DELEGATING WAR POWERS

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ABSTRACT

Academic scholarship and political commentary endlessly debate the President's independent constitutional power to start wars. And yet, every major U.S. war in the last sixty years was fought pursuant to war-initiation power that Congress gave to the President in the form of authorizations for the use of military force. As a practical matter, the central constitutional question of modern war initiation is not the President's independent war power; it is Congress's ability to delegate its war power to the President.

It was not until quite late in American history that the practice of war power delegation became well accepted as a domestic law basis for starting wars. This Article examines the development of war power delegations from the founding era to the present to identify when and how war power delegations became a broadly accepted practice. As this Article shows, the history of war power delegation does not provide strong support for either of two common but opposite positions: that war power, as a branch of foreign affairs powers, is special in ways that make it exceptionally delegable; or that it is special in ways that make it uniquely nondelegable. More broadly, that record counsels against treating "foreign affairs delegations" as a single category, and it reveals that constitutional questions of how Congress exercises war power are as significant as whether it does.

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INTRODUCTION: WAR POWER AND THE NEW NONDELEGATION DEBATES

Academic scholarship and political commentary endlessly debate the President's independent constitutional power to start wars or launch military interventions.[1] And yet, every major U.S. war in the last 60 years—Vietnam, the Persian Gulf War, Afghanistan, and the 2003 Iraq War—was fought pursuant to war-initiation power that Congress gave to the President in the form of authorizations for the use of military force.[2]

Congress's war power—*and by that term, or alternatively "war-initiation power," we mean throughout this Article specifically the power to commence war, as distinct from power to wage it*[3]—is generally understood to arise from Article I, Section 8's power "To declare War."[4] But none of the congressional war authorizations of the past sixty years was in any sense a declaration of war. None had the effect of initiating, or directing the

1. *See* William Michael Treanor, *The War Powers Outside the Courts*, 81 IND. L.J. 1333, 1333 (2006) ("War powers scholarship continues to be haunted by the War in Vietnam, and the dominant question continues to be whether Congress must approve large-scale, sustained military action.").

2. *See* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005). For example, in 2002, Congress resolved that "[t]he President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to . . . defend the national security of the United States against the continuing threat posed by Iraq . . . ." Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, § 3(a)(1), 116 Stat. 1498, 1501 (2002). The United States has engaged in many lower-intensity conflicts during this period, some under congressional authority and others under claimed independent presidential power. Beyond the four conflicts named in the text, the most significant U.S. use of ground troops in this period was in Panama in 1989–1990, which was not authorized by Congress.

3. Though, as discussed herein, lines can blur between the power to initiate war or intervene militarily and powers to control how force is used or how to wage war.

4. U.S. CONST. art. I, § 8, cl. 11. *See generally* Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543 (2002).

initiation, of military conflict. Instead, they were broad delegations to the President of the power to decide when and whether to initiate hostilities. In each case the President did use force (and it was apparent beforehand that he likely would, at least to some extent), but Congress left that decision to the President.[5] Thus, as a practical matter, the central constitutional question of modern war initiation is not the extent of the President's independent war power; it is the extent of Congress's ability to delegate its war power to the President.

Until very recently, that latter question seemed easy—so easy that it was rarely asked. Under the Supreme Court's modern nondelegation doctrine, Congress can, for the most part, delegate power to the President if it includes an "intelligible principle" by which the delegated power would be exercised—and this principle presents an exceptionally low bar, reviewed by courts with a high degree of deference.[6] So while Congress likely could not delegate to the President discretion to start wars anywhere for any reason, delegations limited to particular places or particular threats (even stated broadly) would easily pass the test.

The conventional permissive nondelegation doctrine has, however, been called sharply into question by academic commentators[7] and, more importantly, by the Supreme Court. In particular, Justice Gorsuch's 2019 dissent in *Gundy v. United States*, joined by Chief Justice Roberts and Justice Thomas, argued for a new, more restrictive approach to the doctrine.[8] In a separate opinion, Justice Alito signaled willingness to revisit the doctrine in an appropriate case,[9] and two Justices added since *Gundy*—Justices Kavanaugh and Barrett—may have sympathy for the project as well.[10] In 2022, the Court rejected the Environmental Protection Agency's purported authority to regulate carbon emissions, reasoning that extra scrutiny and strict statutory interpretive rules apply to claims that Congress delegated to executive agencies power over "major" public policy questions.[11] Justice

5. The discretionary nature of modern war authorizations has led to the common designation "undeclared wars." This is a misnomer. Whether one regards a "declaration" of war to be only a formal announcement or defines it more broadly as action initiating a state of hostilities, each of these conflicts was "declared" by the President, pursuant to a delegation of discretionary war-initiation authority from Congress. Michael D. Ramsey, *Presidential Declarations of War*, 37 U.C. DAVIS L. REV. 321, 334–56 (2003).

6. Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 474–75 (2001).

7. *See generally, e.g.*, AM. ENTER. INST. FOR PUB. POL'Y RSCH., THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT: PERSPECTIVES ON THE NONDELEGATION DOCTRINE (Peter J. Wallison & John Yoo, eds., 2022) [hereinafter Wallison & Yoo].

8. Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting).

9. *Id.* at 2130–31 (Alito, J., concurring).

10. *See, e.g.*, Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari).

11. West Virginia v. EPA, 142 S. Ct. 2587, 2595 (2022).

Gorsuch, joined by Justice Alito, wrote separately to emphasize the foundational constitutional importance of keeping major legislative decision-making in Congress.[12] One senses that a substantial revision of the nondelegation doctrine may be impending, thus provoking new scholarly attention to—among other things—the historical practice of delegation.[13]

War powers have not yet been a focus of this renewed nondelegation debate—but they should be. That is especially so because when the issue comes up, those who consider it are often pulled in one of two opposing directions.

One view sees war-initiation power as special in ways that make it unusually—maybe even uniquely—non-delegable.[14] In this view, there is something about going to war, including the stakes or the institutional advantages and proclivities of the different branches, that constitutionally requires Congress to retain ultimate control. For Congress to yield substantial discretion over such a monumental decision to the President violates a key design feature of the Constitution.

A contrary and more common view (at least in the modern era) sees war-initiation power as special in ways that make it unusually delegable. Some justices and commentators have suggested that a more stringent nondelegation doctrine, even if revived in domestic matters, would not apply to foreign affairs.[15] And, indeed, at the height of its nondelegation jurisprudence in the 1930s, the Court in *United States v. Curtiss-Wright Export Co.*[16] indicated that the doctrine generally applies less strictly in

12. *Id.* at 2617-18 (Gorsuch, J., concurring).

13. For recent and conflicting accounts of founding-era nondelegation practices in general, see, for example, Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021); Christine Kexel Chabot*, The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81 (2021); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288 (2021); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021); Aaron Gordon, Note, *Nondelegation*, 12 N.Y.U. J.L. & LIBERTY 718 (2019). For a seminal originalist discussion of delegations, see Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002). In contrast, recent accounts specifically directed to foreign affairs or war powers delegations have been less frequent and less comprehensive. *See generally*, Note, *Nondelegation's Unprincipled Foreign Affairs Exceptionalism*, 134 HARV. L. REV. 1132 (2021); Robert Knowles, *Delegating National Security*, 98 WASH. U. L. REV. 1117 (2021); Jacob C. Beach, *Authorization and Delegation: AUMFs and Historical Practice*, 8 NAT'L SEC. L.J. 54 (2021). For discussion of the major questions doctrine and foreign affairs (but not war powers in particular), see generally Timothy Meyer & Ganesh Sitaraman, *The National Security Consequences of the Major Questions Doctrine*, 122 MICH. L. REV. (forthcoming 2023).

14. For example, this view was an important part of the constitutional criticism of the Vietnam War. *See, e.g.*, *infra* notes 260–268 and accompanying text.

15. *See, e.g.*, Gundy v. United States*,* 139 S. Ct. 2116, 2137 (2019) (Gorsuch, J., dissenting); MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING 326–35 (Stephen Macedo ed., 2020); Michael B. Rappaport, *A Two-Tiered and Categorical Approach to the Nondelegation Doctrine*, *in* Wallison & Yoo, *supra* note 7, at 195, 199–200.

16. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936); *cf.* Panama Refining Co. v.

foreign affairs than in domestic matters. Given that war powers are (again, at least in the modern era) a quintessential foreign affairs matter, and given that the President has some independent military powers, this view treats war powers as especially delegable.

Neither of these opposing views has been accompanied by sustained examination of historical practice. Such examination is important not just for history's sake but because historical interpretive gloss often plays an important role in constitutional separation of powers law[17] and because, in addition to the rising originalist orientation of the Supreme Court, the political branches often invoke originalism to support their respective positions on war powers.

This Article examines the development of war power delegation from the founding era to the present to identify when and how war power delegations became a broadly accepted practice. Ultimately, we argue that the historical record does not provide strong support for either of the two polar views described above: that war-initiation power is exceptionally delegable, or that it is uniquely nondelegable. Throughout much of American history, both political branches sometimes treated war initiation as constitutionally distinct, but not so consistently to alone justify either of those positions. We then explore what that history suggests about both constitutional war power and foreign affairs delegations more generally.

We show first that, contrary to common assumptions, early American history offers little support for broad war-initiation delegation. If anything, the historical record reveals that such delegations were rare and narrow, and sometimes accompanied by strong expressions of concern. In that way, this Article contributes directly to the current debate about nondelegation originalism, pointing to the ways in which war power in particular was understood to operate. We then go on to show that even as war power delegations became more widely used in the nineteenth and especially the twentieth centuries, eventually becoming an accepted practice during the Cold War, constitutional objections to war power delegations have had remarkable staying power. Even if now a minority view, they resurface again and again, especially at moments of major controversy about the role of

Ryan, 293 U.S. 388 (1935) (finding broad domestic delegation unconstitutional). *Curtiss-Wright* rested on a historical account of the founding that has been sharply criticized, and the delegation in *Curtiss-Wright* was, despite the Court's broad language, quite narrow (and did not involve war-initiation power). *See, e.g.*, Charles A. Lofgren, United States v. Curtiss-Wright Export Corporation: *An Historical Reassessment*, YALE L.J. Nov. 1973, at 1; Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379 (2000).

17. *See* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

military force in American foreign policy.

We do not contend that the historical record alone yields a clear doctrinal answer to whether and to what extent the war power is delegable—and, to reiterate, by that we mean the power to commence war as distinct from powers over how to wage it.[18] A comprehensive doctrinal analysis would look at other factors, including functional arguments.

Nevertheless, our analysis of the historical record yields at least four implications for thinking about law in this area. First, this Article casts doubt on efforts to separate a category of "foreign affairs delegation" from resurgent controversies about the nondelegation doctrine in general, because it shows that foreign affairs delegation is not a single, coherent category. Those who want to breathe new life into the nondelegation doctrine, often on originalist grounds, sometimes carve out foreign affairs for special treatment as an area in which broad delegation of executive policy discretion seems especially appropriate. This Article, however, draws attention to the ways in which war-initiation power has historically been viewed as distinct from some other foreign affairs delegations. Contrary to the tendency of some constitutional critics of delegation in general to see Congress's war power as an area in which delegation is especially appropriate, this Article spotlights arguments as to why war power delegation has sometimes been viewed as uniquely problematic. Among other things, this account complicates efforts by some jurists and commentators to pursue on originalist grounds a restrictive domestic nondelegation doctrine while preserving broad delegations as to war and foreign affairs.

Second, this Article shows that the contemporary emphasis in constitutional debates on *whether* Congress authorizes war or force misses the historical emphasis on *how* Congress does so. The stakes involved in the latter are immense, too. Any reform project aimed at restoring Congress's "original" war powers also needs to grapple with constitutional limits to their delegation.

Third, the periodic reemergence of war power nondelegation objections illustrates how constitutional arguments have always been a major part of policy debates over U.S. military power. A defining feature of *American* constitutional war powers is the extent to which, even centuries after the founding, many basic legal questions remain contested, and the extent to which partisans in strategic debates over the use of military force wield constitutional arguments for political effect. This point is worth highlighting at this moment because U.S. overseas military commitments face intense

18. *See supra* note 3 and accompanying text.

resistance from both the right and the left. The history in this Article suggests that we will likely see an uptick in war power nondelegation arguments again as a tool of resistance to military adventurism—and at a time when nondelegation doctrine generally seems to be in some flux.

And, fourth, this Article shows the many ways in which war power delegations have been used or proposed to deal with a wide array of novel strategic challenges. One obvious function of war power delegation is to manage complexity, by giving the President leeway to respond quickly and flexibly to crises. This fits with standard arguments for delegation in general. The story of war power delegation is more intricate. This tool also served as a device for handling various, specific challenges—including dilemmas that were virtually unimaginable to the founders—that arose over time in the context of overseas policing, collective security, and nuclear deterrence.

The Article proceeds as follows. Part I considers what, if anything, the Constitution's drafting and ratifying history can contribute to debates about war power delegation. Part II examines historical war power practice up to 1860 under four categories of conflicts and their legal bases: (1) formally named "wars"; (2) the "Quasi-War" with France in 1798–1800; (3) lesser-known nineteenth-century episodes in which war power delegation was considered or debated but no actual military conflict ensued; and (4) other use-of-force delegations relating to frontier conflicts with Native American tribes, piracy, and insurrections. Part III looks at delegations from the Civil War to the Second World War, a period in which the nation's emergence as a global power was, perhaps surprisingly, not accompanied by any material delegation of war-initiation power. Part IV examines practices beginning with the Cold War, in which we find the most decisive shift to a regime of broad delegation of war power. Part V discusses the implications of this history for war powers doctrine, foreign affairs nondelegation doctrine, and war powers reform.

I. WAR POWER DELEGATION AT THE FOUNDING

A vast scholarly literature has explored the extent to which the Constitution's original design vested the war power exclusively in Congress.[19] Article I gave Congress the power to declare war, and Article II vested executive power in the President and made the President commander

19. *See generally* LOUIS FISHER, PRESIDENTIAL WAR POWER (3d ed. 2013); FRANCIS D. WORMUTH, EDWIN B. FIRMAGE, & FRANCIS P. BUTLER, TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW (1986); Treanor, *supra* note 1; Ramsey, *supra* note 4; Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by "Declare War,"* 93 CORNELL L. REV. 45 (2007); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996).

in chief. Debate rages today about whether, beyond giving the President wide powers to control the conduct of war, those Article II powers also include authority to initiate military hostilities. We do not relitigate that issue here. For present purposes, we assume that the original design gave Congress *some* exclusive war power—a proposition not widely contested—and ask instead what founding-era debates suggest about Congress's ability to delegate that exclusive power (whatever its extent may have been) to the President.

We find that the founding-era debates say surprisingly little on the matter. Neither the framers nor the ratifiers appear to have engaged war power delegation directly. The war power did not play a large role in founding-era debates, and contemporaneous commentary on that power lacked detail about *how* it would be exercised. Further, discussions of delegation more broadly (which themselves were rare) do not have obvious implications for war power delegations. The founding-era debates and background understandings do not clearly establish congressional authority to delegate war powers. If anything, they indicate strong beliefs among at least some key framers that important war power decisions should not lie with the President, raising doubt whether those framers would have thought it permissible for Congress to broadly hand them off to the President by statute.

A. WAR INITIATION IN THE CONVENTION AND RATIFICATION DEBATES

The records of the 1787 Philadelphia Convention indicate that delegates discussed war powers on two material occasions. Although both exchanges convey a strong sense that Congress, not the President, should hold war-initiation power, neither considers the question of war power delegation directly or definitively.

On May 29, Edmund Randolph opened the Convention's substantive debate by introducing the Virginia Plan,[20] which soon prompted a discussion of the war power. The Plan said nothing directly about war power, but it proposed a national government headed by a "National Executive" which, in addition to "general authority to execute the National laws," would have "the Executive rights vested in Congress by the [Articles of] Confederation."[21] Various speakers objected that this language could be read to give war powers to the President.[22] The delegates did not vote specifically on the war

20. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 18–23 (Max Farrand ed., 1966) [hereinafter Farrand 1].

21. *Id.* at 21 (Madison's notes).

22. Charles Pinckney objected that "the Executive powers of (the existing) Congress [under the Articles] might extend to peace & war &c which would render the Executive a Monarchy, of the worst kind, towit an elective one." *Id*. at 64–65 (Madison's notes). John Rutledge agreed: "[H]e was for vesting

power point, but on a subsequent motion by James Madison (seconded by James Wilson) they dropped the reference to the executive powers of the Confederation Congress and substituted a direction that the executive would have power "to carry into execution the national laws" and "to appoint to offices in cases not otherwise provided for."[23] The task of defining legislative and executive powers ended up with the inaptly named Committee of Detail,[24] which delivered to the Convention on August 6 a draft giving Congress the power "To make war."[25]

When the full Convention reached the "make war" language on August 17, Charles Pinckney suggested that the war power should go to the Senate rather than Congress as a whole, and Pierce Butler spoke in favor of "vesting the [war] power in the President."[26] Butler's suggestion received no recorded support; Elbridge Gerry replied that he "never expected to hear in a republic a motion to empower the Executive alone to declare war."[27] Madison and Gerry famously moved to replace "make" with "declare," which passed eight states to one.[28] That vote established what became the Constitution's final language,[29] and the delegates seem not to have returned to it.

The August 17 debate tends to support the idea of congressional war-initiation power, but it is unhelpful on the question of delegation. Questions of how Congress would exercise war power were not addressed directly at all. One might argue that the delegates' focus on the dangers of executive war initiation suggests that they would not have wanted Congress to delegate

the Executive power in a single person, tho' he was not for giving him the power of war and peace." *Id.* at 65 (Madison's notes). James Wilson observed that he "did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war and peace &c." *Id.* at 65–66 (Madison's notes).

23. Farrand 1*, supra* note 20, at 63 (Journal); *id.* at 66–67 (Madison's notes). This motion is discussed further below. *See infra* Section I.B.

24. *See* MCCONNELL, *supra* note 15, at 62 (noting that the "Committee gave the office of the President its name, its structure, and most of its powers"); *id.* at 62–73 (discussing the Committee's work).

25. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 182 (Max Farrand ed., 1966) [hereinafter Farrand 2].

26. *Id.* at 318 (Madison's notes).

27. *Id.* Pinckney's motion to reallocate Congress's war power was "disagd. to without call of States." *Id.* at 319 (Madison's notes).

28. *Id.* at 318–19 (Madison's notes); *id.* at 313 (Journal). Sherman, Ellsworth and Mason all indicated that they opposed giving the President power to commence war. *Id.* at 318–19 (Sherman saying that "The Executive shd. be able to repel and not to commence war. 'Make' much better than 'declare' the latter narrowing the power too much.") (Madison's notes); *id.* at 319 (Ellsworth saying that "It shd. be more easy to get out of war, than into it.") (Madison's notes); *id.* (Mason opposing giving war power to the Executive or the Senate and adding that he "was for clogging rather than facilitating war") (Madison's notes). Madison argued that the change to "declare" would "leav[e] to the Executive the power to repel sudden attacks," *id.* at 318 (Madison's notes). King added that " 'make' war might be understood to 'conduct' it which was an Executive function." *Id.* at 319 (Madison's notes).

29. U.S. CONST. art. I, § 8, cl. 11.

it broadly to the President.[30] Ellsworth and Mason, for example, seemed to favor congressional war power as a way of reducing the likelihood of war—because they thought presidents would be too inclined toward it.[31] Sherman and Gerry argued (along with Pinckney, Rutledge, Wilson, and Madison in the earlier debate) that the President should not have war-initiation power.[32] Perhaps this meant they thought the President should not have war-initiation power even with Congress's approval, but that is not certain. Alternatively, they (or some of them) might have thought only that Congress should make the initial decision, but that decision might include empowering the President ultimately to exercise discretion. In the end, only a few delegates spoke to the war power issue (though the speakers included some of the most influential delegates).[33] It seems that the delegates were thinking generally about the question of which branch should have war power, and what the scope of that power would be,[34] but were not focused on how that power would be exercised in practice, including the permissibility or impermissibility of delegating it.

This pattern continued in the ratification debates. As at the Convention, war initiation was not a major focus. When it came up, speakers seemed to assume it was a congressional power without dwelling on how they expected Congress to exercise it. For example, in an often-quoted passage, James Wilson in Pennsylvania said:

> This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress, for the important power of declaring war is vested in the legislature at large; this declaration must be made with the concurrence of the House of Representatives. From this circumstance we may draw a certain conclusion, that nothing but our national interest can draw us into a war.[35]

30. *See* WORMUTH ET AL., *supra* note 19, at 198.

31. *See* Farrand 2, *supra* note 25, at 319 (Madison's notes).

32. *Id.*; Farrand 1, *supra* note 20, at 65–66 (Madison's notes).

33. Hamilton's plan for the Constitution, presented on June 18, gave the Senate "the sole power of declaring war" while the "supreme Executive authority" would have "the direction of war when authorized or begun." Farrand 1, *supra* note 20, at 292 (Madison's notes). The plan did not say anything specifically about war power delegation.

34. It seems clear that the delegates assumed giving declare-war power (or make-war power) to Congress would deny it to the President. Similarly, they assumed that rewriting the grant to Congress from "make" to "declare" would allow the President to exercise some powers the President would otherwise be denied—for example the power to repel sudden attacks. *See* Farrand 2, *supra* note 25, at 318 (Madison explaining that his motion to substitute "declare" for "make" would "leav[e] to the Executive the power to repel sudden attacks") (Madison's notes). Presumably that was because the President had the executive power and the commander-in-chief power.

35. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 583 (Merrill Jensen ed., 1976). To similar effect, James Iredell said at the North Carolina ratifying convention: "The President has not the power of declaring war by his own authority" because that power is "vested in other

The Federalist also had little to say about war initiation. The most significant discussion is in *Federalist 69*, in which Alexander Hamilton—a bit disingenuously—compared the President's power under the Constitution to the power of the British monarch and the governor of New York. Regarding war power, Hamilton noted that while the monarch alone could declare war, under the Constitution that power "would appertain to the legislature."[36]

As with the comments at the Philadelphia Convention, these statements can be read to imply a nondelegable power in Congress. Although Wilson's comment does not address delegation directly, concerns about lodging war initiation in a single person—instead demanding that such decisions ultimately rest with both houses of Congress—might also cut against allowing Congress to delegate its war power to the President. But again, that is far from certain. Such statements might only mean that Congress must make the initial decision regarding war, but that choice might include a decision to pass discretionary authority to the President. In Hamilton's contrast between the British monarch and the Constitution's President, even if Congress's war-initiation power were delegable, placing it in Congress in the first instance would still represent a substantial limit on the President's power compared to the British monarch's.

Like the drafting debates, the statements regarding war power in the ratification period have only limited value for our inquiry. They are isolated statements by only a few participants (albeit important participants), not addressed to the particular issue of delegation, and not part of an extended discussion of the operation of war powers. Their central focus was to point out an important constitutional limit on presidential power. Their phrasing—and the fact that they were not contested by anti-federalist speakers or writers—indicates a broad consensus on the basic proposition that allocating declare-war power to Congress implicitly denied the President a corresponding independent power. But, how Congress could exercise its declare-war power is a different matter.[37]

hands." 30 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 325 (John P. Kaminski et al. eds., 2019).

36. THE FEDERALIST NO. 69, at 417–18 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

37. The framers' failure to address the question is puzzling because late eighteenth-century wars were often not begun by formal declarations. *See* Ramsey, *supra* note 4, at 1574-78. Thus, the founding generation knew (or should have known) that giving Congress power to declare war did not resolve how Congress would exercise war-initiation power. Yet, how Congress would authorize the President to begin fighting—as important as that topic is today—seems not to have been addressed.

B. GENERAL UNDERSTANDINGS OF DELEGATION IN THE FOUNDING ERA

The framers and ratifiers might not have addressed war-initiation delegations specifically because they had a broader understanding of delegation that would encompass war power along with many other congressional powers. The founding-era view on that broader issue is sharply contested, with some scholars contending that the founding generation generally saw Congress's powers as delegable subject perhaps to only modest limits[38] while other scholars argue that the founding generation held more exacting restrictions on congressional delegation.[39] This debate has said little about war power directly, and we do not take a position on it here.

One specific strand of that debate over the founders' view of delegation, however, is quite relevant to war power and merits further discussion. Several commentators have suggested that, notwithstanding substantial general limits on delegation, the framers may have understood foreign affairs powers to be broadly delegable. Because that categorical exception might include war-initiation power, we address it briefly here.

The core case against delegation starts with the text of Article I, Section 1: "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ."[40] By negative implication, it may be argued, legislative powers shall not be vested elsewhere—and statutes delegating power to the President, to the extent they transfer that legislative power to the President, appear to violate this directive.[41] Further, influential English political theorists including Locke and Blackstone had suggested that delegation of lawmaking power by the parliament to the monarch threatened separation of powers.[42] These sources may indicate a background principle of nondelegation informing the founding-era understanding of Article I.[43] But even if the Constitution contained such a broad nondelegation principle regarding Congress's legislative powers, it is not clear how it would relate

38. *See, e.g.*, Mortenson & Bagley, *supra* note 13 (arguing for broad delegation power); Chabot, *supra* note 13 (same).

39. *See, e.g.*, Wurman, *supra* note 13 (arguing for limited delegation power); Gordon, *supra* note 13 (same).

