles to this premise, the legislature is tasked with the "more important" questions of hostilities against sovereigns while the executive could handle the less clear implications of hostilities with non-state actors under broader guiding principles. Under that approach, an AUMF could identify the geographic scope of force that is permissible, or a specific non-state actor more broadly. In that hypothetical, however, force against a sovereign would not be permissible unless the target was clearly identified.

The Post Roads debate provides analogous support here. Like the post roads, where Congress had to pick the initial cities that would benefit, Congress must identify the sovereign target. Moreover, whereas the Postmaster General was permitted to extend the roads as a temporary matter, the executive can operate against collateral non-state hostilities (with timebound discretion) thereafter.

2. Rebuttals

This theory runs into two pitfalls. The first comes from the difficulty in delineating between defensive war power (not requiring congressional authorization) and seemingly offensive actions justified as a preemptive defense.[115] Because the delegation concern is nonexistent where independent authority rests in the executive, the difficulty in drawing the preemptive defense line similarly undermines a viable delegation critique. However, this difficulty is not unique to the proposed theory, and plenty of scholarship attempts to offer controlling principles on this point.[116] The second and more unique

[115] *See* Jonathan G. D'Errico, *The Specter of a Generalissimo: The Original Understanding of the President's Defensive War Powers*, 42 FORDHAM INT'L L.J. 153, 181 (2018) ("An original understanding of the Constitution would necessarily be incomplete without recognition of the President's defensive war powers.").

[116] *See, e.g., id.* Mortsen, Bagley, and Wurman examined an early delegating broad military authority to the president; Wurman concludes it is permissible delegation because of the President's inherent authority. *See* Wurman, *supra* note 10, at 1544. This is true under a simple application of the defense principle. One set of Professors relied on the 1790 Act permitting the President to call forth the militia when necessary to "[protect] the inhabitants of the frontiers of the United States" as an

issue here is that, even if the sovereignty theory is true, the authority to recognize sovereignties is vested in the executive and a much clearer application of its foreign relations authority.[117] This would effectively permit the executive to claim that the hostility was not against a sovereign at all—an approach that has some historical support.[118] But, as a practical matter, the executive would likely be constrained by international law and norms in identifying sovereignties.[119]

B. Recent War Powers Practice Arguably Violates This Principle

The proposed theory seeks a proper balance between executive and legislative discretion that respects both historical context and modern practice. If correct, does our modern practice pass scrutiny?

1. 2001 AUMF

Modern war powers revolve around the use of authorizations of force rather than formal declarations of war. Following the September 11th terrorist attacks, Congress passed the 2001 Authorized Use of Military Force (AUMF), which permits the President to:

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example of broad delegation of another branch's "constitutional space." Wurman agrees this act "meets nondelegation principles."

[117] *Curtiss-Wright Exp. Corp.*, 299 U.S. at 320.

[118] Haviland, *supra* note 4, at 518 (explaining that three of the hostilities were "arguably sovereign states, but the President tried to evade the Declare War Clause by arguing that they were pirates . . . The President never asserted that he had the inherent power to initiate hostilities against a foreign state; he only argued that the targets of these reprisals were not sovereign states.").

[119] Curtis A. Bradley & Jack L. Goldsmith, *Obama's AUMF Legacy*, 110 AM. J. INT'L L. 628, 643 (2016) ("Although the administration did not similarly invoke *jus ad bellum* to inform the meaning of the AUMF, it did claim that this body of law (especially as it relates to the sovereignty of nations from which terrorist organizations operate) constrained its targeting actions under the AUMF. In this context too, the administration adopted contested interpretations of international law that gave it significant flexibility in intervening in other nations without their consent.").

> [U]se 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 persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[120]

Much ink has been spilled over the interpretation, longevity, and potential abuse of the AUMF.[121] The question here is whether the use of the 2001 AUMF complies with the new insights related to historical war powers practice and the nondelegation debate.

