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Can the President and Congress Establish a Legislative Veto Mechanism for Drawing Down a Long And Controversial War?

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By Charles Tiefer*

I. Introduction

In the simplest case: Congress declares war, and does not intrude on the President’s solo decision about when the troops come home. 1 However, in our time, long wars occur with great controversy over their continuation. Yet, the President and the Congress, divided on partisan grounds, have difficulty finding a joint way to wind down the war. They may seek Congressional mechanisms to resolve their differences with interactive processes. Then, constitutional issues arise as to whether a Congressional mechanism may use a legislative veto – a reservation of power for a vote by the two Houses of Congress – so as to let the President plan to draw down troop levels while reserving Congressional power to challenge him. These issues illuminate war powers in the abstract; the issues also apply concretely to the main war of the 2010s, namely, the long war in Afghanistan.

Take two speculative yet real-world paths:

(1) In the simpler case, Congress enacts a schedule for only a slow drawdown, withdrawing troops at, say, ten percent of the force every two years. This raises a

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controversy about whether a Congressional drawdown regulates unconstitutionally the Commander-in-Chief’s disposition of forces.

(2) In the more complex and interesting case, the President is significantly interested in compromise. Yet, he needs a mechanism to work with the more hawkish opposition to a drawdown, which encompasses the opposition political party supported by key military commanders.

So, he and the Congress use a statutory mechanism that is familiar from the past. Congress votes war appropriations without an outright bar to drawdowns. Rather, Congress includes in those war appropriations a statutory mechanism providing that, during the fiscal year, drawdowns may be deferred by a concurrent resolution of the House and Senate – that is, a vote of the two chambers not subject to presidential veto. So, a drawdown can go forward on the Presidential schedule, but the two Houses of Congress have reserved the right to block it. Although the legislative veto mechanism is not generally known, this mechanism has definitely been used to balance broad initiations of war powers for the President with a channel for potential checks by Congress.

Suppose Congress enacts, and the President signs into law, such a provision --- with suspicion on both sides yet a sigh of relief at balancing and moving forward with, for now, the otherwise strongly disagreeing political forces. Before and after enactment, critics may say the mechanism violates INS v. Chadha – the Supreme Court decision

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invalidating the legislative veto, though only for domestic powers delegated by Congress outside the national security realm. What does such a mechanism have in the way of constitutional support?3

These constitutional issues illustrate the larger issue of Congressional mechanisms for war. To understand that complex issues like these may well occur, put such scenarios in a particular context – the Afghanistan War in the early-to-mid 2010s during a slow troop drawdown.4 Sometime in the years to come, a President may face Congressional hawks who oppose him with support from military commanders.5

Both sides may find common ground that starting a substantial drawdown of troop strength in Afghanistan may be allowable if, but only if, there can be rethinking based on changing conditions as time goes by. So, Congress may allow Presidential drawdowns grudgingly on condition of Congress having power to conduct such rethinking during the following year. The President would embrace a mechanism to start a drawdown at a pace he deems proper, while Congress would stand ready, if the military commanders express alarm at developments in Afghanistan, to stop or to slow the drawdown.

This analysis shines a new light on the constitutionality of mechanisms for long wars in general as well as the Afghan War in particular. In recent years, wars have received analysis primarily just as to incidentals. Critics of controls on Presidents have

4 Michael E. O’Hanlon & Hassina Sherjan, TOUGHING IT OUT IN AFGHANISTAN (2010); SETH G. JONES, IN THE GRAVEYARD OF EMPIRES: AMERICA’S WAR IN AFGHANISTAN (2009); AHMED RASHID, DESCENT INTO CHAOS: THE U.S. AND THE DISASTER IN PAKISTAN, AFGHANISTAN, AND CENTRAL ASIA
5 As early as 2009-2010, President Obama drew his support for a surge of troops into Afghanistan from a coalition of Republicans and centrist Democrats, whereas the coalitions for virtually all his other controversial policies involved Democrats overcoming Republican opposition. For an overall treatment of President Obama’s ambivalence about the large escalation in sending troops to Afghanistan, see BOB WOODWARD, OBAMA’S WARS (2010).
developed their positions on a range of war contexts in the “global war on terror.”

These issues include commission trials, detention and interrogation treatment, and eavesdropping.

In doing so, the critics draw on the overall classic and contemporary stance of maximal Presidential war powers.

However, there has been little or constitutional analysis about just what role Congress may play in the core issue of the stepping-up or –down of the use of force in the war. This article culminates a trilogy of articles by the author on such war powers issues newly raised by novel constitutional aspects of the Iraq and Afghanistan wars.