40. U.S. CONST. art. I, § 1.

41. *See* MCCONNELL, *supra* note 15, at 328. By parallel argument, Article III, Section 1 provides that "[t]he judicial Power of the United States, shall be vested in" the Article III federal courts; attempts by Congress to vest that judicial power elsewhere are unconstitutional. *Id.*; U.S. CONST. art. III, § 1.

42. *See, e.g.*, JOHN LOCKE, TWO TREATISES OF GOVERNMENT 380–81 (Peter Laslett ed., Cambridge Univ. Press, 2nd ed. 1967) (1690); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 261 (sharply criticizing the 1539 Proclamations by the Crown Act, 31 Hen. 8 ch. 8, which briefly gave the monarch general power to issue proclamations with the force of law).

43. *See* MCCONNELL, *supra* note 15, at 327–28. *See also* Wayman v. Southard, 23 U.S. 1, 42–43 (1825) (Marshall, C.J.) ("It will not be contended that Congress can delegate . . . powers which are strictly and exclusively legislative.").

to war-initiation power (and other foreign affairs powers). Under the British system, war initiation—like much of foreign affairs—was a power of the monarch, not of parliament.[44] Thus, to the framers and the thinkers who influenced them, war power may not have been considered the type of lawmaking (that is, making rules governing ordinary private behavior) to which nondelegation principles applied.[45]

The most developed defense of this position, principally based on Convention debates, comes from Professor Michael McConnell. He suggests that "the non-delegation doctrine, with its roots in the rejection of a Proclamation Power, may apply only to lawmaking, not to the former royal prerogative powers given to the legislative branch."[46] He finds support in an exchange near the outset of the Convention, in which participants discussed and rejected a proposal by Madison to specify that the executive would have power "to execute such other powers not Legislative nor Judiciary in their nature as may from time to time be delegated by the national Legislature."[47] McConnell suggests that the Convention accepted the view that Congress could authorize presidential exercise of congressional powers if those powers were not legislative in nature, and that the President's exercise of such delegated powers was within the law execution power.[48] He goes on to include "formulating foreign policy" as an example of powers that are not judicial or legislative in nature and which might be especially delegable to the President.[49]

Perhaps, but this seems far from certain. There was little recorded debate on this issue, and it seems unclear whether the delegates rejected Madison's proposal because they thought it redundant (McConnell's view) or because they opposed it on the merits. Nor is it clear whether the category of matters "not Legislative nor Judicial in their nature" approximated the former royal powers or included foreign affairs. And even if McConnell is right about the broad outlines of his conclusion, it is unclear whether

44. 1 BLACKSTONE, *supra* note 42, at 249–50.

45. *See* MCCONNELL, *supra* note 15, at 328–35.

46. *Id.* at 328–29.

47. Farrand 1, *supra* note 20, at 67 (Madison's notes). Madison initially proposed a general executive power to exercise delegated power but accepted an amendment limiting it to "powers not Legislative nor Judiciary in their nature." *Id.* Pinckney (seconded by Randolph) moved to strike Madison's proposed delegation revisions on the ground that they were redundant: "He said they were unnecessary, the object of them being included in the 'power to carry into effect the national laws.' " Madison replied that the clause should be retained "to prevent doubts and misconstructions" but Pinckney's motion carried 6 states to 3. *Id.*

48. MCCONNELL, *supra* note 15, at 330–31. Thus, on his account, the delegates rejected Madison's proposal as superfluous, not because they disagreed with it. *Id.*

49. *Id.* at 331 (distinguishing between former prerogative powers of the monarch and the "core legislative power to make laws binding on the people").

Convention participants would have regarded war power as within the category of non-legislative delegable powers. Several key delegates, including Wilson and Madison himself, said or implied that war power was legislative in nature (even if some other foreign affairs powers might not be).[50]

In sum, it is difficult to discern how the founding generation would have thought general principles of delegation applied to war power, even if one could determine what, if any, general principles on delegation they held in common. Lacking specific discussion of war power delegations, the founding-era debates and assumptions seem not to provide clear direction on the matter.

II. DELEGATION AND WAR POWER, 1789–1860

Given the ambiguity of the founding era regarding war power delegations, early practices may be particularly salient in establishing precedent.[51] This Part examines early congressional practice relating to delegation and military conflicts. It proceeds in four parts. First it considers conflicts that Congress formally designated as "war." Second, it describes the most significant authorization of military force in the period apart from formal declarations, the naval "Quasi-War" in 1798–1800. Third, it considers a series of lesser-known incidents involving delegations that did not lead to material conflicts. Finally, it examines delegations relating to uses of force in frontier conflicts with Native American tribes and suppression of piracy and insurrections.[52]

We conclude in this Part that the early record of war-initiation delegation is surprisingly thin. Delegations during this period were scattered, relatively narrow, and often accompanied by special circumstances that caution against their use as broad precedents. Moreover, proposals to delegate war-initiation authority (or related authority) were sometimes opposed on constitutional grounds, including on the grounds that war-initiation power was especially nondelegable. These objections stand in contrast to Congress's extensive delegations during this period as to the manner in which the President might conduct wars and other uses of force

50. Wilson said directly that powers "of war & peace" were "of a Legislative nature." Farrand 1, *supra* note 20, at 65–66 (Madison's notes). Madison was recorded as agreeing with Wilson. *Id.* at 70 (King's notes).

51. Early practice may be indicative of original meaning, if close enough to ratification. Alternatively, consistent practice even well after the founding can provide a "historical gloss" on ambiguous provisions. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring); *see generally* Bradley & Morrison, *supra* note 17.

52. Presidents also used military force without direct congressional authority during this period, but these unilateral actions do not bear on congressional delegation.

that Congress authorized.

A. FORMAL WARS

In the first seventy years of practice under the Constitution, Congress recognized four wars against foreign powers by name and authorized the President to use the U.S. military to fight them. Two of these are the well-known conflicts with Britain, begun in 1812, and with Mexico, begun in 1846. The other two, less commonly included on the list of formal wars, are conflicts with Tripoli (authorized in 1802) and Algiers (authorized in 1815).

The War of 1812 was the only time in this period that Congress used the phrase "declare" war. Amid rising tensions with Britain on various matters, President Madison asked Congress for a declaration of war in mid-1812, and Congress responded with an Act stating that "[W]ar . . . is hereby declared to exist between [Britain] and the United States . . . and that the President of the United States is hereby authorized to use the whole land and naval force of the United States to carry the same into effect . . . ."[53]

Notably for our purposes, the 1812 statute was not a delegation of war-initiation power. Unlike modern authorizations, it did not leave war initiation to presidential discretion. Congress itself invoked the state of war. The statute went on to authorize broad presidential discretion in conducting the war. But that is distinct from war initiation. At minimum, the Commander-in-Chief clause indicates a shared power of war-making between the President and Congress.[54] Congress's recognition of broad presidential discretion signaled Congress's decision not to direct or limit the President's exercise of the commander-in-chief power in conducting the hostilities.

Congress's first formal recognition of a state of war came a decade earlier in 1802. The Pasha (ruler) of Tripoli, in modern Libya, as a prelude to beginning piratical attacks on U.S. merchant shipping in the Mediterranean, formally declared war against the United States in 1801.[55] President Jefferson asked Congress for authority to respond;[56] in early 1802, Congress recognized a state of war and authorized the President to conduct

53. Act of June 18, 1812, Pub. L. No. 12-106, 2 Stat. 755; *see* DAVIS P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801-1929, at 164–65 (2001).

54. Recall that at the Convention Gouverneur Morris observed that changing Congress's power from "make" war to "declare" war would properly leave the power to "conduct" war to the executive. Farrand 1, *supra* note 20, at 319 (Madison's notes).

55. CURRIE, JEFFERSONIANS, *supra* note 53, at 123–29; RAY W. IRWIN, THE DIPLOMATIC RELATIONS OF THE UNITED STATES WITH THE BARBARY POWERS, 1776-1816, at 103–09 (1931).

56. It is unclear whether U.S. military action against Tripoli in these circumstances required Congress's approval (Hamilton argued it did not because Tripoli had begun the war). *See* Michael D. Ramsey, *The President's Power to Respond to Attacks*, 93 CORNELL L. REV. 169, 184–88 (2007) (discussing this debate); CURRIE, JEFFERSONIANS, *supra* note 53, at 127–28 (same).

hostilities against Tripoli.[57] Although Congress did not use the word "declare," the 1802 Act resembled the subsequent 1812 declaration in other significant respects—including that it did not delegate war-initiation authority. Congress itself acknowledged the war's existence. Again, Congress recognized broad presidential authority to conduct the war, but the President presumably would have had that authority in any event once the existence of war was established.[58]

The 1815 events with Algiers resembled the earlier Tripoli conflict. During the War of 1812, Algiers's navy began seizing U.S. shipping, but the United States had little ability to respond with force. After hostilities with Britain ceased, President Madison asked Congress for war-making authority, which Congress granted in similar terms to the 1802 Tripoli authorization. As with Tripoli, Congress did not delegate war-initiation power; it recognized a state of war and authorized the President to direct the military conflict as he saw fit.[59]

Finally in this period, Congress recognized a state of war with Mexico in 1846. In popular history the Mexican War is often listed with the War of 1812 as a "declared" war. In fact, Congress's authorization of the Mexican War tracked its authorization of the Algiers and Tripoli conflicts, not using the word "declare" but instead recognizing the existence of a state of war resulting from the other party's acts. Prior to the war, President Polk (without Congress's authorization) sent U.S. troops into territory claimed by both the United States and Mexico, whereupon Mexican forces attacked U.S. troops in the disputed territory. Polk then asked Congress to recognize a state of war created by Mexico, which Congress did.[60] Leaving aside the much-debated constitutionality of Polk's provocative deployment,[61] for present purposes the key point is that Congress did not delegate war-initiation power

57. Act of Feb. 6, 1802, Pub. L. No. 7-4, 2 Stat. 29 (stating that "the regency of Tripoli . . . has commenced a predatory warfare against the United States" and authorizing the President to seize Tripoli's ships and "to cause to be done all such other acts of precaution or hostility as the state of war will justify, and may, in his opinion, require").

58. *See* CURRIE, JEFFERSONIANS, *supra* note 53, at 125 n.15 (noting that "the 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").

59. Act of Mar. 3, 1815, Pub. L. No. 13-91, 3 Stat. 230 (referring to Algiers's "predatory warfare" against the United States). *See* CURRIE, JEFFERSONIANS, *supra* note 53, at 165 n.7; IRWIN, *supra* note 55, at 171–76.

60. Act of May 13, 1846, Pub. L. No. 29-16, 9 Stat. 9. The Act began: "Whereas, by the act of the Republic of Mexico, a state of war exists between that Government and the United States" and continued "for the purpose of enabling the government of the United States to prosecute said war to a speedy and successful termination, the President be, and he is hereby, authorized to employ the militia, naval and military forces of the United States." *Id.*

61. *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: DESCENT INTO THE MAELSTROM, 1829-1861, at 104–10 (2005).

to the President. As in the previous conflicts, Congress made the decision for war itself and authorized broad presidential discretion in the means of fighting it.

In sum, Congress's treatment of formal war authorization in the early nineteenth century differed significantly from Congress's modern authorizations. None of the four nineteenth-century acts delegated war-initiation authority. In each of them, Congress itself stated the existence of war without qualification. This contrasts with modern authorizations that, as discussed below, leave to the President the decisions when, whether, and (sometimes) against whom to begin hostilities. Early nineteenth-century practice regarding formal war authorizations thus affords little precedent for modern delegations of war-initiation power.

These four episodes do support broad congressional delegation of power over the conduct of war. But this should not be read to endorse delegation of congressional war-initiation power because the President was likely understood to have independent war-waging authority once Congress recognized a state of war. To the extent Congress has concurrent authority to manage the conduct of war, the nineteenth-century authorizations signaled that Congress would not exercise that power and left the conduct of war to the President. As a result, early precedent for the delegation of war-initiation power must be sought elsewhere.

B. THE QUASI-WAR

The naval war with France at the end of the eighteenth century, called the Quasi-War,[62] is a frequently cited example of early post-ratification delegation. David Currie observed: "The bellicose legislation of the Fifth Congress was riddled with broad delegations of authority."[63] As to war initiation delegation, however, that is something of an overstatement.

The conflict opened in 1797 when France began seizing U.S. merchant ships as part of an effort to cut off trade with Britain. Congress's response was initially limited. Consistent with President Adams's policy of strengthening defenses while seeking peace, it appropriated money for coastal fortifications (with discretion to the President in choosing their

62. *See* ALEXANDER DECONDE, THE QUASI-WAR: THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE, 1797-1801, at 3–141 (1966); STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 581–610 (1993). On the legal aspects of the Quasi-War and cases arising from it, see generally Jane Manners, *Executive Power and the Rule of Law in the Marshall Court: A Rereading of Little v. Barreme and Murray v. Schooner Charming Betsy*, 89 FORDHAM L. REV. 1981 (2021).

63. DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801, at 244 (1997).

location),[64] authorized (but did not require) the President to equip and man three frigates (with very specific directions as to the treatment of the crews), and authorized (but did not require) the President to increase the strength of existing revenue cutters.[65] In early 1798, Congress increased appropriations to these ends and authorized the President to raise an additional regiment of artillery and engineers.[66] But mostly Congress rejected proposals for more aggressive measures from Federalist leaders and awaited results from a diplomatic mission sent by Adams.[67]

The diplomatic mission failed, and once the outcome was known in mid-1798, Congress embraced more warlike measures in the form of delegations. Congress authorized the President to use the navy to seize French ships committing "depredations" on U.S. shipping or "hovering" on the U.S. coastline for that purpose.[68] On the same day, it also approved a Federalist proposal to authorize the President to raise additional troops at his discretion (the so-called Provisional Army); however, at the insistence of Republican and moderate Federalist congressmen, the President's authority was limited to situations in which a foreign power declared war or there was an actual or imminent invasion.[69] In June, Congress prohibited U.S. ships from sailing to French ports and prohibited French ships from sailing to U.S. ports, with discretion to the President to waive the prohibition in some circumstances.[70] Congress later that month authorized U.S. merchant ships to arm themselves and resist French attacks, with the President authorized to provide what we would now call rules of engagement and to suspend the law if France disavowed further hostilities.[71]

In July 1798, Congress took its strongest step, authorizing the President to use the navy to attack French navy ships and privateers on the high seas and to commission U.S. privateers.[72] Some congressional leaders discussed declaring war, but that was never formally proposed, nor was there specific direction to the President to expand the war (merely an authorization). This

64. Act of June 23, 1797, Pub. L. No. 5-3, 1 Stat. 521.

65. Act of July 1, 1797, Pub. L. No. 5-3, 1 Stat. 523. Congress also authorized the President to require states to supply militia if needed. Act of June 24, 1797, Pub. L. No. 5-4, 1 Stat. 522.

66. Act of Apr. 27, 1798, Pub. L. No. 5-31, 1 Stat. 552; Act of April 27, 1798, Pub. L. No. 5-34, 1 Stat. 553; Act of May 3, 1798, Pub. L. No. 5-36, 1 Stat. 554; Act of May 4, 1798, Pub. L. No. 5-38, 1 Stat. 555.

67. *See* CURRIE, FEDERALIST PERIOD, *supra* note 63, at 239–41.

68. Act of May 28, 1798, Pub. L. No. 5-48, 1 Stat. 561.

69. Act of May 28, 1798, Pub. L. No. 5-47, 1 Stat. 558; *see* CURRIE, FEDERALIST PERIOD, *supra* note 63, at 244–48.

70. Act of June 13, 1798, Pub. L. No. 5-53, 1 Stat. 565.

71. Act of June 25, 1798, Pub. L. No. 5-60, 1 Stat. 572.

72. Act of July 9, 1798, Pub. L. No. 5-67, 1 Stat. 578. Currie calls this act "suspiciously like a delegation of the power to determine whether or not to go to war." CURRIE, FEDERALIST PERIOD, *supra* note 63, at 245.

was the high point of Quasi-War delegation. Although the war continued into 1800 before a new diplomatic mission restored peace, Congress's war-related legislation in subsequent years was largely confined to reenacting prior measures and making additional appropriations.

As delegations of war-making power, these measures are important but modest. Congress gave the President some discretionary authority in war-related matters. But the only direct delegations of the decision to use force were the two 1798 statutes authorizing attacks on French ships. Of these, the first (in May 1798) was purely defensive: the President could respond to French attacks or imminent attacks along the U.S. coast. One might have thought that the President had that power in any event, as part of the power (recognized by Madison at the Convention) to repel sudden attacks.[73] Moreover, Congress likely would not have seen this as delegating much policy discretion as a practical matter, as there was no doubt at that time the President would use the force described. Nonetheless, at least formally, the statute conveyed discretion to respond to warlike measures in limited circumstances.

The July 1798 authorization was broader and somewhat more akin to modern war power delegations. It permitted—but did not require—the President to expand the conflict to the high seas and against French shipping and naval forces generally. And the case for the President having this power independently is weaker than for purely defensive measures.[74] On its face, this was a material delegation. But Congress did not authorize the President to begin new hostilities—only to extend existing hostilities. Indeed, the July statute could be seen as lifting some restrictions of the previous statute, which implicitly constrained the President to defensive responses. And the July authorization was itself limited, allowing attacks on the high seas but not against French ports or other land facilities, for example in the French Caribbean colonies. Overall, it seems that Congress was trying to maintain tight control over the extent to which the conflict escalated into full-scale war, rather than transferring to the President substantial discretion over whether to escalate.

The related matter of the Provisional Army is noteworthy because Congress's control over raising a national army (including whether there

73. *See* Ramsey, *supra* note 56, at 172. Representative Gallatin made this point in the debate over the bill. 8 ANNALS OF CONG. 1820, 1831 (1798). *See also id.* at 1832 (Rep. Venable also making this point); *id.* at 1828 (Rep. Bayard arguing that the bill gave the President slightly broader powers). No material discussion of delegation was recorded in connection with the bill.

74. *See generally* Prakash, *supra* note 19 (arguing that the President independently has only defensive response power). Although Congress debated the measure at some length, concerns about delegation were not recorded as being expressed. *See* 8 ANNALS OF CONG. 2062, 2067–83 (1798).

would be one at all) was such a sensitive issue at the founding. Congress delegated only limited power in this case, which might have been viewed as constitutionally comparable to delegating war power. Some members of Congress expressed grave concerns over broad delegation, successfully narrowing the measure's proposed scope. The initial Federalist proposal, enacted by the Senate and sent to the House in April 1798, authorized the President to raise the army at his discretion, if he found it required by the public safety.[75] House Republicans objected, specifically in constitutional terms, that this unduly delegated congressional power to the President.[76] Though the delegation involved raising armies rather than initiating war, the two were thought analogous; Representative Brent, for example, argued that "if a proposition was made to transfer to the President the right of declaring war in certain contingencies, the measure would at once appear so outrageous, that it would meet with immediate opposition."[77] These objections resonated with enough Federalists that the proposal was modified to limit the President's discretion to specified circumstances of a declaration of war or actual or imminent invasion, and only during the next recess of Congress.[78] With this debate on their minds from earlier in the 1798 session, the lack of delegation-based objections to the July force authorization suggests that members of Congress probably did not regard the July measure as a substantial war-initiation delegation.

To be sure, there were other delegations in the Quasi-War period that could be precedent for other types of modern delegations. But as to delegating war-initiation power, the Quasi-War affords only limited precedent. That is particularly significant because the Quasi-War was the only foreign conflict fought pursuant to delegated discretionary authority in the early post-ratification era (and indeed, as later sections show, the only one prior to the twentieth century).

C. DELEGATIONS NOT LEADING TO MILITARY CONFLICT

Perhaps the most interesting and least studied episodes of war power delegation in the post-ratification era are those in which proposed

75. 8 ANNALS OF CONG. 1525, 1631 (1798). *See* CURRIE, FEDERALIST PERIOD, *supra* note 63, at 244.

76. *See, e.g.*, 8 ANNALS OF CONG. 1525 (1798) (Rep. Nicolas objecting that the bill would give the President "[t]he highest act of Legislative power"); *id.* at 1526 (Rep. Gallatin arguing that "if Congress were once to admit the principle that they have a right to vest in the President powers placed in their hands by the Constitution, that instrument would become a piece of blank paper"); *see* CURRIE, FEDERALIST PERIOD, *supra* note 63, at 244–48 (describing this debate).

77. 8 ANNALS OF CONG. 1638 (1798).

78. Professor Currie concludes: "As delegations went, this one was pretty narrowly confined; it could hardly be doubted that Congress itself had laid down the basic policy that was to guide the President's determination." CURRIE, FEDERALIST PERIOD, *supra* note 63, at 247.

delegations were refused, or in which delegations were made but no conflict ensued. These are significant because they highlight optional war power delegations, in which the President is authorized to engage in hostilities, or to opt not to act at all. We identified four such episodes, recounted below. They indicate that no clear consensus or consistent pattern existed in the mid-nineteenth century regarding war power delegation. Further, they provide little support for the proposition, discussed above, that formerly prerogative powers were understood to be broadly delegable.[79]

1. The No-Transfer Act

In 1811, war with Britain was on the horizon. So was the United States' acquisition of Florida. A year earlier, President Madison directed U.S. troops to take possession of West Florida (the coastal strip between the Mississippi River on the west and the Perdido River on the east),[80] on the view that it was part of the Louisiana territory purchased from France in 1803.[81] Spain, which claimed and nominally controlled West Florida, objected but lacked power to mount opposition. That left Spain in control of East Florida (east of the Perdido River) for the moment, but U.S. acquisition of East Florida seemed inevitable. Seeking to make the best of a bad situation, Spain undertook negotiations for a U.S. purchase of East Florida.

With the looming threat of war with Britain and Spain's increasing weakness, U.S. leaders worried that Britain might seize East Florida first. On January 3, 1811, Madison asked Congress for authority to use force to secure U.S. interests in East Florida.[82] Congress responded with a resolution declaring that "the United States cannot see, with indifference, any part of the Spanish Provinces adjoining the said States eastward of the River Perdido, pass from the hands of Spain into the hands of any other foreign Power."[83] Simultaneously, Congress approved the so-called No-Transfer Act, authorizing the President to use force in East Florida, either under an agreement with the "local authority" or in the event of "an attempt to occupy the said territory, or any part thereof, by any foreign government."[84] All of this was done in extraordinary secret sessions (presumably to keep Britain in

79. *See infra* Section I.B; MCCONNELL, *supra* note 15, at 326–35.

80. The Perdido River forms the current border between Alabama and Florida west of Pensacola, Florida.

81. ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS 297–303 (1976).

82. JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 488.

83. Resolution of Jan. 15, 1811, 3 Stat. 471.

84. Act of Jan. 15, 1811, Pub. L. No. 15-130, 3 Stat. 471.

the dark).[85] Britain never made any moves to occupy East Florida, and following the War of 1812, the Monroe Administration concluded the Adams-Onis Treaty of 1819, under which, among other things, the United States purchased East Florida from Spain.[86]

The significance of the No-Transfer Act's delegation of war-initiation powers is unclear. On one hand, the Act entailed a consequential transfer of power to use force from Congress to the President, made without recorded objection on that ground.[87] Armed conflict with Britain was no small thing (as the country found a year later), and the decision to counter a British move in Florida with force carried potentially grave consequences. Unlike the Quasi-War authorizations—the most substantial prior delegations of war power—the No-Transfer Act was not a response to attacks or likely attacks on the United States or U.S. ships; it authorized the opening of new hostilities against a formidable power. On the other hand, the authorization coupled with the resolution that the United States "cannot see, with indifference" any foreign seizure of East Florida, may have been meant to leave little discretion to the President to fail to respond to a British move. The secret Act thus might be seen more as a limited declaration of war conditioned on occurrence of a specific event, rather than a delegation.[88] In that sense, it is not directly analogous to modern war-initiation delegations that leave it to the President to decide on war or not war.

2. Rebuffs of Jackson

As President, former General Andrew Jackson twice sought authority to use the U.S. military to press claims against Mexico and France. Both times Congress declined to enact Jackson's requested authorizations.

By an 1831 treaty, France agreed to pay claims by U.S. shipowners arising from French seizures during the Napoleonic Wars. France failed to pay as required, and in 1834 Jackson asked Congress for authority to make armed reprisals against French property.[89] Congress refused, with some

85. DAVID HUNTER MILLER, SECRET STATUTES OF THE UNITED STATES: A MEMORANDUM 4-5 (1918); SOFAER, *supra* note 81, at 305–06; *see also* SAMUEL F. BEMIS, JOHN QUINCEY ADAMS AND THE FOUNDATIONS OF AMERICAN FOREIGN POLICY 301–02 (1949).

86. SOFAER, *supra* note 81, at 306.

87. We have not found evidence that anyone in Congress objected to the No-Transfer Act on delegation grounds, although the debates are not fully recorded. Some congressmen proposed amendments to narrow the Act by limiting or deleting the authority to respond to foreign occupation, but these failed, and it does not appear that they were supported by appeals to nondelegation. *See* 22 ANNALS OF CONG. 1126–33 (1811); MILLER, *supra* note 85, at 13, 25–26 (discussing proposed amendments).

88. *See* WORMUTH ET AL., *supra* note 19, at 208 (taking this view).