Curtis Bradley and Jack Goldsmith first took on that question in 2005 by looking at the 2001 AUMF from a historical and institutional perspective.[122] Acknowledging that "[t]he President's authority is at its highest '[w]hen the President acts pursuant to an express or implied authorization of Congress,'" the difficulty lies in "determining what Congress has implicitly authorized."[123] Bradley and Goldsmith, at the outset, argue that authorizations are a permissible, if not a necessary, constitutional tool and "Presidents have exercised their full Commander-in-Chief powers in a number of military conflicts throughout U.S. history that involved many of the

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[120] Bradley & Goldsmith, *supra* note 2, at 2050 (quoting Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001)). President Bush quickly determined that Al Qaeda, the terrorist organization, and the Taliban government in Afghanistan, who supported Al Qaeda, satisfied the nexus; *see* Matthew Weed, *Presidential References to the 2001 Authorization for Use of Military Force in Publicly Available Executive Actions and Reports to Congress*, CONGRESS RESEARCH SERVICE 2–3 (May 11, 2016).

[121] *See, e.g.*, Gene Healy & John Glaser, *Repeal, Don't Replace, the AUMF*, CATO INSTITUTE (July/August 2018), https://www.cato.org/policy-report/julyaugust-2018/repeal-dont-replace-aumf; Mary Louise Kelly, *When the U.S. Military Strikes, White House Points to a 2001 Measure*, NPR (Sep. 6, 2016) http://text.npr.org/492857888 ("Many terrorism experts call [the extension of the AUMF] a stretch, when ISIS and al-Qaida are now actively fighting each other in Syria and elsewhere."); Adam Klein, *Part III: Ending the AUMF War*, LAWFARE (April 22, 2016, 10:59 AM), https://www.lawfareblog.com/part-iii-ending-aumf-war; Bradley & Goldsmith, *supra* note 120, at 629.

[122] Bradley & Goldsmith, *supra* note 2, at 2050.

[123] *Id.* at 2052.

purportedly non-traditional elements present in the current conflict with terrorists."[124] Bradley and Goldsmith examine Al Qaeda's status as a non-state actor in the context of how much force is permitted.[125] Summoning historical evidence, they note that "a number of prior authorizations of force have been directed at non-state actors, such as slave traders, pirates, and Indian tribes."[126] Even during declared wars, they reason, "U.S. military forces engaged military opponents who had no formal connection to the state enemy."[127] These claims align with Haviland's thorough research.

Bradley and Goldsmith claim that the *Prize Cases* are instructive to the AUMF debate. For context, during the onset of the Civil War, President Lincoln seized ships headed to the southern ports (in violation of a Union blockade).[128] The ship owners sued. The legality of the action turned on whether the underlying conflict was an insurrection or a war. The Supreme Court deferred to the executive branch's determination that insurrectionists were belligerents, meaning a war was ongoing and the seizures were justified.[129] The conclusion, Bradley and Goldsmith reason, "was relatively easy because the President had used force in response to an attack and because Congress had ratified the President's actions after the fact."[130] So, too, for the AUMF because "Congress ha[d] in fact authorized the President to use all necessary and appropriate force in that conflict."[131] As a result, the "more complex" issue raised "when the President takes action beyond repelling attacks without the authorization of Congress" was not implicated.[132]

Bradley and Goldsmith rejected nondelegation concerns because the AUMF had a sufficient constraining principle and, in any event, was a complement to the "independent authority" underlying

[124] *Id.* at 2057.
[125] *Id.* at 2066.
[126] *Id.*
[127] *Id.* at 2067.
[128] Bradley & Goldsmith, *supra* note 2, at 2071.
[129] *Id.*
[130] *Id.*
[131] *Id.* at 2071–72.
[132] *Id.* at 2071.