89. President Andrew Jackson, Sixth Annual Message to Congress (Dec. 1, 1834), S. DOC. NO. 23-1, at 11. *See* HENRY BARTHOLOMEW COX, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER: 1829-1901, at 17–19 (1984).

speakers referring to the issue of delegation (although much of the discussion focused on the practical question of whether force was necessary). Representative Claiborne argued that the proposal would "be virtually conferring upon the President unconstitutional power—a power to declare war."[90] The Senate Foreign Relations Committee Report on the matter, presented by Henry Clay, specifically objected to Jackson's request partly on delegation grounds.[91] The President's supporters, while not defending delegations of war power, responded that reprisals, which were all Jackson proposed, were different from war.[92]

Similar events transpired with respect to Mexico in 1837. United States citizens pressed various claims for injuries and lost property, which Mexico declined to satisfy. Jackson proposed that he make further demands and that Congress enact legislation authorizing reprisals and other uses of force if the demands were refused.[93] The Senate authorized the demands but not the reprisals or use of force, providing instead that the President should return to Congress for further authorization if Mexico did not respond satisfactorily. The House Committee on Foreign Affairs recommended a similar approach, but the full House failed to act before the end of the session.[94] Describing the episode later that year, new President Martin Van Buren observed the "indisposition to vest a discretionary authority in the Executive to take redress . . . ."[95] Congress refused to act on Van Buren's renewed requests for

90. CONG. GLOBE, 23rd Cong., 1st Sess. 23 (1834). *See* WORMUTH ET AL., *supra* note 19, at 200–01. Gallatin wrote of this episode: "The proposed transfer by Congress of its constitutional powers to the Executive, in a case which necessarily embraces the question of war or no war, appears to me a most extraordinary proposal, and entirely inconsistent with the letter and spirit of our Constitution, which vests in Congress the power to declare war and grant letters of marque and reprisal." *Id.* at 200 (quoting Jan. 5, 1835, letter to Edward Everett).

91. Report of the Senate Committee on Foreign Relations, Jan. 6, 1835, at 22, https://www.loc.gov/item/2022697181 [https://perma.cc/N3NP-V3S7] ("[T]he authority to grant letters of marque and reprisal, being specifically delegated to Congress, Congress ought to retain to itself the right of judging of the expediency of granting them . . . . The committee are not satisfied that Congress can, constitutionally, delegate this right.").

92. COX, *supra* note 89, at 47–48; *e.g.*, CONG. GLOBE, 23rd Cong., 1st Sess. 25 (1834) (Rep. Johnson).

93. Message from the President of the United States, on the subject of the present state of our Relations with Mexico, S. DOC. NO. 24-160, at 1 (Feb. 7, 1837).

94. COX, *supra* note 89, at 48. Delegation did not appear to play much role in the debates. Somewhat ironically in light of later events, see *infra* Section I.C.2, then-Senator James Buchanan cautioned "it was a matter of extreme delicacy for Congress to confer upon the Executive the power of making reprisals, upon a future contingency . . . . Unless an immediate and overruling necessity existed, which could brook no delay, it was always safer and more constitutional, to take the opinion of Congress upon events after they had happened, than to intrust a power so important to the President alone." CONG. GLOBE, 24th Cong., 2d Sess. 210 (1837).

95. President Martin Van Buren, State of the Union of 1837, S. DOC. NO. 25-1 (Dec. 5, 1837). Observing that he did "[n]ot perceiv[e] in what manner any of the powers given to the Executive alone could be further usefully employed" on the matter, he asked Congress to "decide upon the time, the mode, and the measure of redress." *Id.*

authority against Mexico, and the matter was later settled by a treaty sending the claims to arbitration.[96]

It is hard to know what to make of the failure of Jackson's initiatives. Congress declined the requests to authorize prospective uses of force. Some reference, usually by the President's political rivals, was made to constitutional limits on vesting the President with war-initiation power. Perhaps as importantly, responses did not claim broad constitutional license to delegate war-initiation power (nor invoke the No-Transfer Act precedent). But congressional objections likely arose as much from opposition to Jackson's warlike measures on the merits as from constitutional scruples.

3. The Maine Boundary

President Van Buren subsequently had more success obtaining a war power delegation outside the Mexico context (one may speculate that the quieter Van Buren seemed less worrisome to Congress than the bellicose Jackson). In the 1830s, the uncertain border between northern Maine and Canada became a substantial issue. An attempted settlement through arbitration failed during Jackson's administration, and Van Buren inherited the dispute. Professing commitment to a peaceful solution, Van Buren nonetheless asked Congress for authority to use military force in the disputed territory.[97] Perhaps surprisingly, given Congress's rejection of Jackson's requests for military authorizations, Congress in 1839 authorized the President "to resist any attempt on the part of Great Britain, to enforce, by arms, her claim to exclusive jurisdiction over that part of the State of Maine which is in dispute…" by "employ[ing] the naval and military forces of the United States and such portions of the militia as he may deem it advisable to call into service."[98]

The debates over this measure do not provide a clear picture of how Congress understood it. Some members of Congress specifically objected to delegating war-initiation power.[99] Others thought the matter largely one of defense against invasion, perhaps in which the President already had

96. COX, *supra* note 89, at 48–49.

97. Message from the President of the United States, in relation to the dispute between the State of Maine and the British Province of New Brunswick, S. DOC. NO. 25-270 (1839).

98. Act of Mar. 3, 1839, § 1, Pub. L. No. 25-89, 5 Stat. 355. *See* COX, *supra* note 89, at 21–22. Cox calls this "one of the broadest [delegations of war power] accorded any nineteenth century president" which "would have permitted Van Buren to go to war before the British attacked U.S. positions." *Id.* at 21.

99. *E.g.*, CONG. GLOBE, 25th Cong., 3d Sess. 285 (1839) (Rep. Everett) ("It is the act of making war, and cannot be delegated."); *id.* at 299 (Rep. Pickens) ("The Constitution has made Congress the judge of the necessity for war, and we have no right to delegate, directly or indirectly, any portion of that power.").

constitutional and statutory power to respond.[100] Ultimately the bill passed by wide margins.[101]

This might at first seem a clear-cut case of substantial war power delegation. However, its constitutional significance may be discounted because it involved direct defense of territory disputed between Britain and the United States—and hence perhaps the President's implied independent power to repel invasions—and it depended on the specific contingency of Britain using force in connection with that dispute. It nevertheless represents a counterpoint to earlier rebuffs of Jackson and a continuation—arguably an expansion—of the willingness to delegate in the No-Transfer Act. In particular, the Maine delegation is unique for the time in putting entirely in the President's hands, as a practical matter, the decision whether or not to use force. As discussed, the No-Transfer Act (beginning with its title) was close to a direction to the President not to allow British seizure of East Florida. And in the Quasi-War delegation, Congress presumably understood and intended that President Adams would use naval force against France once authorized. The Maine delegation differed from those previous examples in that Congress probably preferred that military conflict not result. Congress would not have assumed that voting for delegation was a vote for war. Rather, circumstances indicated that Congress was passing to the President the decision whether to use force based on future circumstances. In this sense the episode—despite other aspects limiting its significance—can be seen as the first "modern" delegation of the decision whether to initiate war.

4. Buchanan's Mixed Record

After the Maine dispute, the next major discussion of delegating war power occurred in the Buchanan Administration. Buchanan was somewhat more inclined to use force abroad than his immediate predecessors, but he also generally believed that the President lacked authority to initiate hostilities without congressional approval.[102] Thus he made several requests for authority to use force in Mexico, Central America, and Paraguay, with mixed results.

Buchanan's putative success arose after Paraguayan artillery fired on a U.S. ship, the *Water Witch*, on the Paraná River.[103] At Buchanan's request,

100. *E.g.*, *id.* at 225 (Sen. Buchanan); *id.* at 274 (Rep. Saltonstall); *id.* at 276 (Rep. Evans). Evans argued that the bill "simply confers upon the President power, by men and money, to furnish that protection against invasion which the Constitution renders it imperative on him to furnish." *Id.*

101. COX, *supra* note 89, at 49.

102. *See* CURRIE, DESCENT, *supra* note 53, at 127.

103. Paraguay had prohibited foreign warships from navigating rivers within Paraguay and may

Congress authorized the President, if Paraguay refused reparations, to "adopt such measures and use such force" as needed to induce Paraguay to give "just satisfaction" for the attack.[104] Buchanan sent a naval force to the region, leading to a diplomatic settlement.

On first look, the *Water Witch* incident may seem to be a major step in the development of war power delegation. Like the Maine delegation some twenty years earlier, it gave the President wide discretion, both on paper and in practice, to decide whether to launch military attacks. But unlike the Maine delegation, it did not address threats to U.S. territory or immediate U.S. strategic interests. It more closely resembled the authorizations proposed by Jackson and rejected by Congress in part on the argument that they were unconstitutional delegations. Like the Maine delegation but even more so, the Paraguay delegation might be thought akin to modern war-initiation delegations.

But other events complicate the episode as a precedent for emerging consensus on war power delegation. First, Buchanan's proposed action also resembled earlier unilateral presidential uses of force responding to affronts to U.S. interests abroad. In a notable example, in the immediately preceding Pierce Administration, U.S. forces shelled the city of Greytown, Nicaragua, after perceived mistreatment of a U.S. diplomat.[105] In light of this and other unilateral actions, some members of Congress may have thought congressional approval was not constitutionally required in the *Water Witch* incident and thus might not have regarded it as a consequential delegation. Moreover, the Paraguay delegation itself drew some sharp opposition, including on the ground that it was unconstitutional.[106] And while opposition was overcome with respect to Paraguay, it prevailed against Buchanan's more far-reaching proposals.

have mistaken the *Water Witch* for a warship. *See* COX, *supra* note 89, at 230.

104. Act of June 2, 1858, Pub. L. No. 35-1, 11 Stat. 370. *See* CURRIE, DESCENT, *supra* note 53, at 130; COX, *supra* note 89, at 229–30. Wormuth and Firmage refer to the incident as a "conditional declaration of war" but that seems overstated; nothing in the resolution obligated the President to use force nor created a state of war if Paraguay refused compensation. *See* WORMUTH ET AL., *supra* note 19, at 203.

105. The unilateral use of force was later found constitutional in *Durand v. Hollins*, 8 F. Cas. 111 (C.C.S.D.N.Y. 1860).

106. *E.g.*, CONG. GLOBE, 35th Cong., 1st Sess. 1705, 1727, 1963 (1858) (Sen. Collamer); *id.* at 2547 (Rep. Letcher). Collamer specifically argued that the authorization unconstitutionally delegated the power to declare war and that such action was unprecedented. *Id.* at 1727 ("I insist, as a matter of constitutional law, that Congress has no power to authorize the President to commence a war at his discretion."); *id.* (arguing that authorizing the President "to commerce a forcible war . . . in his discretion, when he shall think proper, is entirely unprecedented in our history"). His motion to delete the force authorization was defeated 15-25. CONG. GLOBE, 31st Cong., 1st Sess. 1963 (1850); *see* COX, *supra* note 89, at 231 n.*; CURRIE, DESCENT, *supra* note 53, at 129–30 & n.79 (noting "[e]ven this rather specific authorization was attacked in Congress as delegating to the President Congress's power to declare war").

Buchanan had in mind multiple aggressive uses of military force in Latin America. He asked Congress for authorization "to employ the land and naval forces of the United States" to protect the isthmus of Panama.[107] Similarly, he asked Congress for authority to use force to prevent closure of alternate routes across Nicaragua[108] and the isthmus of Tehuantepec in Mexico.[109] Buchanan argued:

> The remedy for this state of things [disorder and threats to Americans crossing between the oceans] can only be supplied by Congress, since the Constitution has confided to that body alone the power to make war. Without the authority of Congress the Executive cannot lawfully direct any force, however near it may be to the scene of difficulty, to enter the territory of Mexico, Nicaragua, or New Granada . . . even though they may be violently assailed whilst passing in peaceful transit over the Tehuantepec, Nicaragua, or Panama routes . . . . In the present disturbed condition of Mexico and one or more of the other Republics south of us, no person can foresee what occurrences may take place . . . .[110]

Buchanan also asked for authority to establish a military protectorate over parts of northern Mexico to defend the U.S. border, as well as authority to respond with force against Britain for interference with U.S. shipping.[111]

Congress declined to act on all of these requests. How much this had to do with constitutional scruples is unclear; it may simply have been that a majority distrusted Buchanan's motives. One scholar comments: "Congress was too jealous of the war-making power to heed the President's requests, and Republican members in particular were too fearful of giving such authority to a president so sympathetic to the South's desire for more slave territory."[112] But constitutional arguments were strongly, if perhaps conveniently, invoked. Senator Trumbull objected that Congress did not have "any authority to surrender the war-making power to the President . . . He is not vested with it by the Constitution; and we have no right to divest ourselves of that power which the Constitution vests in us."[113] Buchanan responded that the requested authority "could in no sense be regarded as a transfer of the war-making power to the Executive, but only as

107. CURRIE, DESCENT, *supra* note 61, at 127; WORMUTH ET AL., *supra* note 19, at 201–02.
108. CURRIE, DESCENT, *supra* note 61, at 128.
109. *Id.* at 129.
110. *Id.* (citation omitted).
111. COX, *supra* note 89, at 233–36, 241–42.
112. CURRIE, DESCENT, *supra* note 61, at 129 n.78. *Accord* COX, *supra* note 89, at 242 (observing that "by 1860 any notion of unleashing a Democratic president with a war party at his disposal into nearly helpless Mexico was preordained to defeat in Congress").
113. CONG. GLOBE, 35th Cong., 1st Sess. 2748 (1858) (discussing proposed delegation with respect to Britain). *See also* CONG. GLOBE, 36th Cong., 1st Sess. 326–27 (1860) (Sen. Foster discussing proposed delegation with respect to Mexico).

an appropriate exercise of that power by the body to whom it exclusively belongs."[114] Invoking precedent, he added: "In [the *Water Witch* incident] and in other similar cases Congress have conferred upon the President power in advance to employ the Army and Navy upon the happening of contingent future events; and this most certainly is embraced within the power to declare war."[115]

Thus, Buchanan's experiences point in different ways. Congress approved a modern-looking war power delegation in the *Water Witch* incident, over constitutional objections. But in multiple other cases Congress ignored Buchanan's appeals for advance authority to initiate hostilities at his discretion. Constitutional objections to delegation featured prominently in these debates as well, though Congress often had other, more practical reasons to withhold authority.

In sum, the record of war-initiation delegation as to foreign enemies in the pre-Civil War period is thin, though not entirely barren. We count three material delegations in addition to the Quasi-War: the No-Transfer Act, the Maine boundary delegation, and the *Water Witch* delegation. But each delegation was expressly conditioned on a specific fact—a fact that might have triggered the President's limited independent constitutional authority to act anyway—and was somewhat offset by other near-contemporaneous episodes in which Congress refused delegations, with some objections expressed on constitutional grounds.

D. USING FORCE AGAINST NATIVE AMERICAN TRIBES, PIRACY, AND INSURRECTION

Three other areas, distinct from war-initiation delegations, are sufficiently related to merit discussion. First, Presidents directed hostilities throughout this period against Native American tribes on the western frontier, generally with Congress's implicit approval (although not with specific authorization). Second, Congress authorized the navy to suppress piracy and the slave trade. Third, Congress authorized the President to use the army and militia to enforce federal laws and suppress insurrections, an authority most notably invoked by President Lincoln in the Civil War.

114. CURRIE, DESCENT, *supra* note 61, at 129 n.78.

115. *Id.* at 129–30. Buchanan did not specify what "similar cases" he had in mind, though they likely included the No-Transfer Act and the Maine boundary delegation, described above. He may also have included authorizations to use the military to suppress domestic disorder, discussed below, although these seem distinct from the declare-war power.

1. Frontier Conflicts

The United States conducted military operations against Native American tribes on the frontier throughout the post-ratification period. Tribes were generally treated as tantamount to foreign nations for treaty-making purposes—that is, tribal treaties were adopted with the Senate's advice and consent—so by parallel reasoning, the Constitution's war power provisions arguably should have applied to them as well. It is not entirely clear how early Congresses saw the relationship between the tribes and constitutional war power, but in any event, the frontier conflicts do not provide clear examples of war-initiation delegations. They followed a similar pattern. They were not directly declared or authorized by Congress (nor formally called war). Presidents often sought expansions of the military and additional funding on the basis of frontier conflicts, so Congress was well aware of them. But Congress appeared to assume the President had some independent power to conduct frontier conflicts—perhaps because they were internal and were (or were claimed to be) defensive in nature.

The conflict in the Ohio Valley immediately after the Constitution's ratification is illustrative. President Washington inherited a violent northwest frontier, with large numbers of U.S. settlers moving west, provoking conflicts with Native inhabitants.[116] In 1789, he asked Congress to reauthorize and expand the small army carried over from the Articles of Confederation, citing among other things the troubled northwest. Congress did so,[117] and followed up with a further modest expansion in 1790.[118] Washington dispatched an expedition under Josiah Harmar against the northwest tribes. When Harmar was defeated, Washington sent a larger expedition under Arthur St. Clair—which likewise met defeat. Congress authorized more troops, at Washington's request, while conducting a contentious investigation into St. Clair's defeat. The new troops, commanded by Anthony Wayne, gained a decisive victory in 1794.[119]

The source of Washington's authority to fight the northwest conflict is

116. On the conflict in the northwest, see RICHARD H. KOHN, EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783-1802, at 91–143 (1975); William Hall & Saikrishna Bangalore Prakash, *The Constitution's First Declared War: The Northwestern Confederacy War of 1790-95*, 107 VA. L. REV. 119, 130–41 (2021). On debates in Congress, *see* CURRIE, FEDERALIST PERIOD, *supra* note 63, at 81–87, 157–64. *See also* Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1080 (2014) (noting the importance of considering the frontier wars in analyses of war powers).

117. Pub. L. No. 1-25, 1 Stat. 92 (1789). The authorization for troops said nothing about how they should be used. Madison observed: "By the Constitution, the President has the power of employing these troops in the protection of those parts which he thinks require them most." 1 ANNALS OF CONG. 724 (1825). *See* CURRIE, FEDERALIST PERIOD, *supra* note 63, at 81.

118. Pub. L. No. 1-10, 1 Stat. 119 (1790).

119. KOHN, *supra* note 116, at 139–43.

unclear. It is possible to see the early military statutes as broad delegations to the President to use the authorized troops as the President thought appropriate (including for offensive operations) on the frontier.[120] The statutes did not say this, though. They simply authorized troops, with no direction on their use.[121] It seems more likely that Congress understood the troops to be available to respond to ongoing hostilities of the northwest tribes, which had begun before Washington took office. That is, Congress may have seen the United States as already at war in the northwest, with the troop authorizations allowing Washington to use his independent power to fight an existing war but not delegating power to start new ones.[122]

There is reason to think Washington took the latter view. While directing campaigns against the northwest tribes without express congressional authorization apart from the authorization of the army, at the same time Washington refused requests from local authorities to use troops against tribes in the southwestern territories, where only sporadic violence had occurred. Washington explained that offensive operations in the south needed specific congressional approval.[123] Of course, Washington may simply have wanted to avoid southwestern conflicts while embroiled in a northwestern one. But his constitutional reservations fit well with the view that in authorizing troops Congress was not authorizing new theaters of hostilities and that the President had independent power or congressional approval to fight preexisting frontier wars but not to start new ones.

In any event, the Ohio Valley conflict seems a doubtful precedent for congressional delegation of war-initiation power. It is not clear that Congress saw itself delegating such power, as opposed to supplying troops and funds to a pre-existing and ongoing effort. The relevant statutes do not speak in terms of authorization, and modern scholars have drawn various conclusions from them.

Nineteenth-century frontier conflicts took a similar course, typically proceeding on the proposition that they were defensive wars or aspects of

120. *See, e.g.*, Adam Mendel, *The First AUMF: The Northwest Indian War, 1790-1795, and the War on Terror*, 18 U. PA. J. CONST. L. 1309, 1310 (2016); Matthew Waxman, *Remembering St. Clair's Defeat*, LAWFARE (Nov. 4, 2018, 9:00 AM), https://www.lawfareblog.com/remembering-st-clairs-defeat [https://perma.cc/2RNJ-RKKC]. Maggie Blackhawk writes that "President Washington used this broad delegation for the first American war under the newly formed Constitution — the Northwest Indian War." *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1826 (2019). In contrast, Hall and Prakash contend that Congress declared war (albeit without using those words) in the relevant statutes. Hall & Prakash, *supra* note 116, at 152–63.

121. The 1789 statute also authorized the President to call out the militia, specifically for defense of the frontier. Because it did not similarly authorize the use of regular troops in this way, Congress may have assumed the President already had constitutional authority to use the regular troops.

122. *See* Ramsey, *supra* note 56, at 177–81.

123. *Id.* at 177–79.

law enforcement.[124] The 1819 Seminole War is an important example. President Monroe, without congressional authorization, directed Andrew Jackson to attack the Seminoles in Spanish Florida in response to Seminole raids into U.S. territory. During the campaign, Jackson attacked Spanish posts—which Monroe had not authorized. Jackson's actions prompted fierce constitutional debate in Congress. But most participants in the debate conceded that no congressional authorization was needed for hostilities against the Seminoles because those operations responded to attacks; the debate focused on the propriety of attacking the Spanish (who arguably encouraged the Seminoles but had not themselves attacked the United States).[125] This debate reinforces the more general impression that both the executive branch and Congress regarded the Native American conflicts (rightly or wrongly) as defensive and thus undertaken on independent presidential authority.

Congress's most important (and regrettable) action regarding the frontier conflicts in this period, the so-called Indian Removal Act of 1830,[126] is notable for what it did not say. The Act authorized the President to enter into treaties with tribes to exchange land east of the Mississippi River for land in the unorganized western territories. It made no mention of military force; on its face it contemplated peaceful transfers. Of course President Jackson expected forcible removal and most congressmen likely did as well, but this assumption was not reflected in the statute. A range of conflicts with Native American tribes arose during implementation of the removal policy but Jackson and his successors did not seek further congressional force authorizations.

Thus, as with the earlier frontier conflicts, the early nineteenth-century frontier conflicts do not supply a ready precedent for broad war power delegation. It does not appear that Congress saw continuing authorizations of troops as delegating to the President authorization to start wars. Congress probably thought defensive wars (including offensive counterattacks) against the frontier tribes were constitutional, but this view likely rested on independent presidential power to respond to attacks, or perhaps implicit congressional approval to continue fighting preexisting conflicts, rather than

124. *See* WORMUTH ET AL., *supra* note 19, at 123–27 (noting that "[i]n theory, all the Indian wars were responses to sudden attacks" and concluding that "[t]he formless and intermittent character of Indian warfare, and its peculiar status as a rebellion of a dependent nation within the territory of the United States, no doubt encouraged the informality with which Indian wars were treated").

125. Ramsey, *supra* note 56, at 188–90; *see* 33 ANNALS OF CONG. 583-1138 (1819) (recording debate); CURRIE, JEFFERSONIANS, *supra* note 53, at 197–200 (summarizing the debate).

126. Act of May 28, 1830, Pub. L. No. 21-148, 4 Stat. 411. *See generally* 1 FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS (1984) (discussing U.S. policy in this period).

delegation of war-initiation power. At minimum, the frontier wars of the period do not provide clear examples of war-initiation delegations.

2. Piracy

Some authorities suggest that early Congresses delegated to the President discretion to use force against pirates.[127] On closer examination, this suggestion is overstated.

Congress first addressed piracy in the 1790 Crimes Act, which provided punishments for various federal offenses including piratical activities, as well as (among others) treason, murder on federal property, and counterfeiting.[128] As with the other crimes it encompassed, the Act did not expressly authorize presidential enforcement against pirates, presumably because members of Congress thought the President had independent enforcement power under Article II. Subsequent Presidents, notably Jefferson, used U.S. naval forces against pirates to enforce the 1790 Act, without recorded constitutional concerns.[129]

In 1819, Congress passed an act specifically targeting piracy.[130] Unlike the 1790 Act, it expressly authorized the President to use the navy to protect U.S. shipping and seize piratical ships.[131] The point of the 1819 Act, which passed without material recorded debate,[132] is not entirely clear. Piratical activity in the Caribbean and the Gulf of Mexico had surged with the breakdown of Spain's authority over its American colonies.[133] Under pressure from constituents, Congress may have felt a need to take visible action, perhaps to encourage greater presidential attention to the matter.[134] Part of the 1819 Act also may have been designed to overrule the Supreme Court's 1818 decision in *United States v. Palmer*, which held that the general language of the 1790 Act did not criminalize piratical attacks by non-citizens against non-U.S. ships.[135] It seems unlikely, though, that members of

127. *E.g.*, Bradley & Goldsmith, *supra* note 2, at 2074 & n.114.

128. Act of Apr. 30, 1790, Pub. L. No. 1-9, 1 Stat. 112, 113–14 [hereinafter 1790 Crimes Act].

129. SOFAER, *supra* note 81, at 484–85 n.633; GARDNER W. ALLEN, OUR NAVY AND THE WEST INDIAN PIRATES 1–23 (1929); *id.* at 3–4 (describing Jefferson's anti-piracy operations). President Monroe apparently regarded the 1790 Crimes Act, among other enactments, as authorizing force against a pirate base on Amelia Island, Florida (then a Spanish possession) in 1817. SOFAER, *supra* note 81, at 337–38.

130. Act of Mar. 3, 1819, Pub. L. No. 15-77, 3 Stat. 510 [hereinafter 1819 Act]. By its terms the 1819 Act expired in a year, Congress extended it for two additional years in 1820. *See* Act of May 15, 1820, Pub. L. No. 16-113, 3 Stat. 600. The 1820 Act expired by its terms and was succeeded by further enactments in 1822 and 1825, as described below.