"a military response to an attack on the United States." The authorization was limited by "[the] September 11 nexus limitation," which "implicitly restricts authorized targets by virtue of the named enemy and the purposes of the authorization." This aspect of the AUMF is "an important limitation on the scope of the AUMF."[133] The September 11th attacks, they explain, also triggered the inherent Article II authority.[134] "In such a context," they note, "nondelegation concerns are less significant, so the authorization need not be as precise as would be required in the absence of concurrent presidential authority."[135] To support this conclusion, the authors rely on *Loving v. United States,*[136] where the Supreme Court rejected a nondelegation argument against the Uniform Code of Military Justice because the President already possessed independent authority over military discipline as Commander-in-Chief.[137] The same for *United States v. Curtiss-Wright Export Corp.,*[138] which is broadly cited as defeating delegation challenges where the President's inherent foreign relations authority is concerned. However, the authors seem to assume that the foreign affairs power follows a similar model as the war power—a disputed assumption.[139] *Loving*, meanwhile, applies to operating the military, a separate authority than war declaration.[140] The remaining support for that claim, then, is back to the defensive power only.

Bradley and Goldsmith provide a compelling defense of the AUMF as a response to an attack ultimately ratified by Congress. In this situation, they claim, nondelegation concerns did not apply due to independent Article II authority. The 2001 AUMF did not identify Afghanistan and yet was used as justification to violate the country's sovereignty. But, this approach fell squarely under permissible self-

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[133] *Id.* at 2055 (explaining the importance of the nexus but concluding it "nonetheless encompasses terrorist organizations other than those responsible for the September 11 attacks if they have a sufficiently close connection with the responsible organizations.").

[134] Bradley & Goldsmith, *supra* note 2, at 2100–01.

[135] *Id.* at 2100.

[136] Loving v. U.S., 517 U.S. 748 (1996).

[137] Bradley & Goldsmith, *supra* note 2, at 2100.

[138] *Curtiss-Wright Exp. Corp.,* 299 U.S. at 319-22.

[139] Brownell, *supra* note 18.

[140] *Id.* at 2100.

defense. As a result, Bradley and Goldsmith's conclusion dismissing nondelegation concerns made sense—in 2005.[141] However, it is not clear that these defenses stood the test of time.

2. The 2001 AUMF: Revisited

Eleven years after their article, and fifteen years after the 2001 AUMF was enacted, Bradley and Goldsmith followed up on "[t]he transformation of the AUMF from an authorization to use force against the 9/11 perpetrators . . . into a protean foundation for indefinite war against an assortment of terrorist organizations in numerous countries."[142] Although, "[t]he Bush administration gave the AUMF a robust interpretation," for a variety of reasons, the AUMF's reach was "largely unsettled" when President Obama took office in 2009.[143] Bradley and Goldsmith argue that the Obama Administration expanded the 2001 AUMF by applying "limitations" affording broad presidential discretion and flexibility, thereby "cementing the legal foundation for an indefinite conflict against various Islamist terrorist organizations."[144]

The biggest shift, they explain, was the Obama Administration's claim that "the AUMF . . . authorize[d] extensive and ongoing use of military force against the Islamic State," which did not exist in 2001.[145] This pivot justified expansive military actions in countries like Syria and more limited uses of force in nations like Pakistan, Yemen, and Somalia (which fell outside of "areas of active

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[141] *See* Adler & Walker, *supra* note 111.

[142] Bradley & Goldsmith, *supra* note 120, at 628.

[143] *Id.* at 630.

[144] *Id.* at 629; *see also id.* at 638 ("The 2001 AUMF, which is likely to be the primary foundation of U.S. military force against organized terror for the indefinite future, is very much the AUMF that President Obama crafted, argued for, and nurtured. It will stand as one of his primary legal legacies.").

[145] *Id.* at 637. The Islamic State's connection to Al-Qaeda was also unsettled. *See* Mary Louise Kelly, *When the U.S. Military Strikes, White House Points to A 2001 Measure*, NPR (Sep. 6, 2016) https://www.npr.org/sections/parallels/2016/09/06/492857888/when-the-u-s-military-strikes-white-house-points-to-a-2001-measure ("Many terrorism experts call [the extension of the AUMF] a stretch, when ISIS and al-Qaida are now actively fighting each other in Syria and elsewhere.").

hostilities" or "hot battlefields").[146] And yet, simultaneously advocating a broad construction of the 2001 AUMF, the Obama Administration asked Congress to explicitly authorize the conflict against the Islamic State in a separate statute; Congress did not oblige.[147] When identifying targets, the Obama Administration applied "fact-intensive legal standards for 'membership' and 'associated forces,'" which the authors claim "yield[ed] substantial discretion and flexibility."[148] And under the claim of restraint, "the [Obama] administration adopted contested interpretations of international law that gave it significant flexibility in intervening in other nations without their consent."[149] This turn of events highlights the consequences of a broad authorization combined with a passive Congress.

Once the self-defense rationale justifying hostilities against Afghanistan faded, using force against a sovereign under the 2001 AUMF likely violated the original understanding of war powers.[150] This includes the hostilities that could reasonably be construed as infringing on Syria's sovereignty. Moreover, perhaps that is why the Obama Administration sought legislative ratification. Whether the use of force against non-state actors within another sovereign's borders (and not against the sovereign itself) would turn on the interpretation of international law beyond this Article's scope.[151]

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[146] *Id.* at 642.

[147] *Id.* at 637.

[148] Bradley & Goldsmith, *supra* note 120, at 643.

[149] *Id.*

[150] *Id.* at 636 ("President Obama said that the war against Al Qaeda and in Afghanistan was winding down, expressed a desire 'to refine, and ultimately repeal, the AUMF's mandate,' and pledged not to 'sign laws designed to expand this mandate further.'").

[151] *See id.* at 643–44 (explaining that an "important issue here is when the United States can invoke an anticipatory self-defense rationale under the UN Charter to use force against terrorist organizations inside nonconsenting nations" and that "[t]here are few clear controlling legal authorities to govern a transnational non-international armed conflict in which terrorist groups organize and act from nations with which the United States is not at war").

3. 2002 AUMF

The 2002 AUMF, permitting the United States to engage in war with Iraq, authorizes the President to use military force to "defend the national security of the United States against the continuing threat posed by Iraq . . . ."[152] The authorization is detailed—six pages in length—and, as Bradley and Goldsmith observe, resembles those used in declared wars.[153] The United States pursued the war and overthrew Saddam Hussein, leading to "the establishment of a new Iraqi government, the restoration of full Iraqi sovereignty, and the U.S. withdrawal from Iraq."[154] And yet, the 2002 AUMF lived on. In 2019, the Trump Administration seemed to argue that the 2002 AUMF permitted force against Iran.[155] Although the idea was not well received,[156] the Trump Administration still authorized kinetic strikes against Iranian Major General Soleimani claiming inherent Article II authority *and* authorization from the 2002 AUMF. The war powers report explained that the 2002 AUMF permitted force against threats coming "from Iraq," meaning "threats to the United States posed by militias, terrorist groups, or other armed groups in Iraq." To the extent that use of force was an offensive act against Iran's sovereignty, then, it exceeded the executive's 2002 AUMF authority and breached Congress's prerogative.[157]

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[152] Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002).

[153] Bradley & Goldsmith, *supra* note 2, at 2076.

[154] *2002 AUMF*.

[155] *See* Charlie Savage, *Could Trump Use the Sept. 11 War Law to Attack Iran Without Going to Congress?*, N.Y. TIMES (June 19, 2019), https://www.nytimes.com/2019/06/19/us/sept-11-war-law-iran.html.

[156] *See* Edward Wong & Catie Edmonson, *Iran Has Ties to Al Qaeda, Trump Officials Tell Skeptical Congress*, N.Y. TIMES (June 19, 2019), https://www.nytimes.com/2019/06/19/us/politics/us-iran.html.; *see also* Steve Vladeck & Tess Bridgeman, *About that Trial Balloon on Using 9/11 AUMF to Authorize Strikes on Iran*, JUST SECURITY (Feb. 21, 2019), https://www.justsecurity.org/62646/washington-times-aumf-iran/.