131. 1819 Act, §§ 1–2.

132. *See* SOFAER, *supra* note 81, at 365.

133. *See* Nathan S. Chapman, *Due Process Abroad*, 112 NW. U. L. REV. 377, 418–19 (2017).

134. *See* SOFAER, *supra* note 81, at 365 (suggesting that Congress responded to "an aroused public").

135. United States v. Palmer, 16 U.S. 610, 644–45 (1818*); see* SOFAER, *supra* note 81, at 485 n.636.

Congress thought the Act was constitutionally necessary to give the President enforcement authority against pirates. The 1790 Crimes Act had no express use-of-force authorization. And, as discussed below, once Congress engaged in substantial debate on the matter, members appeared to agree that the President had independent enforcement power so long as his actions did not risk war with foreign nations.

The United States stepped up anti-piracy operations after the 1819 Act, with limited success. Pirates evaded U.S. forces by developing hidden bases in remote parts of coastal Cuba and Puerto Rico, where Spanish colonial authorities either could not or would not act against them.[136] A frustrated President Monroe asked Congress in December 1822 for authority to build additional, lighter draft ships suitable for coastal operations.[137] Supporters in Congress proposed a bill authorizing such construction "for the purpose of repressing piracy, and of affording effectual protection to the citizens and commerce of the United States in the Gulf of Mexico, and the seas and territories adjacent."[138] This language provoked the first substantial congressional debate on the matter, with Representative Eustis objecting to the bill as delegating war power because the apparent grant of authority to use force in adjacent territory might lead to war with Spain.[139] Representative Fuller, who introduced the bill, responded that it was not intended to authorize pursuit of pirates on land, but added that the President likely had some independent pursuit power under the law of nations.[140]

An amendment proposed by Representative Smyth to authorize land operations[141] met sharp resistance.[142] Much of the discussion turned on the extent to which the law of nations allowed pursuit of pirates on land, on which there was no consensus among the members. Representative Archer also argued that Smyth "proposed in effect to divest Congress and give to

The 1819 Act covered "any piratical aggression" against "any vessel of the United States, or the citizens thereof, or upon any other vessel." 1819 Act, § 2.

136. Chapman, *supra* note 133, at 418–19; SOFAER, *supra* note 81, at 366–69; ALLEN, *supra* note 129, at 20–21.

137. SOFAER, *supra* note 81, at 369 & n.651.

138. 40 ANNALS OF CONG. 371 (1822) (proposal of the House Committee on Naval Affairs).

139. *Id.* at 375 (expressing "doubts whether this House was ready to invest the Executive with a power amounting to that of making war").

140. *Id.* at 376; *see* SOFAER, *supra* note 81, at 369–70 & n.653 (discussing this exchange). *See also* 40 ANNALS OF CONG. 379 (1822) (Rep. Cambreleng saying that "[t]his bill does not authorize the President to send a land force to pursue the pirates"); *id.* at 380 (Rep. Barbour saying that the extent of power under the law of nations to pursue pirates was a question determined by the President as Commander-in-Chief); *id.* at 382 (Rep. Colden saying that "no power was proposed to be communicated by [the bill] to the Executive which the Executive does not possess").

141. 40 ANNALS OF CONG. 376–77 (1822). Smyth's proposal stated that the President was "authorized and required" to pursue pirates on land.

142. *Id.* at 377–82.

the Executive the power to make war."[143] Eventually Smyth withdrew his proposal, and the bill passed the House and later (without substantive debate) the Senate, becoming law upon President Monroe's signature later that month.[144]

After another two years of mixed results, Congress returned to the matter in December 1824 with a proposal, backed by President Monroe, to authorize land pursuit and blockade of ports in Cuba and Puerto Rico that sheltered pirates.[145] The blockade authorization soundly failed in the Senate. While a range of practical concerns were expressed, Maryland Senator Samuel Smith also raised a delegation objection: "Shall we then, by sanctioning a section of this kind, put in the hands of the Executive the power of declaring war? — a power which we alone possess in Congress . . . . I am unwilling to grant a provisional power, that may lead us into war."[146] A Senate motion also attempted to strike the provision authorizing land pursuit, with a number of Senators arguing that the authorization was unnecessary because the President already had this power under the law of nations. The Senate voted to retain the pursuit authorization,[147] but the House deleted it, apparently on the grounds that it was unneeded. Congressman Forsythe, introducing the Senate bill on behalf of the House Committee on Foreign Relations, said "[t]here did not exist any necessity for granting this provision of the bill, since the President has it already by the law of nations."[148] The Senate acquiesced in the deletion; the enacted bill only authorized expenditure for the construction of ships, without authorization or direction as to their use.[149]

These events cast considerable doubt on the idea that Congress delegated expansive power to the President regarding piracy. The 1790 Act made piracy a crime and Presidents used their constitutional enforcement power to counter it in U.S. waters and on the high seas. These activities appear not to have inspired constitutional concerns.[150] Although Congress

143. *Id.* at 381. Fuller, who introduced the bill but opposed Smyth's amendment, agreed with Archer. *Id.* at 382.

144. SOFAER, *supra* note 81, at 370–71; 40 ANNALS OF CONG. 383–84 (1822); Act of Dec. 20, 1822, Pub. L. No. 17-2, 3 Stat. 720.

145. SOFAER, *supra* note 81, at 374, 488 n.674–75.

146. 1 REGISTER OF DEBATES IN CONGRESS, at 404 (1825). The motion to delete the blockade authorization passed 37-10. *Id.* at 408.

147. *Id.* at 461. The Senate rejected a broader proposal by New York Senator Martin Van Buren to authorize the President to land troops to search for pirates and to engage in reprisals. *Id.* at 462–63.

148. *Id.* at 714. *See also id.* at 726 (Forsythe repeating that "the law of nations gives [the President] power, as the Executive Magistrate"). The pursuit authorization was deleted without recorded vote after several other members agreed with Forsythe. *Id.* at 728.

149. Act of Mar. 3, 1825, Pub. L. No. 18-102, 4 Stat. 131; *see* SOFAER, *supra* note 81, at 375–76, n.678–79; Chapman, *supra* note 133, at 420–22.

150. As Professor Chapman argues, a key to understanding U.S. anti-piracy operations in this period

passed the 1819 Act authorizing anti-piracy operations, Congress became hesitant as intensifying and inconclusive conflict suggested the need for operations in Spanish territory. Members appeared to think that some pursuit of pirates on land was allowed by the law of nations and thus fell within presidential enforcement power. But Congress resisted authorizing broader hostile operations that might provoke war with Spain, with some concerns expressed about unconstitutional delegation of war power. Modern suggestions that the nineteenth-century Congress delegated broad powers to use force against pirates thus seem mistaken or overstated.[151]

3. Insurrections and Law Enforcement

In contrast to early concern about delegating war-initiation power, early Congresses seemed relatively (though not entirely) unconcerned about delegating authority to suppress domestic disturbances. The 1792 Militia Act conveyed broad discretion, after some debate over delegation. It gave the President authority to call the militia into federal service "whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe," as well as "in case of an insurrection in any state, against the government thereof"[152] and "whenever the laws of the United States shall be opposed, or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act."[153]

These were quite broad delegations, made without reference to any particular situation. In the House they prompted objections. "It was surely the duty of Congress," one member said, "to define, with as much accuracy as possible, those situations which are to justify the execut[ive] in its interposition of a military force."[154] The House added amendments limiting power to suppress insurrections to situations where a state requested assistance, and limiting power to enforce federal laws to situations where a

is that they were considered law enforcement actions. *See* Chapman, *supra* note 133, at 416–17. As law enforcement, they did not in themselves implicate war powers, and thus the President had independent constitutional power to direct them (at least once Congress made piracy a federal crime).

151. A similar point applies to congressional acts authorizing suppression of the slave trade. *See, e.g.*, Act of Mar. 2, 1807, Pub. L. No. 9-21, 2 Stat. 424, 428 (authorizing the President to use naval vessels to prohibit importation of slaves); *see also* Bradley & Goldsmith, *supra* note 2, at 2074 n.114 (noting these acts). Once Congress criminalized the slave trade, the President presumably had constitutional authority to enforce the prohibition, including on the high seas (but not in a way that initiated war with foreign nations). It is unclear what additional authority, if any, the subsequent authorizations provided.

152. Act of May 2, 1792, Pub. L. No. 2-28, §§ 1-2, 1 Stat. 264 [hereinafter 1792 Militia Act]. *See* Stephen I. Vladeck, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 156–63 (2004).

153. 1792 Militia Act, § 2.

154. CURRIE, FEDERALIST PERIOD, *supra* note 63, at 161; 3 ANNALS OF CONG. 554 (1792) (Rep. Murray); *see also* 3 ANNALS OF CONG. 574 (1792) (Rep. Mercer).

federal judge found the laws could not be enforced by ordinary means. In addition, the President could use only the militia of the affected state unless it was insufficient and Congress was not in session. The 1792 Act was also effective for only two years[155] (barely lasting to its 1794 invocation by President Washington during the Whiskey Rebellion). But even with these limitations, the Act contained much more open-ended delegations than anything on the international front for many years to come.

A subsequent Militia Act in 1795 made the authorization permanent and dropped several of the restrictions.[156] Congress followed up with the Insurrection Act in 1807, authorizing the President to use the regular army (as well as the militia) to suppress insurrections in situations where the President was authorized to use the militia.[157] The 1807 Act's most famous invocation was the Civil War, as President Lincoln rested his initial military response to Southern secession in part on his authority to suppress insurrection. As the Supreme Court put it in the *Prize Cases* in 1863, rejecting a challenge to Lincoln's actions:

> The Constitution confers on the President the whole Executive power. He is bound to take care that the laws be faithfully executed. He is Commander-in-chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States. He has no power to initiate or declare a war either against a foreign nation or a domestic State. But by the Acts of Congress of February 28th, 1795, and 3d of March, 1807, he is authorized to called out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States.[158]

Compared to delegations of war-initiation power, these authorizations were quite broad, especially after 1795. They operated generally, not in connection with any particular uprising, and (again, especially after 1795)

155. 1792 Militia Act, sec. 10.

156. Act of Feb. 28, 1795, Pub. L. No. 3-36, 1 Stat. 424. The 1795 Act eliminated the requirement of judicial certification and the limit on using militia of other states.

157. Act of Mar. 3, 1807, Pub. L. No. 9-41, 2 Stat. 443 ("[I]n all cases of insurrection, or obstruction to the laws, either of the United States, or of any individual state or territory, where it is lawful for the President of the United States to call forth the militia for the purpose of suppressing such insurrection, or of causing the laws to be duly executed, it shall be lawful for him to employ, for the same purposes, such part of the land or naval force of the United States, as shall be judged necessary, having first observed all the pre-requisites of the law in that respect."). *See* Vladeck, *supra* note 152, at 163–67. The Enforcement Act of 1871 (also known as the Ku Klux Klan Act), Pub. L. No. 42-22, Sec. 3, 17 Stat. 13, authorized the President to use the military to suppress domestic violence and conspiracies to deprive people of their constitutional rights.

158. The Prize Cases, 67 U.S. (2 Black) 635, 668 (1863). The Court also indicated that Lincoln had independent constitutional authority to respond to the Confederacy's initiation of war. In his dissent on behalf of four Justices, Justice Nelson stressed that the power to declare war "cannot be delegated or surrendered to the Executive." *Id.* at 693 (Nelson, J., dissenting).

left it largely to the President's discretion when using the military or militia for domestic purposes was appropriate. And as the Civil War demonstrated, they could authorize large-scale presidential uses of force.

Yet as with piracy, delegation of authority to suppress insurrection stands in a very different light from delegation of authority to start foreign wars. The President has the constitutional authority and obligation to enforce the law, as well as an implied power to repel sudden invasions;[159] the Militia and Insurrection Acts gave him tools (the militia and military) to do so. The President has no corresponding constitutional power relating to war initiation in situations where Congress would be delegating to the President an exclusive power of Congress. Delegating power to use state militia forces might also be distinguished from delegating war power on a separate textual ground: unlike the Declare War Clause that simply grants that power to Congress, Article I states that Congress has the power "*[t]o provide for* calling forth the Militia" for certain purposes, perhaps indicating that militia powers are more appropriately delegated.[160]

E. CONCLUSION: IMPLICATIONS OF THE FIRST 70 YEARS

The early history of war power delegations is complex and resists easy conclusions. But several important ones may be ventured. First, it supplies surprisingly little precedent for modern broad delegation of war-initiation power. Most foreign conflicts of the time were fought pursuant to formal congressional recognition of a state of war—even relatively small-scale ones such as those against Tripoli and Algiers. The only foreign conflict fought by delegated authority was the 1798–1800 campaign against French ships on the high seas, but that was limited in important respects and occurred in the midst of ongoing low-level conflict. That record does not show war-initiation delegation to be unconstitutional, but it does show it to be unusual.

Second, in some now-obscure situations, delegations of war-initiation power began tentatively to take hold—first in the No-Transfer Act, then in the Maine boundary delegation, and finally in the *Water Witch* incident. So one cannot say the early period rejected war-initiation delegation. But these episodes are balanced by contentious debates over the Provisional Army and unsuccessful requests for delegated power to use force by Presidents Jackson and Buchanan, in which there was a recurring idea that the Constitution imposed limits on Congress's delegation of its war powers. From the Republic's birth, there has been an influential strain of thought that regards war powers as *especially* nondelegable. At minimum, this evidence should

159. U.S. CONST. art. II, §§ 1 & 3.
160. U.S. CONST. art. I, § 8, cl. 12 (emphasis added).

caution against a quick assumption that early constitutional practice supports setting aside or loosening general nondelegation principles when it comes to war-initiation power.

At the same time, early practice finds support for broad authorizations in areas where the President had some degree of independent constitutional power. Substantial delegations of war *waging* (as opposed to war initiating) authority were routine, accompanying all of Congress's declarations of war, consistent with the President's power as commander-in-chief to carry out wars once begun. Further, Congress provided broad authorizations in related areas, including using force against pirates and to suppress insurrections[161]—areas in which the President's power to enforce law indicated substantial independent presidential authority.

III. WAR POWER DELEGATIONS FROM THE CIVIL WAR TO WORLD WAR II

This Part considers historical practice relating to war power delegations from 1865 to 1945. Though likely beyond the time relevant to the Constitution's original meaning, practice during this period—a time in which the United States emerged globally as a great power—might contribute to the "historical gloss" on the constitutional regime of delegation.

Again, however, we find little from this period to support a constitutional practice of war-initiation delegation. Congress declared three wars, and authorized the President to direct them, but otherwise most uses of force during this time relied on claimed independent presidential authority, an increasingly common feature of U.S. foreign policy.

It was also during this period, however, that the Supreme Court issued its most significant decision on the nondelegation doctrine and foreign affairs. The Court's 1936 decision in *Curtiss-Wright* rejected a challenge to delegation regarding certain arms exports and stated that the nondelegation doctrine applies less strictly in foreign relations than domestic affairs. Though not involving war powers, the decision's broad language could be read—and we show in later Parts that it would be read by some—to apply in that area.

A. DECLARED WARS

From 1898 to 1945, the United States fought three formally declared wars. As with earlier major wars, Congress delegated to the President vast discretion over how to wage them, but the declarations did not give the

161. As well as slave-trading. *See supra* note 151 and accompanying text.

President decision-making discretion over whether to wage them.

1. War with Spain: Congressional Direction to Use Force

In 1898, U.S. relations with Spain had been fraying for years, primarily over Cuba, a Spanish colony seeking its independence. United States investors in Cuba's agricultural industry also pressed for protection of their interests, and interventionist sentiments intensified when the battleship *U.S.S. Maine* mysteriously exploded in Havana harbor, where President McKinley had sent it to protect U.S. citizens and property.[162]

On April 20, 1898, Congress passed—at McKinley's request—a joint resolution calling for Spain to withdraw from Cuba and authorizing the President to intervene militarily to support Cuban independence.[163] One remarkable feature of that force resolution was its imperative voice. It not only licensed the President to use force but instructed him to do so: "the President of the United States . . . hereby is . . . *directed* and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary" to compel Spain to withdraw from Cuba. True, the resolution's phrase "as may be necessary" could be read either as giving the President discretion over how much and what type of force to use—or even whether to use it at all. But unlike modern force authorizations giving the President an option to use force, this act obliged him to. Moreover, at the time that Congress directed the President to use force against Spain, the President had made clear his intention to do so.[164]

The April 20 resolution prompted Spain to break off diplomatic relations. McKinley then imposed a naval blockade of Cuba, and Spain responded by declaring war.[165] The President returned to Congress on April 25 requesting a war declaration.[166] A legal formality at that point, Congress that day unanimously passed by voice votes a resolution backdating its war declaration by four days, to the date of Spain's declaration.[167] As in previous declared wars, Congress recognized a state of war rather than leaving the

162. DAVID F. TRASK, THE WAR WITH SPAIN IN 1898, at 28–29 (Louis Morton ed., 1981).

163. S.J. Res. 24, 55th Cong. (1898).

164. BENJAMIN R. BEEDE, THE WAR OF 1898 AND THE U.S. INTERVENTIONS, 1898-1934: AN ENCYCLOPEDIA 119–21 (1994).

165. RICHARD F. HAMILTON, PRESIDENT MCKINLEY, WAR AND EMPIRE 117 (2006). Senator Lodge insisted that the joint resolution was "[i]n fact, if not in terms, . . . a declaration of war" because it declared "that Spanish rule in Cuba must cease." HENRY CABOT LODGE, THE WAR WITH SPAIN 43–44 (1899).

166. HAMILTON, *supra* note 165, at 117.

167. S.J. Res. 189, 55th Cong. (1898); JENNIFER K. ELSEA & MATTHEW C. WEED, CONG. RSCH. SERV., RL31133, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS 2 (2014); BEEDE, *supra* note 164, at 120.

President discretion whether to do so.

2. World Wars I and II

Following German targeting of U.S. merchant ships in the Atlantic during World War I, as well as other hostile actions, President Woodrow Wilson asked Congress on April 2, 1917, to declare war against Germany. Within days Congress obliged by large majorities. Its joint resolution stipulated "[t]hat the state of war between the United States and the Imperial German Government which has thus been thrust upon the United States is hereby formally declared" and "authorized and directed"—echoing the imperative voice of the 1898 resolution—the President "to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial German Government."[168] Later that year, Congress declared war against Germany's ally Austria-Hungary, after that government "committed repeated acts of war against" the United States.[169] That war resolution's operative language mirrored the Germany resolution. Both declarations granted immense discretion to the President over how to carry on the war, but they gave no option as to whether to engage in war.[170]

World War II, the United States' last formally-declared war, entailed six separate congressional war declarations.[171] These declarations—against Japan, Germany, Italy, Bulgaria, Hungary, and Rumania—used a common template. They recognized a state of war to exist and (like the 1898 and 1917

168. Act of Apr. 6, 1917, ch. 1, 40 Stat. 1.

169. Act of Dec. 7, 1917, ch. 1, 40 Stat. 429.

170. Once the war was over, the treaty ending it raised constitutional delegation questions regarding future wars. The Treaty of Versailles, which the U.S. Senate rejected, included an agreement to create a League of Nations, guaranteeing the political independence of member states and stipulating that a council of League of Nations states would advise upon the means by which members would fulfill the obligation to address aggression. League of Nations Covenant art. 10. This provision elicited U.S. political opposition on many grounds, especially policy concerns that it would ensnare the United States in dangerous foreign crises. One criticism (among many) leveled by Senate opponents was that that it undermined Congress's exclusive power to decide whether the United States should go to war. Stephen M. Griffin, *Against Historical Practice: Facing Up to the Challenge of Informal Constitutional Change*, 35 CONST. COMMENT. 79, 95–96 (2020). This objection was rarely framed as a formal constitutional objection, but it resembled a nondelegation argument: that it was constitutionally impermissible to delegate to an international body, through a treaty, power to obligate the United States to participate in war. For example, Senator Pointdexter objected that the draft League covenant "constitute[d] a delegation and transfer of sovereign powers to an alien agency. These powers are vested by the Constitution of the United States in Congress. They can not be constitutionally divested." 57 CONG. REC. 3749 (1919); *see also* 58 CONG. REC. 7943 (1919) (statement of Senator Borah, raising questions whether the Constitution permits delegation of Congress's war powers). Defenders generally did not argue that delegation of war powers was constitutionally permissible but that the scheme did not deprive Congress of ultimate decision-making on war. *See, e.g.*, 58 CONG. REC. 960 (statement of Senator Walsh). This argument recurred later in connection with the UN Charter. *See infra* Section IV.A.

171. *See* ELSEA & WEED, *supra* note 167, at 84–87.

resolutions) "authorized and directed" the President to use force to defeat each enemy.[172] The President's delegated discretion was entirely about how to wage war, not whether to enter the war.

B. FORCE AUTHORIZATIONS OTHER THAN DECLARED WARS, 1865–1945

Perhaps surprisingly, the post-Civil War period saw few congressional force authorizations apart from declarations of war. As it corresponded to the nation's increasingly active and powerful position on the world stage, one might expect more force authorizations. But as discussed below, there were only a few, and even these came with significant qualifications. Presidents fought no major foreign conflicts pursuant to delegated authority during this period, although independent presidential uses of force became more frequent, more sustained, and more consequential. With the notable exception of the 1914 intervention in Mexico, discussed below, Congress played little role in, and at times opposed, increasingly interventionist U.S. foreign policy.

1. The Late Nineteenth Century

No conflicts of any sort were fought pursuant to expressly delegated authority between the end of the Civil War and Congress's declaration of war against Spain in 1898. That was not because Presidents were uninterested in using force (although President Cleveland told Congress that he would not pursue war with Spain over Cuba even if Congress declared it).[173] While executive military unilateralism is more associated with the twentieth century, it had some roots in this earlier period. In general, though, the period prior to 1898 was marked by an absence of major foreign conflicts.

A prominent use of U.S. military force in the period was the 1893 landing of marines on Oahu in connection with the overthrow of Hawaii's native ruler, Queen Lili'uokalani, by private American interests led by Sanford Dole (who became Hawaii's head of government). President Harrison apparently did not authorize the landing in advance (though he approved it afterward), and it is unclear whether it played an important role in Dole's success (Harrison denied that it did). Congress did not authorize this use of force, though Congress as a whole also did not object to it.[174]

172. Act of Dec. 8, 1941, ch. 561, 55 Stat. 795 (Japan); Act of Dec. 11, 1941, ch. 564, 55 Stat. 796 (Germany); Act of Dec. 11, 1941, ch. 565, 55 Stat. 797 (Italy); Act of June 5, 1942, ch. 323, 56 Stat. 307 (Bulgaria); Act of June 5, 1942, ch. 324, 56 Stat. 307 (Hungary); Act of June 5, 1942, ch. 325, 56 Stat. 307 (Rumania).

173. FISHER, *supra* note 19, at 52. Fisher's historical account does not discuss any U.S. uses of force between 1865 and 1898.

174. COX, *supra* note 89, at 308. Harrison's administration and the new Hawaiian government signed an annexation treaty, but newly elected President Cleveland withdrew it from Senate

United States Presidents (or cabinet secretaries) had more direct involvement in several other low-level deployments or uses of force, including by the Grant Administration in the Dominican Republic,[175] the Hayes Administration in Mexico,[176] the Cleveland Administration in Haiti,[177] and the Harrison Administration in Brazil.[178] None of these incidents led to significant hostilities, but they marked a trend of presidential unilateralism that intensified in subsequent years. Congress did not directly approve any of these operations.

Three incidents bordering on delegation merit brief further discussion. During the Hayes Administration, Congress passed a bill authorizing the President to use measures "short of war" in a dispute with Britain over an imprisoned U.S. citizen.[179] Apparently nothing came of the authorization, and presumably (in keeping with the "short of war" limitation) Congress did not intend to authorize significant hostilities against a major power over a minor matter.

Second, during the late 1880s, tensions arose with Germany over the Samoan islands, where both countries had interests. President Cleveland sent naval ships to Samoa to protect U.S. interests and then "submitted [the matter] to the wider discretion conferred by the Constitution upon the legislative branch of the Government."[180] Congress approved an appropriation to continue the naval deployment without directly addressing the use of force. Whether Congress regarded this as an authorization to use force if Germany attempted a takeover of the islands seems unclear;

consideration. *Id.* Congress later approved U.S. annexation of Hawaii by statute.

175. *Id.* at 312–15. President Grant sent naval forces to the Dominican Republic in 1869 in connection with negotiation of an annexation treaty, with orders to protect against foreign interference. *See* SUMNER WELLES, 1 NABOTH'S VINEYARD: THE DOMINICAN REPUBLIC, 1844-1924, at 315–408 (1928). Congress sharply debated the constitutionality of Grant's actions, with Senator Sumner charging that he had "seized the war powers carefully guarded by the Constitution." CONG. GLOBE, 40th Cong., 3rd Sess. 1605 (1869). Resolutions condemning Grant's deployment were tabled, and the Senate rejected the treaty. COX, *supra* note 89, at 315. Interest in annexation had begun under the prior Johnson administration, and a resolution was introduced in Congress to give the President authority to establish a protectorate while negotiations were proceeding. In the course of the debate, Representative Bingham objected that "Congress alone . . . is authorized 'to declare war' and Congress cannot delegate that authority." CONG. GLOBE, 42nd Cong., 1st Sess. 338 (1871). The proposal failed by a wide margin. *Id.* at 340.