[157] *See* Weed, *supra* note 120 (The 2001 AUMF had been cited 37 times in connection with actions in 14 countries and on the high seas. The report stated that "Of the 37 occurrences, 18 were made during the Bush Administration, and 18 have been made during the Obama Administration.").

4. The Biden Administration

In his first month in office, President Biden authorized kinetic strikes in "eastern Syria [against] Iran-supported non-state militia groups" in response to "recent attacks against the United States and Coalition personnel in Iraq."[158] President Biden cited his inherent Article II power as well as the United Nations Charter justifying self-defense. He issued similar strikes in June 2019 but, this time, "Iraqi Prime Minister Mustafa al-Kadhimi criticized the airstrikes as 'a blatant and unacceptable violation of Iraqi sovereignty and Iraqi national security.'"[159] The first strike seemed to be a permissible use of force and, in any event, fell under the independent (and effectively unreviewable) defense power. The second strike, though, raises a harder question because of Iraq's direct statement that its sovereignty was breached. Although the Biden Administration did not cite either AUMF each time, relying on the unreviewable preemptive defense raises broader questions of executive overreach while minimizing grounds for Congressional oversight.

5. Delegation and Time

Although modern war powers practice seems, at times, to violate historical practice and separation of powers principles, it is unlikely (to say the least) that a court would—or should—entertain the question.[160] It instead helps to think of this as a conceptual matter and analyze how Congress can pass legislation that advances its aims in a constitutional manner. This is where Professors Adler and Walker's time considerations come into play.[161] Though they examine the effects of delegation on administrative law, the same principles apply

[158] *The Letter*, *supra* note 7.

[159] Gordon & Malsin, *supra* note 9. At least two elected officials publicly questioned the second airstrikes constitutionality. *See* John Hudson & Louisa Loveluck, *In Launching Airstrikes in Syria and Iraq, Biden Lowers Bar for Use of Military Force*, WASH. POST (Jul. 1, 2021), https://www.washingtonpost.com/national-security/biden-military-strikes-policy/2021/07/01/9ab7d7d0-da60-11eb-ae62-2d07d7df83bd_story.html.

[160] *See* Haviland, *supra* note 3, at 523 ("The federal judiciary has continually dismissed suits regarding presidential war power, usually because the plaintiffs lack standing or because the case involves a nonjusticiable political question.").

[161] Adler & Walker, *supra* note 111.

here: broad delegations spanning decades allow executive action that violates the expectations of those who passed the legislation and those who currently govern. For example, would the 2001 Congress have voted to authorize force against Syria? Would the 2019 (politically divided) Congress have affirmatively voted to do so? Or would today's Congress even pass an authorization of force at all? If the answer is no to any of those questions, then democratic principles are not prevailing.[162] This aspect of broad legislation and delegation violates the assumptions underpinning democratic governance, and ultimately "can be viewed as a threat to deliberative democracy" itself.[163] The solution, they concluded, is through temporary legislation, sunsets, and reauthorizations.[164] Yet our current war powers practice, which permits deployment of troops for 60 to 90 days before congressional ratification is required, seems incomplete at the outset. The Post Roads debate provides a helpful analogy here: The War Powers Resolution, which permits the temporary deployments, is more akin to the contract extension within the discretion of the Postmaster General. The broad authorizations, meanwhile, are more analogous to granting the President the discretion to decide where the roads go—a proposition rejected by the Second Congress. The almost unconstrained discretion in identifying targets, combined with a broad time horizon before ratification, seemingly puts the delegation cart before the originalist horse.

This Article is not the first piece to conclude that the 2001 AUMF presents serious delegation concerns.[165] Caitlyn Fiebrich recently argued that the 2001 AUMF would not pass scrutiny under a revived nondelegation doctrine.[166] First, Fiebrich argues that a revitalized nondelegation would take one of three forms, which would permit Congress to delegate to the executive: (1) the authority to fill in the details; (2) the authority to fact-find; or (3) non-legislative functions.[167] Second, she outlines the high-level historical progression

[162] *See id.* at 1945.
[163] *Id.* at 1940.
[164] *Id.* at 1960–74.
[165] Caitlyn Grey Fiebrich, *Guns, Gundy, Gorsuch: Could A New Nondelegation Doctrine Change the Course of the AUMF?*, 58 HOUS. L. REV. 453 (2020).
[166] *Id.* at 476.
[167] *Id.* at 459–60.

of the AUMF targets, beginning with Al Qaeda and Bin Laden, and ending with the use against the Islamic State in 2013.[168] Over this period, she observes that the 2001 AUMF has been the basis for armed conflict in at least eighteen countries, including Cuba and the Philippines.[169] As a result, she concludes the September 11th nexus (which Bradley and Goldsmith found an important constraining principle) has been effectively eviscerated.[170] This development, Fiebrich argues, would cause the 2001 AUMF to fail the first two iterations of a revived nondelegation doctrine. She concludes, however, that the third category, delegating non-legislative functions, would likely permit it to stand. In reaching this conclusion, Fiebrich reiterates the "broader discretion" of national security delegations generally but reminds the readers that delegations are not per se constitutional because of the subject matter.[171] Ultimately, Fieberich concludes, "[a] judicial challenge to the 2001 AUMF under a new reading of the nondelegation doctrine could cause the Court to reevaluate the balance of power between Congress and the executive in the Act."[172]

Building on Fiebrich's thoughtful analysis, there are a few pieces that help color the discussion. First, Fiebrich's point about non-legislative function (which is ceded as the weak point in the argument) is rebutted by Wurman's originalist scholarship. That is, whether the war declaration authority is functionally legislative or not, it is vested in the legislative branch. Delegating the right to declare war (whether functional or formal) to the executive would violate the nondelegation doctrine (to the extent it exists).[173] Second, the historical evidence seems to support delineating between sovereign and non-state actors.

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[168] *Id.* at 465–66; see also Bradley & Goldsmith, *supra* note 120, at 629 (noting the 2001 AUMF "included at least the nation of Afghanistan when it was governed by the Taliban ('nations'), Al Qaeda ('organizations'), Al Qaeda members, and at least those Taliban members who were part of its armed forces ('persons')").

[169] Fiebrich, *supra* note 165, at 470.

[170] *Id.* at 473–74.

[171] *Id.* at 475 ("Congress may confer broader discretion to the Executive in matters which congressional and executive authority operate in tandem--specifically, in the context of national security.").

[172] *Id.* at 476.

[173] Wurman, *supra* note 10, at 1537–38.

Given the broader discretion to use force against non-state actors, pursuing "associated forces" may not offend delegation and separation of powers principles.

III. CONCLUSION

All told, the modern state of warfare provokes a blend of legal and moral questions that must be addressed at a breakneck pace. This Article does not contend that these questions are clear or are easy to resolve. Instead, it aims to provide a cohesive perspective on an area where modern practice seems to have departed from originalist principles. As for the questions posed at the outset: was there a meaningful difference between the actions? The answer seems to be yes, because the strike on Major General Soleimani is much closer to hostilities against a sovereign than the non-state actors targeted by the Biden Administration. This conclusion is undermined, however, by the Iraqi Prime Minister's statement following President Biden's second kinetic strike. At the same time, the executive's use of inherent defensive power against a foreign sovereign opens far more difficult questions. But, to the extent Congress exercises its war power prerogative, it should proceed with care for the unintended consequences of overly broad authorizations of force. As for the broader question, whether the historical war powers framework can keep up with the modern state of war, that is far from clear. Adhering to guiding principles—such as honoring Congress's textual duty to decide the important question of war—is just one aspect that can help achieve that aim.