176. The Hayes Administration authorized incursions across the Mexican border to pursue irregular forces and native tribes raiding into U.S. territory. COX, *supra* note 89, at 302–03.

177. President Cleveland sent warships to the coast of Haiti during unrest in that country, but apparently there were no U.S. landings or involvement in hostilities. *Id.* at 267.

178. President Harrison's secretary of navy approved using U.S. naval force to protect U.S. shipping against rebel forces in the harbor of Rio de Janeiro, Brazil; some minor exchanges of fire resulted. *Id.* at 308–10.

179. *Id.* at 269–70; 17 CONG. REC. 4569, 4571, 4591 (1878).

180. S. EXEC. DOC. NO. 50-68, at 2 (1889) (message of President Cleveland).

ultimately no open conflict with Germany occurred.[181]

Finally, in 1891, after street violence killed two U.S. sailors and injured others in Valparaiso, Chile, diplomatic tension escalated. President Harrison issued an ultimatum to the Chilean government and began preparations for war.[182] However, he also submitted the matter to Congress asking for "such action as may be decreed appropriate."[183] It is unclear whether Harrison was asking Congress for a declaration of war (at least one member of Congress read his message that way) or whether he was asking for delegated authority. It is also unclear whether Harrison would have taken unilateral action if Chile rejected the ultimatum and Congress failed to authorize force.[184] Chile defused the matter by meeting Harrison's demands, and Congress took no action.

These three incidents are the closest Congress came to delegating war power during the period, and they fall far short of material delegations. As to Britain, Congress expressly disclaimed intent to delegate war power; in Samoa, it is unclear what level of force (if any) Congress meant to delegate; and the Chile episode can as easily be read as a request for a declaration of war rather than a request for a delegation (and, in any event, no congressional action followed). This period, like the preceding one, provides little clear practice or indication of consensus on war power delegation.

181. COX, *supra* note 89, at 267–68; 20 CONG. REC. 1376 (1889) (Senate approval); *id.* at 1984 (House approval). Cox states: "This legislation amounted to a virtual U.S. guarantee of Samoan independence and indicated that Congress was willing to delegate considerable discretion to the president to take military action, if necessary, without further consultation." COX, *supra* note 89, at 268. This seems to overstate. No hostilities were imminent at the time of the appropriation (although some had arisen earlier) and it is doubtful that Congress regarded itself as giving the President authority to resist a German takeover without further congressional approval. The record does not reflect any members saying the appropriation had this effect, and several members directly said it did not. *See* 20 CONG. REC. 1291 (Sherman); *id.* at 1332 (Dolph); *id.* at 1336 (Reagan). No hostilities occurred in connection with the 1889 deployment. A decade later, during the McKinley administration, the U.S. military engaged in hostilities, including landing troops, in support of one side in a local civil war, but it is unclear that the administration claimed congressional approval for this action. The United States and Germany agreed by treaty (ratified in 1900) to partition the islands, with the eastern portion becoming the territory of American Samoa. *See* GEORGE H. RYDEN, THE FOREIGN POLICY OF THE UNITED STATES IN RELATION TO SAMOA 560–62, 571–74 (1933).

182. JOYCE S. GOLDBERG, THE "BALTIMORE" AFFAIR 1-25 (1986); COX, *supra* note 89, at 271–74; FISHER, *supra* note 19, at 56.

183. COX, *supra* note 89, at 273.

184. *See id.* at 273–74. Cox says that "the president placed before Congress events already shaped for war and thus curtailed congressional power as decisively as if he had unilaterally committed troops in the field." *Id.* This seems to overstate, as Harrison's ultimatum did not expressly commit to war if Chile refused amends, and Congress might have found the matter too trivial to justify hostilities. *See* FISHER, *supra* note 19, at 56 (interpreting Harrison's actions as leaving the decision to Congress).

2. The Twentieth Century before World War II

President McKinley kicked off the new century by sending U.S. forces to China to aid other Western governments in suppressing the Boxer Rebellion in 1900.[185] Thereafter, presidential uses of force mounted, including Theodore Roosevelt's support of Panama's independence from Colombia (setting up U.S. control of the route of the prospective canal)[186] and substantial interventions, sometimes involving commitments of ground troops spanning multiple presidencies, in the Dominican Republic, Haiti, Cuba, and Nicaragua.[187]

One should not overstate the rise of presidential uses of force. All major foreign conflicts in this period were declared by Congress. Though some presidential uses of force were quite consequential, none involved substantial commitments of troops, extended hostilities, or significant U.S. casualties. They were not clearly "wars" in the constitutional sense, and were not regarded as wars by the political branches or in popular description. Congress was generally aware of these activities, sometimes conducting inquiries of them after-the-fact, and continued to authorize the armed forces used for them, which later (and to this day) led the executive branch to argue that Congress tacitly acknowledged the President's independent constitutional power to conduct them.[188] With Presidents less inclined to seek congressional authorization for low- and medium-level uses of force, there were limited congressional opportunities even to debate delegations.

Only one explicit congressional force authorization occurred in this period, though its significance is uncertain. It came with regard to the situation in Mexico in 1914.

Earlier, in 1910–1911, a popular uprising overthrew the longstanding dictatorial regime of Porfirio Díaz, bringing to power a democratically elected but weak government under Francisco Madero. During the unrest, President Taft considered the need to intervene to protect U.S. investments, but left the question to Congress, reporting that he had troops "in sufficient number where, if Congress shall direct that they shall enter Mexico to save American lives and property, an effective movement may be promptly made."[189] Congress did not act.

185. FISHER, *supra* note 19, at 57.
186. *Id.* at 58–59.
187. *Id.* at 57–64.
188. *See* Memorandum from Steven A. Engel, Assistant Atty Gen. for the Off. of Legal Couns. to the President*, April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities*, 6 (May 31, 2018).
189. FISHER, *supra* note 19, at 60. Taft added that he "seriously doubt[ed]" he had independent power to commit troops to Mexico—a somewhat odd stance as he had already sent troops to Cuba, Honduras and Nicaragua to suppress disorder (the latter intervention continuing until 1925). *Id.* at 60–63.

Taft's successor, Wilson, took a more aggressive stance. In the closing months of the Taft Administration, General Victoriano Huerta seized power from Madero, plunging Mexico into a bloody multi-sided civil war. Wilson refused to accept Huerta's legitimacy and in 1914 used a minor incident to justify a substantial intervention. Telling Congress that Huerta had insulted U.S. forces by refusing a 21-gun salute, Wilson asked for authority to use force:

> No doubt I could do what is necessary in the circumstances to enforce respect for our Government without recourse to the Congress, and yet not exceed my constitutional powers as President; but I do not wish to act in a manner possibly of so grave consequence except in close conference and cooperation with both the Senate and House. I, therefore, come to ask your approval that I should use the armed forces of the United States . . . .[190]

Congress obliged with a joint resolution declaring that "the President is justified in the employment of the armed forces of the United States to enforce his demand for unequivocal amends for certain affronts and indignities committed against the United States."[191] The resolution included language (added to the House bill by the Senate) that the United States "disclaims any hostility to the Mexican people or any purpose to make war upon Mexico."[192]

The language—that the President "is justified" rather than "is authorized"—suggests that Congress may have accepted Wilson's view that the President had independent authority to act.[193] Moreover, Wilson did not wait for Congress; while the Senate debated, Wilson ordered bombardment and seizure of the port of Veracruz, where U.S. forces remained for seven months until Huerta was overthrown.[194]

Thus the only material force authorization (apart from war declarations) in this period was more likely a recognition of presidential power than a delegation, and in any event it disclaimed intent to authorize war; the ensuing hostilities, though perhaps consequential, were small in scale. Wilson's presidency, like those before and after, was more significant for its growing presidential unilateralism than for delegation.

190. H. R. DOC. 63-910, at 5 (1914). *See* ROBERT E. QUIRK, AN AFFAIR OF HONOR: WOODROW WILSON AND THE OCCUPATION OF VERACRUZ (1962).

191. H.R.J. Res. 251, 63rd Cong., 38 Stat. 770 (1914).

192. *Id. See* 51 CONG. REC. 6937 (House bill); 51 CONG. REC. 7014 (Senate approval).

193. Congressional debate was fairly extensive and divided, with a number of members regarding the proposed resolution as effectively a declaration of war and a number denying that it gave the President any authority he did not already have. *See generally* 51 CONG. REC. 6934–7002.

194. *See* FISHER, *supra* note 19, at 60-61. Two years later in 1916, Wilson on his own authority sent troops into northern Mexico to pursue General Pancho Villa, who earlier led a raid on Columbus, New Mexico. *Id.* at 62.

C. *CURTISS-WRIGHT* AND WAR POWER DELEGATION

During this same era, the Supreme Court's seminal 1936 opinion in *Curtiss-Wright* drew a distinction between foreign affairs delegation and domestic affairs delegation, stressing that the Constitution permits Congress greater latitude to delegate foreign affairs decision-making to the President.[195] That case arose from a 1934 joint resolution authorizing the President to proclaim an arms embargo against Paraguay and Bolivia if he found that doing so would contribute to peace in their ongoing war. "[C]ongressional legislation which is to be made effective through negotiation and inquiry within the international field," wrote Justice Sutherland, "must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."[196]

A leading justification the Court gave was functional—the President's institutional advantages in agility and information—but the opinion also emphasized historical practice:

> Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs.[197]

Curtiss-Wright's implications for war power delegations are uncertain. War-initiation power of course may be thought of as a prime example of foreign affairs powers, and the Court's invocation of the President's institutional advantages in foreign affairs may seem particularly applicable to it. But *Curtiss-Wright* was not itself about U.S. war powers, only the prohibition of arms sales. Further, as our review of the historical record thus far shows, the Court's argument from historical practice lacked support as applied to war-initiation, which (unlike some other aspects of foreign affairs) had not previously been a common subject of delegation. Nonetheless, as the following Part shows, *Curtiss-Wright*—especially its functional and historical claims—played a role in justifying expanded war power delegations in subsequent years.[198]

195. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 315–20 (1936).

196. *Id.* at 320.

197. *Id.* at 324. The opinion also engaged in apparently unnecessary speculation about foreign affairs powers arising outside of the Constitution, a view that has been sharply criticized. *See* Ramsey, *supra* note 16, at 379–87.

198. *See infra* notes 211, 267, 271, and 273 and accompanying text. Citing *Curtiss-Wright*, the Supreme Court explained decades later in *Zemel v. Rusk* that "simply because a statute deals with foreign relations," Congress may not "grant the Executive totally unrestricted freedom of choice." But "because

IV. THE COLD WAR AND BEYOND

This Part shows that it was in the early Cold War period—when the United States became a superpower, with large standing military forces deployed around the world—that the modern practice of war power delegations, through legislative force authorizations, took hold. A watershed moment was a 1955 force resolution that, notably, the President never exercised.

It was also in that period, however, that Presidents asserted much broader unilateral powers to use military force, and Congress largely (if tacitly and dividedly) acquiesced. To those who viewed the President's unilateral powers as wide even without legislative authorization, force resolutions would not have posed nondelegation issues. And to those opposing that view, the nondelegation issue probably seemed secondary to reclaiming Congress's exclusive powers.

A. COLLECTIVE SECURITY AND DELEGATION: THE UN PARTICIPATION ACT

From World War II's ashes, the victorious powers created the United Nations ("UN"), with a Security Council charged with maintaining peace and security, and empowered to employ military force to do so. In subsequent years, as the East-West Cold War quickly developed, the United States embraced a network of security commitments—some formal defense treaties, some informal pledges—around the world, aimed especially at stemming Communist aggression. To the architects of these arrangements, it was important that the United States be able to react quickly to crises and to assure foreign partners and adversaries of that ability. But a constitutional system of exclusive congressional prerogative to decide on war was designed to move slowly. Thus, security imperatives encouraged both more aggressive claims of independent presidential power and wider delegation of war power by Congress.

To participate effectively in the UN, Congress enacted the UN Participation Act ("UNPA") in December 1945.[199] That statute provided that the chief U.S. diplomat at the UN would act at the President's direction.[200] It also contained a broad authorization to use force that remains on the books,

of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature, Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas." 381 U.S. 1, 17 (1965).

199. S. REP. NO. 79-717, at 3 (1945).

200. 22 U.S.C. 287, § 3.

but has never been used.

Specifically, section 6 authorized the President to negotiate agreements with the Security Council, pursuant to UN Charter Article 43, to make U.S. military forces available for maintaining peace and security.[201] Section 6 made Article 43 agreements "subject to the approval of the Congress,"[202] so that Congress retained responsibility over "the numbers and types of armed forces, their degree of readiness and general location, and the nature of facilities and assistance . . . to be made available to the [Council]."[203] But the President did not need to return to Congress before providing these forces to the Council.[204] Thus, if Congress approved Article 43 agreements in advance, the President could send forces into UN-approved armed conflicts as they developed. This statutory framework specified no geography. It specified no enemy. It specified no particular threat or type of threat.

The UNPA's vast war power delegation was never activated because the idea that member states would place military forces at the Council's disposal was stillborn. Cold War geopolitics made it impossible, given that the United States and the Soviet Union each had a veto on Council decisions. No Article 43 agreements were ever concluded. When the Charter and the UNPA were adopted, however, Article 43—and hence section 6 of the UNPA—were understood as a main way the Council would pursue its mandate to preserve international peace and security.[205] The United States planned to carry it out and expected other members to do the same.[206]

The UNPA generated some congressional pushback on nondelegation grounds, but not much. To some critics, the arrangement was a double-delegation: it delegated decisions on war to an international organization, the Security Council, and it delegated decisions about U.S. participation in that body to the President. Senator Burton Wheeler, a prominent isolationist, was foremost among the objectors and among seven senators who voted against the UNPA.[207] Wheeler noted "that there is no mention in the Constitution of any power of Congress to delegate its [Declare War] authority to the President and for him in turn to authorize his appointee to an international

201. *Id.* § 6.
202. *Id.*
203. *Id.*
204. *Id.*; *Participation by the United States in the United Nations Organization: Hearing on H.R. 4618 and S. 1580 Before the H. Comm. on Foreign Affairs*, 79th Cong. 23 (1945) (Statement of Dean Acheson, Under-Secretary of State).
205. *See id.* at 92. Article 106 of the Charter refers to Article 43 as the means to enable the Council to "exercise . . . its responsibilities under article 42." U.N. Charter art. 106.
206. *See* RUTH B. RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES, 1940-1945, at 467 (1958).
207. 91 CONG. REC. 11409 (1945).

organization to vote to put down aggression in foreign countries."[208]

In recommending passage, the Senate and House foreign relations committees stated that "[t]here exist several well-recognized and long-standing precedents for the delegation to the President of powers of this general nature."[209] Tellingly—and consistent with our reading that the historical record to this point is quite thin—they cited congressional delegations regarding international commerce in the early Republic, and only statutes specific to armed force from the Quasi-War with France.[210] They also cited *Curtiss-Wright* for support.[211]

The muted congressional concerns about the UNPA's delegation might be explained on several grounds. Congress strongly supported the Charter—the Senate voted 89-2 for ratification[212]—and many members understood that its collective security system required the U.S. military to back up Security Council mandates.[213] Additionally, political leaders and lawyers may have viewed UN-backed emergency interventions, sometimes called at the time "police action," as distinct from inter-state war;[214] therefore, legislating discretionary authority to participate in them did not delegate war-initiation power. One lesson of World War II was that early international military action might prevent major war. If used to prevent wide-reaching war, then (so the logic went) an international police action did not implicate the Constitution's Declare War Clause, at least not in the same way.[215] A strong current of thought within Congress held that the President could

208. *Id.* at 11393 (1945) (Sen. Wheeler). Similarly, Senator Bushfield argued: "No one will seriously dispute the statement that Congress alone has power to declare war. Attempting to delegate such power is in direct violation of our Constitution." *Id.* at 1767. Some similar objections had been raised a generation earlier to the League of Nations, but the Senate rejected the League's founding treaty more on policy grounds and general concerns about sovereignty than formal legal objections.

209. S. REP. NO. 79-717, at 7 (1945); *see also* H. REP. NO. 79-1383, at 6 (1945).

210. S. REP. NO. 79-717, at 7.

211. *Id.*

212. 91 CONG. REC. 10965 (1945).

213. The Senate Foreign Relations Committee report stated that the delegation "is simply a necessary corollary to our membership in this Organization." S. REP. NO. 79-717, at 6; *see also* H. REP. NO. 79-1383, at 6 (making a similar argument); David Golove, *From Versailles to San Francisco: The Revolutionary Transformation of the War Powers*, 70 U. COLO. L. REV. 1491, 1495–96 (1999) (arguing that the UN's American architects understood that collective security required loosening some constitutional war powers constraints).

214. *See* FISHER, *supra* note 19, at 85 ("Senator Claude Pepper (D-Fla.) opposed any delegation of Congress's war-declaring power to an international body but believed that it would be permissible for American troops to be used, without prior congressional approval, as a 'police force' to combat aggression in small wars.").

215. *See, e.g.*, 91 CONG. REC. 10968 (Sen. Connally) ("I am convinced that the Presidential use of armed forces in order to participate in the enforcement action under the Charter would in no sense constitute an infringement upon the traditional power of Congress to declare war. We are not taking the power away from the Congress . . . . How important it is that we authorize the President to take such action in collaboration with the other United Nations in order to maintain world peace.").

engage in limited police actions unilaterally but required congressional assent for full war.[216]

This latter view of presidential war powers was implemented five years later, when North Korea invaded the South and President Truman intervened militarily, without express congressional authorization, in what became the three-year Korean War. Truman called the move a police action, citing UN approval. Though the Korean War did not involve delegation, it marks an important moment in background constitutional practice. The issue of war-initiation delegation assumes that Congress's war-initiation power is largely exclusive (perhaps subject to narrow exceptions). Although there were precursors, the Korean War was a high-water mark in presidential assertions of unilateral constitutional power to launch large-scale military interventions. Congressional reactions were mixed, but it was also a high-water mark among a contingent of legislators who regarded unilateralism as proper. The Cold War's stakes, the advent of nuclear weapons, a general sense of permanent military emergency, and extensive overseas American military commitments and troop deployments all contributed to this shift in thinking.[217]

Alongside these geopolitical and security developments, the postwar period marked virtual obsolescence of formal war declarations, as a matter of both international law and U.S. domestic law.[218] The UN Charter's outlawing of force except in self-defense or when authorized by the UN Security Council contributed to that discontinuance.[219] Beyond legal technicalities, the widespread public view of war as a moral catastrophe also cast old-fashioned war declarations as outdated. Without such clear markers, the lines around states of war—and hence war-initiation—became even blurrier.

B. COLD WAR DELEGATIONS

Many of the contextual factors—including perceptions of vital stakes in Cold War security crises around the world—that contributed to broader assertions of presidential powers to use force also set the stage for the broadest and potentially most consequential delegations of war power to that point in American history. The first ones, in the Eisenhower years, were never invoked. The last one of this critical early-Cold War period, in the Johnson years, was a basis for one of the United States' costliest wars. These

216. *See* Jane E. Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 GEO. L.J. 597, 607–12 (1993).
217. *See generally* Griffin, *supra* note 170.
218. *See* ELSEA & WEED, *supra* note 167, at 21–23.
219. *See* ANDREW CLAPHAM, WAR 48 (2021).

force authorizations entrenched the modern practice of broad war-initiation delegations.

1. A Delegation Turning Point: Eisenhower's Force Resolutions

The post-World War II shift in thinking about presidential war powers is important to understanding two extraordinary congressional war power delegations during the Eisenhower Administration.[220] Eisenhower rejected broad presidential unilateralism, generally believing only Congress could authorize major U.S. conflicts, but in a reversal of typical positions, many in Congress regarded the President's unilateral war powers as vast.[221]

Eisenhower's security strategy emphasized military commitments to overseas allies to offset threats posed by the Soviet Union and China. It also emphasized taming runaway defense spending. To reconcile these seemingly conflicting tenets, Eisenhower relied on the threat of massive retaliation—including with nuclear weapons—against aggression. This approach encountered a major test in 1954–1955, when Communist China shelled tiny coastal islands that were under control of U.S.-aligned Nationalist China, based on the island of Formosa. In late January 1955, Eisenhower asked Congress for authorization to use force to assure Formosa's security.[222] Days later, Congress obliged by nearly unanimous votes in both houses, resolving that:

> *[The]* President . . . is authorized to employ the Armed Forces of the United States as he deems necessary for the specific purpose of securing and protecting Formosa and the Pescadores against armed attack, this authority to include the securing and protection of such related positions and territories of that area now in friendly hands and the taking of such other measures as he judges to be required or appropriate in assuring the defense of Formosa and the Pescadores.
>
> This resolution shall expire when the President shall determine that the peace and security of the area is reasonably assured by international conditions created by action of the United Nations or otherwise, and shall so report to the Congress.[223]

As tensions simmered, Eisenhower signaled the possibility of major military action—even publicly referencing nuclear options. But all sides

220. *See* Matthew Waxman, *Remembering Eisenhower's Formosa AUMF*, LAWFARE (Jan. 29, 2019, 8:34 AM) https://www.lawfareblog.com/remembering-eisenhowers-formosa-aumf [https://perma.cc/AZ2L-44L8]; Matthew Waxman, *Remembering Eisenhower's Middle East Force Resolution*, LAWFARE (March 9, 2019, 10:00 AM) https://www.lawfareblog.com/remembering-eisenhowers-middle-east-force-resolution [https://perma.cc/RY2F-M76A].

221. *See* Waxman, *Remembering Eisenhower's Formosa AUMF*, *supra* note 220.

222. 84 CONG. REC. 600–01 (1955).

223. Act of Jan. 29, 1955, Pub. L. No. 84-4, 69 Stat. 7.

soon stepped back from the brink. Several years later, shelling and skirmishing between Communist and Nationalist China resumed, but the conflict did not escalate.[224]

The 1955 force resolution gave enormous discretion to the President. It provided advance authorization to initiate military conflict—understanding that it might include nuclear escalation—to protect a distant ally. It specified no target or enemy, though Communist China was obviously the intended one. Multiple times it emphasized the President's role as sole judge of necessity. And its duration was subject to presidential judgment that the region was secure.[225] Congress eventually repealed it twenty years later, and it probably would have stayed on the books much longer had the United States not reached a diplomatic détente with Communist China.

Despite this open-endedness, the nondelegation question was peripheral in congressional debates. Senator Wayne Morse, a harsh critic of Eisenhower with deep reservations about U.S. commitments to defend Formosa,[226] was one of the few legislators to raise this issue. He objected to the constitutionality of a "predated declaration of war."[227] According to Morse:

> I respectfully submit that we have no right under our oaths of office to delegate that great constitutional obligation of Congress. . . . In my judgement, we cannot do it constitutionally. . . . [W]e have no constitutional right to authorize any President to exercise his discretion in determining whether or not he should commit an act of war . . . .[228]

But Morse was an outlier. Eisenhower received more pushback from Congress on the grounds that its authorization was unnecessary.[229] When Eisenhower consulted congressional leaders before seeking the force resolution, House Speaker Sam Rayburn "said that the President had all the powers he needed to deal with the situation," and Rayburn even believed "that a joint resolution at this particular moment would be unwise because the President would be saying in effect that he did not have the power to act instantly."[230]

224. 2 D.F. FLEMING, THE COLD WAR AND ITS ORIGINS, 1917-1960, at 707–28 (1961); PANG YANG HUEI, STRAIT RITUALS: CHINA, TAIWAN, AND THE UNITED STATES IN THE TAIWAN STRAIT CRISIS, 1954-1958, at 187 (2019).

225. *See* Waxman, *Remembering Eisenhower's Formosa AUMF*, *supra* note 220.

226. Larry Ceplair, *The Foreign Policy of Senator Wayne L. Morse,* 113 OREGON HIST. Q. 6, 6 (2012).

227. 84 CONG. REC. 738 (1955).

228. *Id.* at 842.

229. *See* Waxman, *Remembering Eisenhower's Formosa AUMF*, supra note 220.

230. S. Everett Gleason, *26. Memorandum of Discussion at the 233d Meeting of the National Security Council, Washington, January 21, 1955, 9 a.m.*, OFFICE OF HISTORIAN, https://history.state.gov/historicaldocuments/frus1955-57v02/d26 [https://perma.cc/5J8A-8MEU].

Modern Presidents have usually requested force authorizations because the President has already initiated force or has concrete plans to do so. But an important aspect of the Formosa resolution is that it was never invoked. Eisenhower did not launch strikes, even when Communist China's shelling of Chinese Nationalist forces later resumed. The authorization's purpose was more about signaling than warfighting. Eisenhower's strategy was deterrence—so China was a key audience—and he expected war power delegation to bolster the credibility of his threats.

For similar reasons, two years later, Congress passed—at Eisenhower's urging—one of the broadest war delegations in American history. The 1957 act endorsed whatever force the President deemed necessary to prevent Communist aggression anywhere in the Middle East. It had no expiration date; in fact, it remains on the books today. Like the Formosa resolution, it was primarily about signaling rather than warfighting and has never been invoked.[231]

As background, Eisenhower saw the Middle East as an emergency situation in 1956. The Suez crisis discredited European allies' influence there, and the administration feared the Soviet Union would fill the vacuum without strong U.S. commitment. In January 1957, Eisenhower requested congressional support for military and economic aid for Middle East nations and sought authority to use military force to protect them. In a four-hour White House meeting with congressional leadership on January 1, 1957, the President emphasized that a force resolution would bolster deterrence and reassure allies:

> [Eisenhower] added that should there be a Soviet attack in that area he could see no alternative but that the United States move in immediately to stop it. . . . He cited his belief that the United States must put the entire world on notice that we are ready to move instantly if necessary. He reaffirmed his regard for constitutional procedures but pointed out that modern war might be a matter of hours only.[232]

Two months later, Congress passed legislation endorsing the military and economic aid and included the following provision:

> [T]he United States regards as vital to the national interest and world peace the preservation of the independence and integrity of the nations of the Middle East. To this end, if the President determines the necessity thereof, the United States is prepared to use armed forces to assist any such nation

231. *See* Matthew Waxman, *Remembering Eisenhower's Middle East Force Resolution*, *supra* note 220.

232. Memorandum from L. A.. Minnich, Jr., Notes on Presidential-Bipartisan Congressional Leadership Meeting (Jan.1, 1957), https://history.state.gov/historicaldocuments/frus1955-57v12/d182 [https://perma.cc/7N6K-CVTK].

> or group of such nations requesting assistance against armed aggression from any country controlled by international communism.[233]

The resolution provided that it would expire when the President determined that the "peace and security of the nations in the general area of the Middle East" was "reasonably assured" or if Congress revoked it with a concurrent resolution.[234]

Unlike the Formosa resolution, which Congress passed quickly and overwhelmingly, the Middle East resolution prompted major debate. Some members supported the proposal, some thought it was dangerously—and possibly unconstitutionally—open-ended, and some thought it was dangerous and possibly unconstitutional in the other direction, by implying that the President lacked unilateral power to respond to emergencies.

A number of senators and representatives specifically objected that it unconstitutionally delegated Congress's war powers.[235] Senator William Fulbright, for instance, argued that the delegation overturned legislative checks—though without clearly saying whether this was a constitutional or a policy objection:

> It asks for a blank grant of power over our funds and Armed Forces, to be used in a blank way, for a blank length of time, under blank conditions, with respect to blank nations, in a blank area. We are asked to sign this blank check in perpetuity or at the pleasure of the President—any President. Who will fill in all these blanks? The resolution says that the President, whoever he may be at the time, shall do it.[236]

Other legislators believed that the President's unilateral powers to use force were vast and feared that legislative authorization would undermine that position.[237]

In part to paper over these disagreements, the resolution avoided the

233. Joint Resolution to Promote Peace and Stability in the Middle East, Pub. L. No. 85-7, 71 Stat. 5.

234. *Id.*

235. Senator Morse again made this argument. 85 CONG. REC. 2712 (1957) (calling the proposed resolution "an unconstitutional delegation of the power to declare war."). See also similar statements by Senator Sam Ervin, *The President's Proposal on the Middle East: Hearings on S.J. Res. 19 and H.J. Res. 117 Before the S. Comm. on Foreign Relations and the S. Comm. on Armed Services,* 85th Cong. 101–02 (1957); *Resolution Regarding the Middle East: Hearing Before the S. Comm. on Foreign Relations,* 85th Cong. (1957), *reprinted in* EXECUTIVE SESSION OF THE SENATE FOREIGN RELATIONS COMMITTEE 297 (U.S. Government Printing Office, 1979), as well as Congresswoman Marguerite Church, *Economic and Military Cooperation with Nations in the General Area of the Middle East: Hearings Before the H. Comm. on Foreign Affairs on H.J. Res. 117,* 85th Cong. 189–90 (1957) (testimony of Dean Acheson); 85 CONG. REC. 1182–83 (1957); Congressman Usher Burdick, 85 CONG. REC. 1201 (1957); and Congressman John Flynt, 85 CONG. REC. at 1195–97.

236. 85 CONG. REC. 1856 (1957).

237. *See* Waxman, *Remembering Eisenhower's Middle East Force Authorization*, *supra* note 220.

term "authorize," instead adopting a statement approving a policy of force. The Senate Report emphasized that the language had "the virtue of remaining silent" on constitutional allocations of war powers.[238] The House Report added that "the resolution does not delegate or diminish in any way the power and authority of the Congress of the United States to declare war, and the language used in the resolution does not do so."[239] Given that Eisenhower believed congressional approval was constitutionally required to start wars, however, he must have read the resolution as a delegation—even if not technically styled as such.[240]

Taken together, the congressional force resolutions adopted at Eisenhower's request represented major steps in the practice of war power delegation. They responded to a perceived strategic imperative to give the President discretion to respond immediately to threats against foreign partners. And nondelegation concerns were muffled or balanced by a rising sense among political leaders and many constitutional lawyers—though, ironically, not Eisenhower himself—that the President possessed such discretion even without congressional approval.

2. Two Cuba Crises: One Covert, One Nuclear

In the years after the Middle East resolution, Cuba was the epicenter of two major Cold War crises. Both situations involved congressional action that might be seen as war power delegations, though neither presented the issue squarely.[241] One concerned the postwar institutionalization of covert paramilitary operations by the Central Intelligence Agency ("CIA"); the other concerned a congressional resolution on Cuba policy.

Congress established the CIA in 1947 and authorized it to conduct various intelligence activities.[242] The statutes creating the CIA were ambiguous as to whether they authorized paramilitary operations, including training, advising, and supporting proxy forces against foreign governments. Under Eisenhower, the CIA engaged in clandestine operations against governments of, for example, Iran and Guatemala (both leading to

238. S. REP. 85-70 (1957), at 1135–36, *reprinted in* 1957 U.S.C.C.A.N. 1128.

239. H.R. REP. 85-2, at 7 (1957).

240. Internal conversations suggest that his administration read it as such. *See*, *e.g.*, Memorandum of Conversation, Mid-Ocean Club, Bermuda (Mar. 23, 1957), https://history.state.gov/historicaldocuments/frus1955-57v12/d203 [https://perma.cc/3QH2-XVKC].

241. *See* STEPHEN M. GRIFFIN, LONG WARS AND THE CONSTITUTION 109–14 (2013) (discussing constitutional war powers questions arising in these episodes).

242. National Security Act of 1947, Pub. L. 80-253, §§ 102(d)(4), (5), 61 Stat. 495 (1947) (prior to 2004 Amendment). *See also* Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, S. REP. NO. 94-755, Book 1, at 475 (1976) ("Flexibility was provided through an undefined and apparently open-ended grant of authority to the National Security Council, and through it, to the CIA.").

overthrows), and Congress continued to fund the CIA.[243] This raises questions whether Congress had implicitly delegated broad discretion to the President to engage in such operations, and whether that delegation included war-initiation power. The answers are unclear because the legislative basis was ambiguous and neither branch seemed to regard such operations as constitutionally equivalent to war or overt military intervention.[244]

The CIA paramilitary operation that most resembled an armed invasion was the 1961 Bay of Pigs fiasco, which highlighted those ambiguities. Though originally conceived under Eisenhower, President Kennedy in 1961 implemented plans for about 1,400 U.S.-trained and -armed Cuban exiles to overthrow Fidel Castro's regime. After landing at the island's Bay of Pigs, the invaders were routed by government forces.[245] Little is publicly known about internal legal discussions behind the operation, but afterwards the Justice Department produced a memorandum characterizing such activities as exercises of the President's independent foreign relations powers. That document compared covert paramilitary operations to war powers, but seemed to treat them as distinct. It also argued that Congress's continued funding of such activities represented tacit congressional approval.[246]

Since then, Congress has legislated procedural and notification requirements for covert activities.[247] It remains unclear, however, whether

243. ARTHUR M. SCHLESINGER, Jr., THE IMPERIAL PRESIDENCY 167 (1973); *see also* Malcolm Byrne, *CIA Admits it was Behind Iran's Coup*, FOREIGN AFFAIRS (Aug. 19, 2013, 1:00 AM), https://foreignpolicy.com/2013/08/19/cia-admits-it-was-behind-irans-coup [https://perma.cc/X3MT-46NF]; Kate Doyle & Peter Kornbluh, *CIA and Assassinations: The Guatemala 1954 Documents*, GEO. WASH. UNIV. NAT'L SEC. ARCHIVE, https://nsarchive2.gwu.edu/NSAEBB/NSAEBB4/index.html [https://perma.cc/S76G-CF55].

244. *See* GRIFFIN, *supra* note 241, at 100–04.

245. RICHARD M. BISSELL, JR., JONATHAN E. LEWIS & FRANCES T. PUDLO, REFLECTIONS OF A COLD WARRIOR: FROM YALTA TO THE BAY OF PIGS 190 (1996).

246. Matthew Waxman, *Remembering the Bay of Pigs: Law and Covert War*, LAWFARE (Apr. 16, 2019, 8:00 AM), https://www.lawfareblog.com/remembering-bay-pigs-law-and-covert-war [https://perma.cc/HBJ4-XKBE]; Office of Legislative Counsel, *Department of Justice, Memorandum Re: Constitutional and Legal Basis for So-Called Covert Activities of the Central Intelligence Agency* (Jan. 17, 1962), https://s3.documentcloud.org/documents/5836225/73-1501862.pdf [https://perma.cc/NF6R-NFK5]. *See also U.S. Intelligence Agencies and Activities: Hearings Before the H.R. Select Comm. on Intel.*, 94th Cong. 1737 (1975) (statement of Mitchell Rogovin, Special Counsel to the Director of Central Intelligence) ("In sum, the history of congressional action since 1947 makes it clear that Congress has both acknowledged and ratified the authority of the CIA to plan and conduct covert action.").

247. Intelligence Authorization Act of 1991, Pub. L. 102-88 § 503, 105 Stat. 436, 442 (1991). That act (the Hughes-Ryan Act of 1974, amended) states that "The President may not authorize the conduct of a covert action . . . unless the President determines such an action is necessary to support identifiable foreign policy objectives of the United States and is important to the national security of the United States . . . ." The findings, in writing, are required within forty-eight hours of the covert action. *See also* Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, S. REP. NO. 94-755, Book 1, at 508 (1976) ("Given [Congress's knowledge of CIA covert action], congressional failure to prohibit covert action in the future can be interpreted as congressional authorization for it.").

either branch regards the laws governing such activities as delegations, regulations of inherent presidential authority, or both—or whether either regards covert paramilitary activities as exercises of war powers or a separate category of foreign relations powers.

In 1962, Cuba was again the locus of Cold War crisis, arguably one of the most dangerous moments in world history. When U.S. intelligence discovered Soviet nuclear missiles on the island, Kennedy ordered a blockade—calling it a "quarantine"—and considered other military actions including air strikes. Although often considered an exercise of unilateral presidential powers,[248] a congressional joint resolution resembling a war power delegation operated in the background.

Congress passed that Joint Resolution with overwhelming support on October 3, 1962,[249] a few weeks before the missile crisis. It stated that "the United States is determined," among other things:

> to prevent by whatever means may be necessary, including the use of arms, the Marxist-Leninist regime in Cuba from extending, by force or the threat of force, its aggressive or subversive activities to any part of this hemisphere;
>
> to prevent in Cuba the creation or use of an externally supported military capability endangering the security of the United States . . . .[250]

The resolution did not expressly authorize presidential action and is not generally regarded as a force authorization.[251] It instead declared a policy, implying strongly that the United States was willing to use force in broad circumstances. And the Cuban Missile Crisis is usually thought of as a momentous instance of executive unilateralism.[252]

Nonetheless, the resolution's language resembles the 1957 Middle East resolution discussed above, which generally *is* regarded as a force authorization.[253] And although the Kennedy Administration emphasized in internal deliberations the President's Article II authority to act, it also cited

248. The Justice Department concluded that Presidents have unilateral authority to impose blockades without congressional authorization. *See* Dep't of Just. Memorandum, *Legal and Practical Consequences of a Blockade of Cuba* (Oct. 19, 1962), https://www.justice.gov/file/20906/download [https://perma.cc/EAP8-YXPJ].

249. Act of Oct. 3, 1962, Pub. L. No. 87-733, 76 Stat. 697. The resolution passed in the Senate 86-1, and in the House 384-7. 108 CONG. REC. 20058, 20910–11 (1962).

250. 76 Stat. at 697.

251. It is not, for example, included in the Congressional Research Service's compilation of force authorizations. *See* ELSEA & WEED, *supra* note 167, appendix B; *see also* FISHER, *supra* note 19, at 125 ("[The resolution] merely expressed the sentiments of Congress.").

252. *See*, *e.g.*, Richard E. Neustadt & Graham T. Allison, *Afterword* to ROBERT F. KENNEDY, THIRTEEN DAYS: A MEMOIR OF THE CUBAN MISSILE CRISIS 102 (1999).

253. *See* ELSEA & WEED, *supra* note 167 at 8–9, 95–96.

this resolution for support, without clearly stating whether that support was legally (or merely politically) significant.[254] The record is ambiguous as to whether members of Congress regarded this as a force authorization.[255]

In sum, around the same time Congress was enacting broad use of force delegations regarding Formosa and the Middle East, it was taking other actions that, although not formal delegations of war power, shared common attributes. One reason why their status as delegations remains ambiguous was that the executive branch simultaneously asserted (and Congress generally accepted) broad unilateral presidential war power. And, again, these episodes took place in the Cold War context of constant East-West hostilities and permanent U.S. military presence worldwide, which were further blurring the line between war and peace, or between war and military actions short of war.

3. Vietnam, War Powers Reform, and Delegation

In contrast to the Formosa and Middle East resolutions, Congress passed the 1964 Gulf of Tonkin Resolution with clear expectation that President Lyndon Johnson would use force in Vietnam—even if it was not at all clear that the conflict would become so protracted and costly. Indeed, by the time Congress enacted this resolution, the United States was already deeply involved militarily.[256]

Following an alleged North Vietnamese attack on American naval vessels, Johnson asked Congress for a broad force authorization. Days later and nearly unanimously,[257] Congress provided:

> That the Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression . . . . Consonant with the [Constitution and UN Charter] and in accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is . . . prepared, as the President

254. *See* U.S. Dep't of State, *Foreign Relations of the United States, 1961-1963: Volume XI, Cuban Missile Crisis and Aftermath*, doc. 31 (Edward C. Keefer et al., eds., 1998) (citing views at October 19, 1962 meeting that the President had constitutional and statutory authority to take military action); Dep't of Justice, *Legal and Practical Consequences of a Blockade of Cuba*, 1 Op. O.L.C. Supp. 486, 491 (Oct. 19, 1962) (expressing the view that the President had authority to take military action and that congressional resolution supported that view).

255. *See* Patrick Hulme*, Congress, the Cuba Resolution and the Cuban Missile Crisis*, LAWFARE, (Apr. 22, 2021, 8:01 AM), https://www.lawfareblog.com/congress-cuba-resolution-and-cuban-missile-crisis. [https://perma.cc/QNW7-34GY].

256. For several years the United States had been providing military support to the South Vietnamese government. *See* ELSEA & WEED, *supra* note 167, at 9.

257. The House passed the resolution 416-0 after forty minutes of debate, while the Senate passed it 88-2 after nine hours. E.W. Kenworthy, *Resolution Wins*, N.Y. TIMES, Aug. 8, 1964, at A1.

> determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom . . . .This resolution shall expire when the President shall determine that the peace and security of the area is reasonably assured by international conditions created by action of the United Nations or otherwise, except that it may be terminated earlier by concurrent resolution of the Congress.[258]

This language gave the president broad discretion in extent of force ("all necessary measures" and "all necessary steps"), in purpose ("to prevent further aggression"), in geography ("southeast Asia"), and in time (until "the President shall determine" that peace and security is restored). Over the next decade, Presidents used it—in addition to assertions of unilateral executive power—to justify combat involving hundreds of thousands of troops, not just in Vietnam but also in neighboring countries.[259]

As in earlier post-war episodes, Senator Morse was a lonely voice objecting on nondelegation grounds.[260] Morse labeled the resolution a "predated declaration of war, in clear violation of article I, section 8 of the Constitution, which vests the power to declare war in the Congress, and not in the President."[261] "In effect," he asserted, "this joint resolution constitutes an amendment of article I, section 8, of the Constitution, in that it would give the President, in practice and effect, the power to make war in the absence of a declaration of war."[262] The resolution's supporters generally disregarded the nondelegation issue—sometimes referring to the 1955 and 1957 resolutions as precedent for authorizing force in broad terms.[263] A few

258. Act of Aug. 10, 1964, Pub. L. No. 88-408, 78 Stat. 384.

259. *See generally* JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 13–30 (1993).

260. Senator Ernest Gruening stated that Morse had made his case "wholly convincingly," while himself arguing against the resolution on policy, not constitutional, grounds. 110 CONG. REC. 18,413 (1964). Apparently, Morse was the only member of Congress to argue against the Resolution on nondelegation grounds. Only Morse and Gruening voted against it, with eighty-eight senators voting in favor. *Id.* at. 18,470–71.

261. *Id.* at 18,427.

262. *Id.* at 18,445. Morse did not explicitly invoke nondelegation doctrine, except in contrasting the Resolution to the recent Cuba-related resolution discussed above, which Morse explained he supported because "constitutional power of Congress was not delegated to the President in that resolution." *Id.* at 18,430.

263. The Senate Committee on Foreign Relations Report did not address constitutionality. S. REP. No. 88-1329 (1964). The House Committee on Foreign Affairs Report dealt with constitutional objections summarily:

> As it had during earlier action on resolutions relating to Formosa [1955] and to the Middle East [1957], the committee considered the relation of the authority contained in the resolution and the powers assigned to the President by the Constitution. While the resolution makes it clear that the people of the United States stand behind the President, it was concluded that the resolution does not enter the field of controversy as to the respective limitations of power in the executive and the legislative branches.

H.R. REP. NO. 88-1708, at 4 (1964). Similarly, Secretary of Defense Robert McNamara treated the

congressional backers of the resolution explicitly endorsed delegating war power to the President.[264]

Although the nondelegation issue received almost no attention when the resolution was adopted, it became more controversial as the conflict became a quagmire and the Johnson and Nixon administrations expanded it. In some court cases challenging the legality of the Vietnam War, litigants argued that Congress had invalidly delegated its war powers without itself declaring war, but no courts directly adjudicated these claims.[265] In a 1971 speech on the legal basis for the war, then-Assistant Attorney General for the Office of Legal Counsel William Rehnquist felt obliged to address the issue. Rehnquist argued that from historical examples (though citing none between the Quasi-War and the 1950s Eisenhower resolutions), "both Congress and the President have made it clear that it is the substance of congressional authorization, and not the form which that authorization takes, which determines the extent to which Congress has exercised its portion of the war power."[266] Brushing aside objections of "unlawful delegation of powers," Rehnquist noted that *Curtiss-Wright* demonstrated that the "principle [of unlawful delegation of powers] does not obtain in the field of external affairs."[267] Thus, Rehnquist concluded, "[t]he notion that an advance authorization by Congress of military operations is some sort of an invalid delegation of congressional war power is untenable in the light of the decided cases."[268]

Resolution's constitutionality as settled. *Joint Hearing Before the Comm. on Foreign Rels. and the Comm. on Armed Servs.: Hearing on a Joint Res. To Promote the Maintenance of International Peace and Security in Southeast Asia*, 88th Cong. 3 (1964) (testimony of Robert McNamara). McNamara pointed to past resolutions dealing with Formosa (1955), the Middle East (1957), and Cuba (1962) and observed "There can be no doubt . . . that these previous resolutions form a solid legal precedent for the action now proposed." *Id.*

264. Senator Jennings Randolph stated that "[i]n effect, congressional authority for future military action in southeast Asia would be delegated to the President—and properly so—by this resolution." 110 CONG. REC. 18,419 (1964). Even one lukewarm supporter of the resolution accepted its constitutionality: Senator George Aiken expressed "misgivings" about Johnson's actions but stated that he did "not believe that any of us can afford to take a position opposing the President of the United States for exercising the power which we, under our form of government and through our legislative bodies, have delegated to his office." *Id.* at 18,456–57 (1964).

265. *See generally* Rodric B. Schoen, *A Strange Silence: Vietnam and the Supreme Court*, 33 WASHBURN L.J. 275, 305–06 (1994) (summarizing litigation); *see also, e.g.*, Mora v. McNamara, 389 U.S. 934, 935 (1967) (Stewart, J., dissenting from denial of cert. and highlighting improper war power delegation question as "large and deeply troubling question[]"); Sarnoff v. Connally, 457 F.2d 809 (9th Cir. 1972), *cert. denied*, 409 U.S. 929 (1972) (dismissing improper delegation argument as nonjusticiable political question).

266. *Congress, the President, and the War Powers: Hearings Before the Subcomm. on Nat'l Sec. Pol'y and Scientific Dev. of the Comm. on Foreign Affs. H.R.*, 91st CONG. REC. 543 (1970) [hereinafter *Hearings Nat'l Sec. Pol'y*].

267. *Id.*

268. *Id.*

This notion—that Congress's advance authorization of military operations was an invalid delegation—surfaced often in war powers reform debates at that time, including legislative discussions that culminated in the 1973 War Powers Resolution. That resolution (which is still on the books) among other things required the President to withdraw forces from hostilities within sixty days unless Congress authorized their use. In legislative discussions leading to that act, critics argued that the Gulf of Tonkin Resolution had been an unconstitutional delegation, while some critics of the Resolution further argued that allowing the President sixty days of unilateral action was also an unconstitutional delegation. Senator Eagleton, for example, who initially supported the Resolution, voted against the final version because it delegated "a predated declaration of war to the President and any other President of the United States, courtesy of the U.S. Congress."[269] "That is not," he argued, "what the Constitution of the United States envisaged when we were given the authority to declare war. We were to decide ab initio, at the outset, and not post facto."[270] Congressional defenders of the Resolution echoed Rehnquist's arguments based on *Curtiss-Wright* that, even if the resolution was a delegation, it was a valid exercise of congressional power.[271]

The nondelegation objection to open-ended force authorizations, including the Gulf of Tonkin Resolution, was pressed at that time by prominent constitutional scholars. In a 1972 article styled *Requiem for Vietnam*, Professor William Van Alstyne wrote that "it seems to me clearly the case that the exclusive responsibility of Congress to resolve the necessity and appropriateness of war as an instrument of national policy at any given time is *uniquely not delegable at all*."[272] In extensive legislative testimony, Professor Alexander Bickel argued that absent detailed standards, Congress could not delegate to the President its own war power, "despite *United States v. Curtiss-Wright Export Corporation*, which was really quite a limited

269. 119 CONG. REC. 36,189 (1973).

270. *Id.* at 36,190; *see also id.* at 33,556. A handful of mostly Democratic members of the House opposed the Resolution on similar nondelegation grounds. *See id.* at 24,700 (statement of Rep. Rarick); *id.* at 24,704 (statement of Rep. Drinan); *id.* at 36,204 (statement of Rep. Green); *id.* at 36,210 (statement of Rep. Young); *id.* at 36,216 (statement of Rep. Bennett); *id.* at 33,872 (statement of Rep. Holtzman).

271. *Id.* at 25,115 (Senator Dole). Not all supporters staked much on *Curtiss-Wright*: Senator Javits stated that "it's unlikely that we will have a resolution from the courts of this area of the Constitution which has been called a twilight zone . . . . The issue must be decided in the political arena." *War Powers: Hearings Before the Subcomm. on Nat'l Sec. Pol'y and Scientific Devs. of the Comm. on Foreign Affs. H.R.*, 93d Cong. 7 (1973).

272. William Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, U. PA. L. REV., Nov. 1972, at 16 (emphasis added). Van Alstyne argued the Gulf of Tonkin Resolution impermissibly delegated war powers: "[t]he congressional responsibility may not be thus diluted, no matter how eagerly Congress itself might wish to be quit of it." *Id.* at 22.

case."[273] *Curtiss-Wright*'s statements about independent executive power were "largely dicta," Bickel asserted, and the case was not about "powers to go to war, or to use the armed forces without restriction."[274] When asked whether he challenged the Gulf of Tonkin Resolution as an unconstitutional delegation, Bickel replied, "Oh, yes."[275] The Lawyers Committee on American Policy Towards Vietnam took a similar position.[276]

Other prominent legal voices—including Eugene Rostow, John Norton Moore, and former Supreme Court Justice Arthur Goldberg—endorsed the constitutionality of Congress delegating authority to the President to use force. Rostow rejected the arguments of Bickel and others "that, save for minor exceptions, hostilities can be authorized only by Congressional action *at the time they begin* [rather than in advance], and then by delegations narrowly limited in scope,"[277] finding this argument so impractical as to be unconstitutional, and arguing that the Gulf of Tonkin Resolution was sufficiently specific.[278] In his subsequent book about the Vietnam War and the Constitution, John Hart Ely noted that opposition to the conflict generated efforts by scholars to push nondelegation objections against the Gulf of Tonkin Resolution and other broad force authorizations, but he sided with the Resolution's defenders: "The bottom line must . . . be that the Tonkin Gulf Resolution could not have been held at the time, and cannot now responsibly be said, to violate the delegation doctrine unless one postulates a general doctrine significantly stronger than any the Supreme Court (or the academy) has been willing to recognize since the 1930s."[279]

273. *War Powers Legislation: Hearings Before the Comm. on Foreign Rels. on S. 731, S.J. Res. 18 and S.J. Res. 59*, 92d Cong. 148–49 (1971) [hereinafter *Hearings*] (Letter from Alexander M. Bickel, Professor of Law, Yale University, to Sen. Jacob K. Javits, Chair, Committee on Foreign Relations (1971). *See also id*. at 555 (statement of Bickel) (arguing that *Curtiss-Wright* did not authorize "broad delegation without standards of legislative power to the President").

274. *Id.*

275. *Id.* at 563. *See also* Alexander M. Bickel, *Congress, the President and the Power to Wage War*, 48 CHI.-KENT L. REV. 131, 137–39 (1971) (making similar arguments).

276. *Hearings, supra* note 273, at 841–49. That group in 1970 sponsored a book by Professor Lawrence Velvel taking a narrow view of the constitutionality of war power delegations, arguing specifically against the constitutionality of the Gulf of Tonkin Resolution. LAWRENCE R. VELVEL, UNDECLARED WAR AND CIVIL DISOBEDIENCE: THE AMERICAN SYSTEM IN CRISIS 65–89 (1970). Velvel argued that while delegations are permitted in domestic affairs, "it ought to be impermissible to have delegations of the power to decide to enter future wars." *Id.* at 85.

277. Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 885 (1972).

278. *Id.* at 486–88. *See also Hearings Nat'l Sec. Pol'y*., *supra* note 266, at 127 (statement of John Norton Moore) (citing the Formosa, Middle East, and Gulf of Tonkin Resolutions to argue that "resolutions authorizing limited hostilities or delegating authority to the President are constitutional options open to Congress."); *Hearings*, *supra* note 273, at 781 (statement of Arthur Goldberg) (concluding that Congress may authorize presidential deployment of forces without further congressional input if the President finds certain circumstances met).

279. *See generally* ELY, *supra* note 259, at 24–26.

Ely went on to say a stronger argument would be that force authorizations must be sufficiently specific regarding against whom they are directed, but he concluded the Gulf of Tonkin Resolution met that requirement.[280]

In sum, after being almost entirely eclipsed in the early Cold War, war-power nondelegation arguments made a comeback in the wake of failure in Vietnam. As the following section shows, these arguments linger throughout the post-Cold War period, though at this point again contained to a small minority view in Congress.

C. POST-COLD WAR DELEGATIONS

Since the end of the Cold War, the United States has fought three major ground wars: two in Iraq, and the war against al Qaeda and the Taliban in Afghanistan and elsewhere. All three were waged pursuant to delegated war power. The President requested, and Congress legislated, these resolutions in the context of broad executive branch assertions of presidential power to use force.[281]

1. Two Iraq War Delegations

Congress enacted force authorizations against Iraq in 1991 and 2002, both delegating discretion to initiate war. They authorized the President to use force—or not—based on the President's judgments about the need and wisdom. In that respect they resembled the 1950s force resolutions, though unlike those earlier ones, presidential intentions to use force were apparent at the time. They also contrast with other force authorizations from the period, such as Congress's 1983 (Lebanon) and 1993 (Somalia) resolutions authorizing force when substantial military deployment was already underway.[282]

280. *Id*. at 26.

281. Some executive branch lawyers and officials took the position that the President had sufficient unilateral power to engage in these conflicts even without congressional authorization.

282. *See* Bradley & Goldsmith, *supra* note 2, at 2,077. In 1983, Congress approved for up to eighteen months continuation of President Reagan's military deployment in Lebanon to enforce a fragile peace. Multinational Force in Lebanon Resolution, Pub. L. No. 98-119, §§ 3–4, 6, 97 Stat. 805, 806–07 (1983). In 1993, it approved continuation of U.S. military deployment initiated by President Bush and expanded by President Clinton, to protect humanitarian aid and UN personnel in Somalia. Resolution Authorizing the Use of United States Armed Forces in Somalia, S. J. Res. 45, 103d Cong. (1993). Although on their faces these approvals appear, like the Iraq resolutions, to be broad delegations—they authorized the President to use force (or not) at his discretion—in practice they did not operate that way, because they approved presidential decisions to use force after the fact. The military operations were already well underway. Also, although substantial casualties ensued, they were understood as lower-level uses of force than full-scale war, in part because there was no apparent sovereign adversary.

On March 23, 1999, the Senate also passed a nonbinding concurrent resolution authorizing the President to use air power against the Federal Republic of Yugoslavia in response to the Kosovo crisis. At that point, the President's intention to use force was clear; he ordered the air campaign to commence the next day. *See* CONG. RSCH. SERV., RL30729, KOSOVO AND THE 106TH CONGRESS 8 (2001). The

In the lead-up to the first Iraq War, following Iraq's 1990 invasion of Kuwait, the George H.W. Bush Administration generally argued that it had authority to use military force against Iraq even absent congressional authorization.[283] The central constitutional debate in public commentary, legislative hearings, and the eventual floor vote concerned that assertion.[284] At this point, the UN Security Council had also authorized member states to use force if Iraq failed to withdraw from Kuwait by a certain date.[285] Many members both favoring and opposing force authorization emphasized the importance of Congress's role in commencing military conflict; and many members characterized even a broad delegation not as passing the buck but as preserving Congress's formal role in war initiation.[286] The House passed a nonbinding resolution (shortly before authorizing the use of force) that declared: "the Constitution of the United States vests all power to declare war in the Congress of the United States. Any offensive action taken against Iraq must be explicitly approved by the Congress of the United States before such action may be initiated."[287]

Congress ultimately passed, in January 1991, a joint resolution authorizing the President "to use United States Armed Forces" pursuant to and to achieve the objectives of UN Security Council Resolutions, that is to eject Iraqi forces from Kuwait.[288] At that point it was virtually certain that President Bush would use force. Nonetheless, the resolution gave the President wide latitude to decide whether or not to initiate war. The only express limitation was that before commencing war, the President was

Senate debate on the resolution contains no discussion of delegation. 145 CONG. REC. S3065-S3118 (daily ed. March 23, 1999).

For completeness, we also note that the American Servicemembers' Protection Act of 2002 authorizes the President to use "all means necessary and appropriate" to bring about release of certain U.S. or allied persons detained by the International Criminal Court. ASPA, Pub. L. No. 107-206, 116 Stat. 899 (2002). This statute is sometimes dubbed the "Hague Invasion Act" or "Invade the Hague Act" because that provision might be interpreted to include authorization of military force—and in that regard a possible war power delegation—though we regard that as largely symbolic and therefore do not discuss it in detail.

283. *See, e.g.*, The President's News Conference on the Persian Gulf Crisis, 1 PUB. PAPERS 17, 20 (Jan. 9, 1991); Statement on Signing the Resolution Authorizing the Use of Military Force Against Iraq, 1 PUB. PAPERS 40 (Jan. 14, 1991). *See generally* H. W. Brands, *George Bush and the Gulf War of 1991*, 34 PRESIDENTIAL STUD. Q. 113 (2004).

284. Brands, *supra* note 283; *see also The Constitutional Roles of Congress and the President in Declaring and Waging War: Hearing Before the S. Comm. on the Judiciary*, 102d Cong. 1-4 (1991) (Sen. Biden).

285. U.N.S.C. Res. 678 (Nov. 29, 1990).

286. *See, e.g.*, 137 CONG. REC. 944 (1991) (statement of Senator Leahy) ("[W]e have our own constitutional responsibility . . . . It is time for the Senate to speak its mind."); *id.* at 946 (statement of Senator Boren) ("[W]e may not duck and we may not dodge. We must do our duty under the Constitution as it requires."); *id.* at 991 (statement of Senator Lieberman) ("by [authorizing force,] we do not pass the buck of responsibility").

287. 137 CONG. REC. 1034, 1049 (1991).

288. Act of Jan. 14, 1991, Pub. L. No. 102-1, 105 Stat. 3.

required to report to congressional leadership that, in his determination, peaceful diplomatic means were insufficient to achieve the objectives.

Some congressional concerns were raised, especially in the House, about nondelegation. Like other modern force authorization debates, though, this was not a central issue and the constitutional objections remained a small minority view. A few representatives framed their criticism as constitutional protests that sound like nondelegation arguments, but it was often not clear whether they were invoking strict legal barriers or just appealing to general principles of legislative responsibility (or perhaps a different constitutional argument).[289]

Nondelegation arguments emerged a bit more vocally in Congress during debate over authorizing the next Iraq War. For a decade after the Gulf War, the Iraqi regime had obstructed Security Council-mandated weapons inspections. In 2002, at President George W. Bush's request, Congress again authorized force against Iraq. The 2002 resolution empowered the President to use military force "as he determines to be necessary and appropriate" to "defend the national security of the United States against the continuing threat posed by Iraq; and . . . enforce all relevant United Nations Security Council resolutions regarding Iraq."[290] The force resolution again included the condition only that the President report to congressional leadership his determination that diplomatic means were insufficient.[291]

Though still a minority, several members of the Senate[292] and House[293] raised constitutional nondelegation concerns. Others made arguments that

289. *See*, *e.g.*, 137 CONG. REC. 1050 (1991) (statement of Rep. Hamilton) ("We have a constitutional responsibility to vote at the time when and if the President concludes force is necessary . . . . The President's resolution means Congress gives up the right to decide. It means we give the President unlimited discretion to start a war in circumstances that cannot be foreseen."); *id.* at 1056 (statement of Rep. Jenkins) ("I will not transfer my responsibility as a member of the U.S. Congress to the President . . . [A] straight declaration of war resolution should be brought to this Congress for debate, not some resolution delegating to the President that sole responsibility."); *id.* at 1063 (statement of Rep. Smith) (making similar argument); *id. at* 1100 (statement of Rep. Murphy) (same).

290. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498, 1501.

291. *Id.*

292. Senator Arlen Specter stated that "It is a concern of mine as to whether there is authority for the Congress under the Constitution to make this kind of a delegation." 148 CONG. REC. S9871 (daily ed. Oct. 3, 2002). He went on to vote for the authorization, however.

293. *See, e.g.*, *id.* at H7242 (daily ed. Oct. 8, 2002) (statement of Rep. Norton) ("As clear as it gets, this vote would be an unconstitutional delegation of the exclusive power of Congress to declare war. It is simply shocking to give away the unique life and death power to declare war bestowed on the Congress by the framers."); *id.* at H7396 (daily ed. Oct. 9, 2002) (statement of Rep. Jackson-Lee) ("It is by article 1, section 8 of the Constitution of the United States that calls for us to declare war . . . . Congress may not choose to transfer its duties under the Constitution to the President."); *id.* at H7425 (daily ed. Oct. 9, 2002) (Statement of Rep. Filner) (making similar argument); *id.* at H7009–10 (daily ed. Oct. 3, 2002) (Rep. Paul) (same).

might be read either as legal objections or prudential ones.[294] Several proponents expressly defended the constitutionality of the resolution.[295] Then-Senator Joseph Biden specifically addressed delegation, arguing that the resolution included sufficient parameters to satisfy the nondelegation doctrine:

> I am confused by the argument that constitutionally we are unable to delegate that authority. Historically, the way in which the delegation of the authority under the constitutional separation of powers doctrine functions is there have to be some parameters to the delegation . . . . But as I read this grant of authority, it is not so broad as to make it unconstitutional for us, under the war clause of the Constitution, to delegate to the President the power to use force if certain conditions exist. . . . [C]onstitutionally, this resolution meets the test of our ability to delegate. It is not an overly broad delegation which would make it per se unconstitutional, in my view.[296]

Beyond the legislative debate, the 2002 force resolution generated a rare judicial opinion on the war power nondelegation issue. After the resolution passed, a group including members of the armed forces and their relatives and members of Congress sued President Bush, seeking to enjoin him from initiating war.[297] One of the plaintiffs' claims was that the resolution unconstitutionally delegated Congress's power to declare war.[298] The district court dismissed the suit and the First Circuit affirmed, holding that the dispute was unripe and "[did] not warrant judicial intervention."[299] However, it also addressed the nondelegation argument:

> In this zone of shared congressional and presidential responsibility, courts should intervene only when the dispute is clearly framed. An extreme case might arise, for example, if Congress gave absolute discretion to the President to start a war at his or her will. Plaintiffs' objection to the October Resolution does not, of course, involve any such claim . . . . The mere fact that the October Resolution grants some discretion to the President fails to raise a sufficiently clear constitutional issue.[300]

The court rejected the nondelegation argument for several reasons. First, it treated war power as "shared between the political branches," in

294. *Id.* at S10089 (daily ed. Oct. 8, 2002) (statement of Sen. Kennedy) ("The most solemn responsibility any Congress has is the responsibility given the Congress by the Constitution to declare war. We would violate that responsibility if we delegate that responsibility to the President in advance . . . .").

295. *See, e.g.*, *id.* at S10085 (daily ed. Oct 8, 2002) (statement of Senator Lieberman).

296. *Id.* at S10249 (daily ed. Oct. 10, 2002) (statement of Senator Biden).

297. Doe v. Bush, 323 F.3d 133 (1st Cir. 2003).

298. *Id*. at 141.

299. *Id.* at 139–44.

300. *Id.* at 143 (citations omitted).

contrast to many other Article I legislative powers.[301] Thus it apparently rejected the premise that war-initiation power is exclusively vested in Congress, or perhaps it recognized that war-initiation power is not always so easy to separate cleanly from war-waging or other foreign affairs powers. Second, citing *Zemel v. Rusk* (which had cited *Curtiss-Wright* for this proposition), it noted that "the Supreme Court has also suggested that the nondelegation doctrine has even less applicability to foreign affairs."[302] It adopted the common assumption that war power is a subset of foreign relations powers for delegation purposes, and that within that subset, broader delegation is constitutionally permitted. Third, it rebutted the argument that Congress had relinquished policymaking responsibility to the executive branch. "Nor is there clear evidence of congressional abandonment of the authority to declare war to the President," the court said. "To the contrary, Congress has been deeply involved in significant debate, activity, and authorization connected to our relations with Iraq for over a decade, under three different presidents of both major political parties, and during periods when each party has controlled Congress."[303]

At the time of this writing, Congress is actively considering the repeal of the 1991 and 2002 Iraq force authorizations.[304] The fact that they remained on the books for years after the overthrow of Saddam Hussein's regime, as well as the withdrawal of U.S. combat forces from Iraq, also means that they continued to operate as possible delegations for resuming conflicts or initiating news ones in and around Iraq.[305]

2. The 2001 AUMF

Congress's broadest force authorization may be the one following the terrorist attacks of September 11, 2001, which remains in effect. It authorizes the President 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 persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[306]

301. *Id.*
302. *Id.*
303. *Id.* at 143–44.
304. *See* Karoun Demirjian, *Decades Later, Senate Votes to Repeal Iraq Military Authorizations*, N.Y. TIMES (Mar. 29, 2023), https://www.nytimes.com/2023/03/29/us/politics/congress-iraq-war-powers-authorization.html [https://perma.cc/5KDC-T68H].
305. *See infra* note 342.
306. Authorization for Use of Military Force Pub. L. No. 107-40, 115 Stat. 224 (2001).

It specifies a purpose—to prevent further terrorist attacks by those categories of target—but it names no specific enemy or duration. It requires the target to have some nexus to the September 11 attacks but gives the President wide latitude to determine who—individuals, groups, or states—comes within that scope.[307]

Unlike other modern war power delegations, the United States had been directly attacked on September 11. Even those who interpret the Constitution as lodging war-initiation decisions exclusively in Congress generally recognize an implicit exception for repelling invasions or attacks. So, although the 2001 AUMF is sweeping, at least part of its scope may be understood as recognizing preexisting presidential powers to respond to attacks.[308] Presumably the reasoning applies to al Qaeda (the actual perpetrators), but defining that group's organizational and geographic boundaries and determining whether presidential power also applied against, for example, Afghanistan or other nations or entities for harboring al Qaeda, are complicated matters. Thus, the authority granted the President to use force against those not already covered by the President's constitutional power to respond to direct attacks was potentially quite broad, especially if the nexus requirement is interpreted loosely.

Nondelegation concerns were barely raised, if at all, in Congress or commentary when the AUMF was hurriedly enacted. A few members of Congress indicated at the time that they believed that this resolution was crafted more narrowly than the Gulf of Tonkin Resolution, to avoid serving as a "blank check," but they did not explain how so.[309]

Although nondelegation objections were inaudible in 2001, some critics of the 2001 AUMF and proponents of amending it have more recently raised such concerns. As with the Gulf of Tonkin resolution, expansive interpretations by successive administrations—including applying it in countries far beyond Afghanistan and against new terrorist groups like the Islamic State—probably contributed to a view that at minimum Congress should name specific enemies.[310] In response to academic proposals to

307. *See* Bradley & Goldsmith, *supra* note 2, at 2078–83; *see also* Michael Stokes Paulsen, *Youngstown Goes to War*, 19 CONST. COMMENT. 215, 252 (2002) (observing that although the 2001 AUMF is a constitutional delegation because it contains an intelligible standard, it is "arguably the broadest congressional delegation of war power in our nation's history").

308. During the 2001 congressional floor debate over the AUMF, many members emphasized that the United States was already party to a conflict resulting from acts of war against it. *See* 147 CONG. REC. H5492–705 (daily eds. Sept. 11–14, 2001); *id.* at S9283–464 (daily eds. Sept. 12–14, 2001).

309. *See* Bradley & Goldsmith, *supra* note 2, at 2079–80 n.135 (quoting congressional members' statements).

310. *See, e.g.*, Stephen Wertheim, *End the Imperial Presidency*, N.Y. TIMES (Aug. 25, 2021), https://www.nytimes.com/2021/08/25/opinion/declaration-war-president-Congress.html [https://perma.cc/6T4E-KQ7W] (arguing that authorizing force without naming specific enemies breaks with original

update the 2001 AUMF to allow the President to add new terrorist groups to its coverage, some commentators objected that doing so would skirt constitutional requirements. As two scholars put it:

> The proposal to bypass Congress and instead delegate such future—and momentous—decisions to the President lacks *any* historical precedent, and for good reason. It is *Congress*, not the Executive, that is given the authority under our Constitution to declare war. As our Founding Fathers understood well, an authorization to use military force is a measure that should be undertaken solemnly, after public debate and with buy-in from representatives of a cross-section of the nation, based upon a careful and deliberate evaluation of the nature of the specific threat. It should not be an *ex ante* delegation to the President to make unreviewable decisions to go to war at some future date against some as-yet-unidentified entity.[311]

Note the echo of arguments from earlier eras, that there is something uniquely problematic constitutionally about delegating war-initiation power, due to its special character.

As during the Cold War, broad legislative delegations were widely accepted in the post-Cold War period as an appropriate mode of exercising war power. Still, the nondelegation objection never fully went away.

V. SUMMARY AND IMPLICATIONS

The historical record laid out in previous Parts yields several significant and surprising points about history, doctrine, and legal reform in the field of war power. As to history, we conclude that—contrary to common assumptions—the originalist or historical case for broad war-initiation delegation is weak. At the same time, however, that history does not support the opposite position, that Congress's war power is essentially nondelegable at all. Throughout much of American history, both political branches often treated war initiation as constitutionally distinct, but not so consistently to alone justify either of those positions. Modern war power delegation practices arose in the 1950s in response to geostrategic imperatives of the Cold War, but also, importantly, against a background expansion in the

constitutional design and early practice).

311. Jennifer Daskal & Stephen I. Vladeck, *After the AUMF*, 5 HARV. NAT'L SEC. J. 115, 138 (2014) (responding to Robert Chesney, Jack Goldsmith, Matthew C. Waxman & Benjamin Wittes, *A Statutory Framework for Next-Generation Terrorist Threats* (2013), https://www.hoover.org/research/statutory-framework-next-generation-terrorist-threats [https://perma.cc/WL65-2M23]. *See also* Statement for the Record of Human Rights First to the U.S. House Foreign Affairs Committee Hearing on "Authorization for the Use of Military Force and Current Terrorist Threats" (July 24, 2017), https://docs.house.gov/meetings/FA/FA00/20170725/106315/HHRG-115-FA00-20170725-SD001.pdf [https://perma.cc/F8BL-8JX7] ("Authorizing the president to use force against unknown future enemies, for undefined purposes, or in unknown locations is an unconstitutional delegation of Congress's power to declare war.").

exercise of unilateral presidential power to use force.

Moreover, the mixed historical record shows that treating "foreign affairs delegation" as a special constitutional category is problematic. Rather, it points in favor of disaggregating that category, and even disaggregating the sub-category "war powers delegation." The sparse record of war-initiation delegations prior to modern times also highlights the immense practical stakes of this issue as well as the varied and evolving strategic rationales behind broad delegations. In that way our focus on *how* Congress exercises its war power adds new dimensions to familiar accounts of *whether* Congress has done so. And as to legal reform, that historical record raises important questions about calls for restoring Congress's traditional role in initiating war.

A. THE HISTORICAL DEVELOPMENT OF WAR POWER DELEGATION

This Article's account of war power delegations suggests at least three conclusions about relevant constitutional history. First, the founding era has relatively little definitive evidence to offer on the topic, particularly for those searching for affirmative support for either broad war power delegation or near-absolute war power nondelegation. The drafters and ratifiers seem not to have discussed the matter directly.[312] Although some scholars suggest that war power (and other foreign affairs powers) was seen at the time as more delegable than domestic lawmaking power, the leading specific defense of this suggestion relies principally upon extrapolation from a single obscure exchange in the Convention debates, with little if any confirmation in subsequent practice or commentary.[313] And to the contrary, at least some key figures of the time emphasized the need to place war-initiation decisions in Congress specifically to check the President.[314] The influential idea at the founding that decisions to start wars should rest with Congress, because Presidents might be too tempted toward war, is in considerable tension with unconstrained delegations of that power. [315] Overall, though, originalist-oriented analysis of the founding era seems unlikely to generate specific conclusions on the delegability of war power, making this particular issue difficult to separate from the larger debate over Congress's power to delegate its constitutional powers more generally.[316]

312. *Supra* Section I.A.

313. *See* MCCONNELL, *supra* note 15; *supra* Section I.B.

314. *Supra* Section I.A.

315. *See* Beach, *supra* note 13 (developing this argument).

316. What one thinks of the founding evidence, then, may depend on what one thinks is the appropriate baseline: to what extent did the Constitution *generally* disfavor congressional delegation, or allow delegation only if accompanied by fairly definite directions. As noted, see *supra* note 13, there is scholarly debate about whether Congress's legislative powers were generally regarded as delegable at

Second, broad delegations of war-initiation power were surprisingly rare in historical practice prior to the Cold War. The 1798 Quasi-War statutes, often identified as key precedents for war power delegations, were actually quite narrow and incremental, sharply limiting the President's ability to expand the naval conflict into a larger war.[317] Moreover, they were infrequently repeated. After the Quasi-War, no significant foreign conflict was initiated pursuant to delegated power until Vietnam.[318]

While early Congresses authorized hostilities on a few now-obscure occasions in which Presidents ultimately chose not to use force, each of these has limitations as clear precedent for broad delegation. The 1811 No-Transfer Act was conditioned on the occurrence of specific events. The 1839 authorization concerning the Maine border involved defense of specific disputed territory under potential military threat from a hostile power. The 1858 *Water Witch* authorization also depended on specific events and likely contemplated a low-level use of force.[319] And those examples have generally received little scholarly or lawyerly attention, probably because they were never activated: Presidents did not invoke the delegated authority to use force because the facts on which they were conditioned did not occur.[320] Indeed, none of the nineteenth-century acts just mentioned even appears in a recent Congressional Research Service compilation of historical authorizations to use military force.[321]

Moreover, during the nineteenth century, Congress rebuffed Presidents Jackson and Buchanan when they requested delegated authority to use force, amid arguments (among others) that such delegations were constitutionally impermissible.[322] For example, the *Water Witch* delegation was offset by Congress's subsequent refusal to grant Buchanan wider authority to use force in Mexico and Central America. The 1839 Maine authorization came only a few years after Congress refused Jackson's request for force authorizations against France and Mexico.[323] And part of the Quasi-War

that time; this Article does not address that debate.

317. *Supra* Section II.B.

318. *Supra* Parts II and III.

319. *Supra* Section II.C. The only presidential use of force arguably pursuant to delegated authority between the Quasi-War and the Cold War was the 1914 intervention in Mexico, and that episode may be better understood as an exercise of independent presidential authority. *See supra* Section III.B. By our count, prior to the Cold War, Congress formally recognized a state of war more often (seven times: Tripoli, War of 1812, Algiers, Mexican War, Spanish-American War, World Wars I and II) than it delegated use-of-force decisions to the President (five times: Quasi-War, No-Transfer Act, Maine boundary, *Water Witch*, 1914 Mexico intervention).

320. *See* Matthew C. Waxman, *The Power to Threaten War*, 123 YALE L.J. 1626, 1653–62 (2014) (discussing tendency of lawyers and legal scholars to overlook cases of threatened force).

321. ELSEA & WEED, *supra* note 167, appendixes A, B.

322. *See supra* Sections II.B–C.

323. *Supra* Section II.C.3.

debate involved authorization for the President to establish a Provisional Army, in which the analogous delegated power was sharply circumscribed in response to nondelegation concerns.[324] So, war initiation was sometimes—but not consistently—treated as a special case for which broad delegation was impermissible. In sum, there is little historical practice to support broad delegations of war-initiation power prior to the Cold War, although a somewhat better case might be made for a limited practice of narrow delegations, particularly ones tied to specific circumstances or events.

In contrast, broad delegations of military powers were much more common in related areas. For example, all of Congress's formal declarations and other official recognitions of a state of war contained essentially unlimited authorizations for the President to choose ways of fighting the war.[325] Similarly, as to suppressing insurrections and law enforcement, Congress made open-ended authorizations with less concern or debate.[326] Thus, if anything the early historical record suggests that war-initiation delegation was an area of concern—even if the doctrinal limits were unclear and contested.

The historical record of war-initiation delegation spotlights another less-obvious reason that its early practice was more contested than delegation of war-waging powers. Whereas today war-initiation power is usually seen as a core foreign affairs issue, earlier it was viewed as straddling both foreign and domestic affairs. Madison, exemplifying concerns among some constitutional architects, observed that "[w]ar is the parent of armies; from these proceed debts and taxes; and armies, and debts, and taxes are the known instruments for bringing the many under the domination of the few."[327] When Justice Nelson, dissenting in the *Prize Cases*, argued that Congress's war-initiation power cannot be delegated, he did not appeal to grave foreign policy consequences; he cited the effects on the "business and property of the citizen."[328] As one modern scholar puts it, even today "[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

324. *Supra* Section II.B.

325. *Supra* Section II.C.

326. *Supra* Section II.E.

327. James Madison, Political Observations, *in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 491–92 (Philadelphia: J. B. Lippincott & Co., 1867) (1795). This was written in 1795, when Madison was a member of Congress.

328. The Prize Cases, 67 U.S. (2 Black) 635, 693 (1863) (Nelson, J., dissenting). *See supra* note 158 and accompanying text. The Civil War context of course makes this concern sharper.

Constitution."[329] Historically, it was as much the domestic implications of war initiation as the foreign ones that gave opponents of its delegation pause.[330]

A third conclusion about constitutional history in this area is that the pivotal period for war power delegation was the early Cold War, after which one might argue that the practice reflected a modern "historical gloss" on the Constitution.[331] In a relatively short period of time, Congress passed a series of force authorizations granting or acknowledging broad presidential discretion as to whether (and sometimes even where and against whom) to begin hostilities: the Formosa resolution (1955), the Middle East resolution (1957), the Cuba resolution (1962), and the Gulf of Tonkin Resolution (1964).[332] Nothing like these authorizations had occurred previously. Yet, at the time, they were largely uncontroversial, passing by wide margins with only isolated objections on nondelegation grounds. The Gulf of Tonkin Resolution became controversial later, with the growing unpopularity and inconclusiveness of the expanded Vietnam War, and with that controversy came a rise in political and scholarly appeals to constitutional nondelegation principles.[333] But those objections faded as the United States withdrew from Vietnam and the Cold War was replaced by concerns over terrorism and rogue regimes.[334]

The most evident explanation for this shift is geostrategic. To be sure, the Supreme Court gave comfort through its prior *Curtiss-Wright* decision, indicating reduced constitutional concern about delegation in foreign affairs generally.[335] But the fundamental changes presaging the new regime of war-initiation delegation were the rise of enduring Cold War military and ideological competition, the U.S. emergence as a global superpower with a worldwide ring of military bases and defensive alliances, and the advent of nuclear weapons. These new and dire circumstances underlay a broad consensus that Presidents needed powers to respond to global emergencies quickly and with a broad range of options. The constant military mobilization and sense of emergency muddied the distinction between war-initiation and presidential commander-in-chief activities, and the obsolescence of formal war declarations in international law further blurred it. Those conditions

329. J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 32 (1991).

330. *See* Beach, *supra* note 13.

331. *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) (discussing "systematic, unbroken" practice accepted by the political branches).

332. *See supra* Section IV.B.2, including caveats therein regarding inclusion of the Cuba resolution in this list.

333. *See supra* Section IV.B.3.

334. *Supra* Section IV.C.

335. *Supra* Section III.C.

drove not only new thinking about delegation, but also new acceptance of presidential war powers unilateralism, as reflected in Korea and Cuba.[336]

Thus, while the 1955 Formosa authorization was a significant step-up from previous cases in the breadth of delegation, it occurred at a time when many officials in both political branches believed that security imperatives in the Cold War required interpreting Article II of the Constitution to allow the President to defend distant American interests from the Communist bloc. Only a few years earlier, President Truman took the United States into the Korean War without express congressional approval. Although Eisenhower, who had a narrower view of presidential powers, requested the Formosa authorization, he received at least as much congressional pushback on the grounds that he did not need it to use force as on the grounds that it granted too much discretion.[337] These developments bring us to the modern view in which war power delegations are relatively well accepted with relatively little understanding of their origins.

In sum, although on their face congressional force authorizations over time included broader delegations, these resolutions were passed in the context of broader understandings and prevailing practice of executive unilateralism. War power delegation may generally look broader over time in absolute terms, but so do background presidential powers. Perhaps one might attach to Cold War resolutions a historical gloss in favor of delegation, but those background assumptions about independent presidential powers and the perceived need at all for congressional authorization at that time render unclear whether the political branches understood that they were systematically engaging in novel legislative delegations. Indeed, as pointed out in Part IV, that growth in unilateral presidential powers has largely obscured the nondelegation questions lurking below.

B. DOCTRINAL IMPLICATIONS

This section considers the modern doctrinal implications of the foregoing history. We suggest at least four.

First, for those who would revive a strong version of the nondelegation doctrine, war power delegations are not so easily distinguished from domestic legislative delegations. As discussed, some judges and scholars who seek such a revival on originalist and structural grounds suggest that it would not extend to war alongside other foreign affairs powers.[338] Our

336. *Supra* Section IV.B.

337. *Supra* Section IV. The 1914 Mexico intervention was an early foreshadowing of these developments.

338. *Supra* Section I.B.

account calls that suggestion substantially into question; at minimum it should caution against assuming that such a carve-out is easy to justify. As described, originalist and early post-ratification evidence for broad war-initiation delegations is quite thin. There is little basis for assuming that the founders were less concerned about war power delegations than they were about other delegations (and some evidence that they would have been more concerned). And prior to the 1950s there was essentially no practice of broad delegation of the decision to go to war. The originalist-driven project to revive the domestic nondelegation doctrine may necessarily entail grappling with war power delegations, however much some of its advocates might wish to avoid that.

Second, the historical record cautions against treating war-related or military-related delegations as a single category. Longstanding practice indicates much greater acceptance of some kinds of broad delegations: delegations as to the method of fighting wars, and as to matters of law enforcement and suppression of domestic insurrection.[339] For example, starting with early force authorizations after the Quasi-War, including the 1802 Tripoli resolution and every formal war declaration thereafter, Congress delegated to the President broad discretion regarding how to use military force. Importantly, these are areas in which the President is widely believed to have substantial independent constitutional power as a result of the President's constitutional status as commander-in-chief and head of the executive branch.[340] "Some delegations have, at least arguably, implicated the president's inherent Article II authority," noted Justice Gorsuch in *Gundy*. He continued: "The Court has held, for example, that Congress may authorize the President to prescribe aggravating factors that permit a military court-martial to impose the death penalty on a member of the Armed Forces convicted of murder—a decision that may implicate in part the President's independent commander-in-chief authority."[341]

In contrast, war-initiation power—much of which was widely thought, at least in the early Republic, to be vested exclusively in Congress—lacks a similar, long-running historical pattern of broad delegation. Relatedly, to the extent there is historical precedent for delegation of war-initiation power, it involves (prior to the Cold War) specific and limited delegations rather than broad open-ended ones. There is not simply one blanket category of military-

339. Of course, it is not always easy to draw a sharp line between these types of delegations. Presidential action to protect troops could provoke conflict, for example.

340. *See* David Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?*, 83 MICH. L. REV. 1223, 1260–61 (1985) (arguing that war declarations are not delegations because the President's discretion as to how to wage war derives from Article II powers).

341. Gundy v. United States, 139 S. Ct. 2116, 2137–40 (2019) (Gorsuch, J., dissenting).

or war-related powers for which delegability was historically treated and practiced in the same way.

Third, the above considerations suggest a possible path for limited revival of nondelegation principles in war power debates and adjudication, namely, through interpretation of force authorizations' scope. To be clear, we are not arguing that such delegation in the modern era is unconstitutional, nor do we think courts are likely anytime soon to address this issue, let alone to hold so. Delegation might be defended on grounds other than originalism and history, and at this point, recent practice has ingrained broad delegations not just as an available option for Congress but even as the preferred option for those who believe that Congress must authorize war or force. However, well short of finding them unconstitutional, legislators, judges, and other legal actors who place great weight on early historical delegation practice might be inclined to read modern force authorizations narrowly.

For example, issues have arisen with respect to the scope of the 2001 and 2002 AUMFs: Presidents have sought to use the 2001 AUMF against entities such as the Islamic State, with only tenuous relationships to the 9/11 attacks, and to use the 2002 AUMF regarding Iraq to authorize force against Syrian and Iranian targets.[342] The constitutional history of delegation suggests that if courts were ever to reach the issue, they might instead read these authorizations more narrowly, similar to the way courts have begun to read ambiguous domestic delegations narrowly, as not encompassing important matters not clearly within the contemplation of the delegating Congress.[343] Much like the Supreme Court held that it would not read a statute to delegate to the Environmental Protection Agency power to decide "major questions" of greenhouse gas regulation absent a clear statement by Congress of that intent,[344] so too courts could reason from the historical record that force authorizations should be read narrowly absent a clear legislative statement.[345]

342. *See* Jack Goldsmith & Matthew Waxman, *The Legal Legacy of Light-Footprint Warfare*, 39 WASH. Q. 7, 14–15 (2016); Charlie Savage, *Obama Sees Iraq Resolution as a Legal Basis for Airstrikes, Official Says*, N.Y. TIMES (Sept. 12, 2014), https://www.nytimes.com/2014/09/13/world/americas/obama-sees-iraq-resolution-as-a-legal-basis-for-airstrikes-official-says.html [https://web.archive.org/web/20230104053635/https://www.nytimes.com/2014/09/13/world/americas/obama-sees-iraq-resolution-as-a-legal-basis-for-airstrikes-official-says.html] (Syria and 2002 AUMF); Warren P. Strobel, *White House Cites 2002 Iraq War Measure to Justify Killing Soleimani*, WALL ST. J. (Feb. 14, 2020, 3:23PM), https://www.wsj.com/articles/white-house-cites-2002-iraq-war-measure-to-justify-killing-soleimani-11581711789 [https://perma.cc/E3TT-2AYF] (Iranian targets and 2002 AUMF).

343. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. DOL, OSHA, 142 S. Ct. 661, 664–65 (2022) (per curiam) (reading workplace safety delegation narrowly as not including power to mandate vaccines); *id.* at 667–70 (Gorsuch, J., concurring) (expressly referring to nondelegation concerns).

344. West Virginia v. EPA, 142 S. Ct. 2587, 2595 (2022).

345. *Cf.* Kristen E. Eichensehr, *The* Youngstown *Canon: Vetoed Bills and the Separation of Powers*, 70 DUKE L.J. 1245, 1286–94 (2021) (making a separate but related argument for narrowly construing

Of course, courts are likely for many reasons—including remedial problems and concerns about comparative expertise—to avoid this issue and treat it as non-justiciable.[346] The wisdom and practicality of such an interpretive rule is beyond this Article's scope, and it would depend on many other factors besides history. Ultimately this will likely remain a constitutional issue for the political branches to wrestle with outside of courts. But regardless of where the issue is debated and decided, the historical record—especially the founding-era concerns about this particular power and the early practice of specific and limited delegations, to the extent war powers were delegated at all—could be used to support such an interpretive approach.

One might respond to these first three doctrinal points by arguing that the President has at least some independent power to use military force, so—for the purposes of constitutional delegation analysis, and perhaps also for purposes of interpreting force authorizations—war-initiation is to some extent an overlapping set of shared powers among the political branches. But even so, assuming there is at least some zone of exclusive congressional power, the question remains how delegation operates in that zone. As noted, this Article assumes the existence of such a zone. We nevertheless acknowledge that the line separating that zone is not a bright one, and that is also among the reasons that courts are likely to regard this issue as nonjusticiable.

Finally and more generally, the above account indicates the importance of disaggregating the category of foreign affairs delegations. Since *Curtiss-Wright*, courts and commentators have discussed a generalized category of foreign affairs powers that (it is said) may be more easily delegated.[347] The history of war power delegations shows that this cannot be so easily assumed. As discussed, even within the foreign-affairs sub-category of military or war-related powers, some powers were historically regarded as more readily delegable than others. By extension, it seems inappropriate to generalize about delegability of foreign affairs powers. Some foreign affairs powers may indeed be readily delegable—particularly if they are associated with independent presidential powers, or with longstanding practice of

force authorizations).

346. *See, e.g.*, Smith v. Obama, 217 F. Supp. 3d 283, 303 (D.D.C. 2016) (rejecting on standing and justiciability grounds a challenge to legality of military operations against Islamic State), *vacated as moot sub. nom*. Smith v. Trump, 731 Fed. App'x 8 (D.C. Cir. 2018); *see also* Sarnoff v. Connally, 457 F.2d 809, 809–10 (9th Cir. 1972) (discussing dismissals of Vietnam War nondelegation challenges as nonjusticiable).

347. *See* Bradley & Goldsmith, *supra* note 2; Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 UNIV. COLO. L. REV. 1089, 1096–97; Note, *supra* note 13, at 1137–38. *But see* Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1971–73 (2015) (documenting recent judicial trend away from foreign affairs exceptionalism).

congressional delegations. Others may not be, perhaps because—like war-initiation power—structurally Congress was designed to play a checking role and longstanding practice is not supportive of delegation. Specific types of foreign affairs delegations should be assessed individually rather than in general categories.

The foreign-domestic distinction in nondelegation law has held little significance in practice since *Curtiss-Wright* because even in domestic cases, courts have generally upheld delegations to the President under very deferential review.[348] However, the idea that the Constitution permits broader delegation in foreign than domestic affairs could become crucial if courts and the political branches were to apply the nondelegation doctrine more strictly, as some Justices say they would. In *Gundy*, for example, Justice Gorsuch (joined by two other Justices), signaled that expansive foreign affairs delegations might survive his stricter nondelegation analysis.[349] Justice Thomas elsewhere similarly suggested that broad foreign affairs delegations might be more permissible.[350] Although, again, courts will likely continue to treat war-initiation disputes as nonjusticiable,[351] a number of scholars have predicted that judges applying a stricter nondelegation doctrine would likely continue to carve out foreign affairs or national security generally for different treatment.[352] Ultimately, delegation of war-initiation may still be constitutionally justified and defended on functional or other grounds, but the history of war power delegation cautions against broad-gauge categorical approaches to foreign affairs as a whole.[353]

C. STRATEGIC SIGNIFICANCE OF WAR POWER DELEGATION

The historical record also gives reason to think that the question whether Congress *may delegate* power to initiate major war has arguably been more consequential than whether Congress *must authorize* major war (defined loosely as ground wars with immense costs to the United States[354]).

348. Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 474–75 (2001).

349. Gundy v. United States, 139 S. Ct. 2116, 2137 (2019) (Gorsuch, J., dissenting).

350. Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 80 (2015) (Thomas, J., concurring) (noting that the President's exercises of discretion pursuant to foreign affairs statutes might not trigger strict nondelegation limits).

351. *See supra* note 346 and accompanying text.

352. *See, e.g.*, Harlan Grant Cohen, *The National Security Delegation Conundrum*, JUST SEC. (July 17, 2019), https://www.justsecurity.org/64946/the-national-security-delegation-conundrum [https://perma.cc/6DGK-PYA5]; Knowles, *supra* note 13, at 1136.

353. *See* Chad Squitieri, *Towards Nondelegation Doctrines*, 86 MO. L. REV. 1239, 1291 (2021) (calling generally for disaggregation of the nondelegation doctrine by subject matter).

354. This generally accords with an approach the Department of Justice has taken to defining "war" for the purposes of the Declare War Clause. *See, e.g.*, Memorandum Opinion from Caroline D. Krass, Principal Deputy Assistant Att'y Gen., Office of Legal Couns., Dep't of Just., to the Att'y Gen., Authority to Use Military Force in Libya, at 31 (Apr. 1, 2011) ("In our view, determining whether a particular

The former issue gets almost no attention today and becomes critically important if one believes the answer to the latter is yes. Apart from the Korean War, the President has always requested and received congressional approval to launch major wars. Presidents have not always regarded this step as necessary, but they have done so. Counterfactual history is of course difficult, but it is hard to show past major wars in which a constitutional requirement of congressional approval would have made a difference.

It may be easier to identify situations where a requirement that Congress actually decide to initiate war might have influenced the outcome or timing. For example, Eisenhower believed that effectively deterring Chinese attacks on Taiwan in 1955 required diplomatic brinksmanship that in turn required congressional pre-approval to use unlimited force. At least in Eisenhower's view, delegated war power reduced the likelihood of war compared to seeking a decision by Congress after a Chinese provocation. Requiring Congress to expressly initiate war rather than delegate the decision might reduce or delay war in other ways. In the Persian Gulf War, the Senate passed the 1991 resolution granting the President an option to initiate war by only a narrow 52-47 margin. Would Congress have passed a resolution firmly deciding to initiate war, if it could not constitutionally delegate that politically difficult decision to the President? Perhaps not, or perhaps only after diplomacy was given more time. Similarly, had Congress been required to decide on war with Iraq in 2002–2003, we wonder whether Congress might have scrutinized more carefully the intelligence about Iraq's alleged weapons of mass destruction. It is impossible to prove the impact of such a requirement (compared to an option to delegate), but it is fair to speculate that war decisions might have played out differently or been slowed. And if merely slowing a decision for war seems insubstantial, remember that it is among the reasons most often cited for lodging war power in Congress to begin with.

The historical record also reveals that how Congress exercises its war power, specifically its choice to delegate decision-making on war, has been of great strategic importance—but for different reasons over time. That episodic history can be understood as efforts by the political branches to wrestle with new foreign policy dilemmas that did not fit neatly with a requirement or practice that Congress itself make the final decision on military intervention.

One obvious rationale for war power delegation is the generic rationale

planned engagement constitutes a 'war' for constitutional purposes instead requires a fact-specific assessment of the 'anticipated nature, scope, and duration' of the planned military operations," and "[t]his standard generally will be satisfied only by prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period.").

behind many legislative delegations: to manage complexity. To deal flexibly with complicated and uncertain situations, Congress often delegates substantial authority to the executive branch to implement policy within legislative parameters. War power delegations since World War II can be understood in similar terms, as recognition that fast-changing geopolitical conditions and the President's simultaneous exercise of other military, diplomatic, and economic powers favor giving the President flexibility on whether and when to use force or initiate war. Indeed, although historically critics of war power delegation were generally concerned about presidential power, the practical impact of strict nondelegation—that is, giving Congress only a stark choice between deciding to use force or not, rather than allowing it to authorize the President to exercise some discretion—might actually have been more presidential unilateralism. As the U.S. government has dealt with a wide range of security crises, war power delegations may also thus reflect adaptive, pragmatic advantages of flexibility in how Congress legislatively exercises its war power.[355]

Historically, however, war power delegation has served as a device for handling various specific strategic challenges in addition to managing complexity. That history is especially useful to those who would justify broad war power delegation on functional grounds. The narrowly crafted 1811 No-Transfer Act involved special need for secrecy, for example. The UNPA involved delegation to solve particular credibility challenges for formal collective security arrangements that would have been unimaginable to the founders. Another new challenge after World War II was extended deterrence, or the credible threat of force to deter attacks on allies, particularly in the Eisenhower Administration.[356] In the UNPA and Eisenhower-era force resolution episodes, war power delegations were intended to signal policy certainty, not highlight policy discretion. That dilemma of squaring credible commitments to use force with congressional control of war initiation was also partially obviated by a shift in practice from congressional delegation to executive unilateralism. As explained next, efforts to roll back presidential war powers will bring some of these dilemmas back to the fore.

355. *Cf.* Memorandum Opinion from William H. Rehnquist, Assistant Att'y Gen., Office of Legal Couns., Dep't of Just., to the Special Couns. to the President, The President and the War Power: South Vietnam and the Cambodian Sanctuaries, at 321, 336 (May 22, 1970) ("If Congress may sanction armed engagement of United States forces only by declaring war, the possibility of its retaining a larger degree of control through a more limited approval is foreclosed.").

356. *See* Matthew Waxman, *Eisenhower and War Powers*, LAWFARE (Sept. 18, 2020, 8:01 AM), https://www.lawfareblog.com/eisenhower-and-war-powers [https://perma.cc/8WBJ-8GCJ].

D. IMPLICATIONS FOR WAR POWERS REFORM

Finally, the historical record of war power delegation—especially questions about its acceptance at the founding and the thin body of practice since then—has implications for war powers reform. Reformists often pitch their calls as "restoring" Congress's proper constitutional role in war initiation, but the historical record raises questions about what interbranch arrangements reformists are usually calling for a return to. For those who advocate reversion to exclusive congressional control over war initiation, it also raises tough questions about Congress's ability to delegate discretion through future force authorizations.

Those advocating tighter congressional control of war initiation, whatever their political stripes, often appeal to originalism. In advocating reforms to the 1973 War Powers Resolution, for example, legislative sponsors often talk of restoring the original constitutional framework, in which Congress wielded exclusive control over decisions to initiate war.[357] The core of many war power reform proposals is to add teeth to the requirement that Congress must authorize major uses of military force. To reformists, it is usually assumed not just that a congressional resolution delegating power to use force is constitutionally sufficient, but that it represents the gold standard of congressional war power primacy. Note, also, that a similar view is currently shared by some members of Congress who propose (much like Eisenhower in 1955) to authorize the President in advance to use force against China to protect Taiwan[358]—a scenario that could entail large-scale war.

Such proposals may be normatively attractive, but if we take reformists' appeal to originalism seriously, that commitment may prove more than

357. *See* National Security Powers Act, S. 2391, 117th Cong. (2021); Press Release, Chris Murphy, Sen., Murphy Statement on the National Security Powers Act (July 20, 2021), https://www.murphy.senate.gov/newsroom/press-releases/murphy-lee-sanders-introduce-sweeping-bipartisan-legislation-to-overhaul-congresss-role-in-national-security [https://perma.cc/ZGC3-6P9M]; Press Release, Bernie Sanders, Sen., Sanders Statement on the National Security Powers Act (July 20, 2021); *see also* National Security Reforms and Accountability Act, H.R. 5410, 117th Cong. (2021); Press Release, James McGovern, H.R., McGovern Statement on the National Security Reforms and Accountability Act (September 30, 2021), https://mcgovern.house.gov/news/documentsingle.aspx?DocumentID=398752 [https://perma.cc/JS7D-UFSA]; Press Release, Peter Meijer, Rep., House of Representatives, Meijer Statement on the National Security Reforms and Accountability Act (September 30, 2021), https://meijer.house.gov/media/press-releases/meijer-mcgovern-introduce-sweeping-legislation-reassert-congressional [https://perma.cc/97A5-9KQJ].

358. *See, e.g.*, Elaine Luria, *Congress Must Untie Biden's Hands on Taiwan*, WASH. POST (Oct. 11, 2021, 4:39 PM), https://www.washingtonpost.com/opinions/2021/10/11/elaine-luria-congress-biden-taiwan [https://perma.cc/UNE4-6QB6] (arguing for proposed Taiwan Invasion Prevention Act). In 1979, the Senate Foreign Relations Committee report accompanying the bill that became the Taiwan Relations Act expressed doubt, on nondelegation grounds, whether it would be constitutional for Congress to empower the President "prospectively to determine under what conditions the United States armed forces will be introduced into hostilities" to defend Taiwan. *See* S. Rep. No. 96-7, at 31-32 (1979).

reformists think. It is not clear that a forward-looking delegation of authority to use force would have satisfied constitutional requirements for how Congress exercised its exclusive war powers at the founding. Whereas today, requiring an express congressional force authorization for any major hostile use of armed force is generally seen as fully restorative of Congress's powers as they were originally understood, our findings show that early understandings were uncertain—not uncertain in the way commonly discussed, as to whether Congress's powers were exclusive, but uncertain as to *how* Congress was required to exercise those exclusive powers.

Our analysis suggests that those advocating a return to greater exclusive congressional war power should also grapple with whether there are any constitutional limits to its delegation. And in doing so, they would simultaneously have to consider how the strategic imperatives discussed in the previous section will continue often to push in favor of broad delegation.

CONCLUSION

This Article's chief aim has been to describe the historical evolution of war power delegation from the founding era to the present. This account is interesting in itself, as it undercuts a common assumption that broad war-initiation delegations of the type used in modern practice are a longstanding feature of the constitutional landscape. To the contrary, the Article shows that from the Constitution's earliest years until the mid-twentieth century, war-initiation delegations were rare and typically specific and conditioned on particular events. Broad delegations became more common only after World War II, first in the Cold War and then continuing to modern times in the conflicts with Iraq and the war on terrorism. The story of war-initiation delegations is a story of constitutional change.

The Article takes no firm position on the ultimate implications for modern war powers doctrine. That depends on one's view of constitutional interpretation more generally—originalists, traditionalists and functionalists may, for example, draw different conclusions. At minimum, though, it is more difficult than often supposed to defend the modern approach to war initiation on grounds of longstanding historical practice. The historical record also spotlights an otherwise-obscured question about common calls to respect Congress's original, exclusive war power: namely, whether originally there were constitutional limits to its delegation.

Our analysis also yields insights for broader debates about nondelegation. The Supreme Court has indicated that delegation may be categorically more appropriate in foreign affairs matters, and modern proponents of reviving the nondelegation doctrine have suggested that the revival might exempt delegation of foreign affairs powers. Especially for

nondelegation revivalists who take originalism seriously, however, this Article cautions against categorical treatment of foreign affairs delegations, and even against categorical treatment of war-related delegations.