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7 CHARLES TIEFER, VEERING RIGHT (2004)(“Veering Right”).
11 For general background, see, e.g., Diane Marie Amann, Abu Ghraib, 153 U. PA. L. REV. 2085 (2005).
12 Heidi Kitrosser, Congressional Oversight of National Security Activities: Improving Information Funnels, 29 CARDOZO L. REV. 1049 (2008); Christopher M. Ford, Intelligence Demands in a Democratic State: Congressional Intelligence Oversight, 81 TUL. L. REV. 721 (2007); U.S. Dep’t of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President (Jan. 19, 2006).
How realistic is it to expect this type of situation? The author has developed this approach while serving as a Commissioner in 2008-2011 on the federal Commission on Wartime Contracting in Iraq and Afghanistan established in 2008 by Congress. This Commission has about two dozen televised hearings, and issued interim and special reports. The Commission’s work on wartime contracting addresses, *inter alia*, a practical understanding of the interactions between Congress and the Afghanistan war. Also, the author performed Congressional service related to war powers issues before that.

As for what lies ahead in this article, the second half of this introduction addresses some aspects of the situation in Afghanistan that give rise to the specific example being used.

Part II looks at the first issue, as to Congress outright barring a draw down. All may agree that Congress can impose a flat funding “cut-off” provision saying that for the following year the President may not spend any funds in an appropriation law on a drawdown.

However, many oppose the view that Congress can regulate a drawdown schedule. Critics may urge that such as drawdown schedule gets Congress too deep into the field decisions of the Commander in Chief of a still-pending war.

Weighing these arguments, the better view surveys the diverse examples of

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19 Full information about the Commission is at http://www.wartimecontracting.gov/.

20 As Solicitor of the House of Representatives, the author personally represented the House of Representatives in a number of constitutional cases on national security. See, e.g., American Foreign Serv. Ass'n v. Garfinkel, 490 U.S. 13 (1989)(vacating ruling striking down as unconstitutional a classified information provision in an appropriation bill), on remand, 732 F. Supp. 13 (D.D.C. 1990). The House brief addressed the constitutionality of the appropriation rider in that case, while also arguing the mootness issue which the Court accepted. The issues were nicely treated in Michael Glennon, *Publish and Perish: Congress’s Effort to Snip Snepp, Before and AFSA*, 20 Mich. J. Of Int’l L. 163 (1989).

The author also served as Special Deputy Chief Counsel on the House Iran-Contra Committee. See infra.
history and treats as valid a Congressional schedule or a mechanism that draws down
troop numbers, however awkward that may be for an effort at a full-scale victory in the
war. The Boland Amendments of the 1980s illustrate this. This part also looks at the
classic relevant doctrine of appropriation as a source of authority for a
law other than a flat cut-off provision on an appropriation.

Part III looks at the second issue: to enact a “concurrent resolution mechanism,” with the President’s support, for a postponed decision on the war – a mechanism the critics would call an unconstitutional “legislative veto.” Part III starts with the clash of
functionalist and formalist approaches to separation of powers: the functionalism of
Youngstown vs. the formalism of Chadha.

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21 Impressive articles that shows Congressional war powers far stronger than argued by those supporting the positions taken by President Bush include Jules Lobel, Conflicts Between the Commander in Chief and Congress: Concurrent Power Over the Conduct of War, 69 OHIO ST. L.J. 391 (2008); David J. Barron & Martin S. Lederman, The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding, 121 HARV. L. REV. 689 n.201 (2008); David J. Barron & Martin S. Lederman, The Commander in Chief at the Lowest Ebb—A Constitutional History, 121 HARV. L. REV. 941 (2008).

22 See, e.g., DaCosta v. Laird, 471 F.2d 1146, 1157 (2d Cir. 1973); DaCosta v. Laird, 448 F.2d 1368, 1369 (2d Cir. 1971); Orlando v. Laird, 443 F.2d 1039, 1042 (2d Cir. 971), cert. denied, 404 U.S. 869 (1972); Mitchell v. Laird, 488 F.2d 611, 615 (D.C. Cir. 1973); Peter Raven-Hansen & William C. Banks, From Vietnam to Desert Shield: The Commander in Chief’s Spending Power, 81 IOWA L. REV. 79 (1995); Hansen, supra; Peter Raven-Hansen & William C. Banks, Pulling the Purse Strings of the Commander in Chief, 80 VA. L. REV. 853 (1994); Kate Stith, Congress’ Power of the Purse, 97 YALE L.J. 1343 (1988).

23 Regarding ratification in the war powers context, see the Prize Cases, 67 U.S. (2 Black) 635, 671 (1862)(Congressional ratification, after the fact, of President Lincoln’s initial war powers actions at the start of the Civil War); Youngstown, 343 U.S. at 631 & n.1 (Douglas, J., concurring); 343 U.S. at 611 (Frankfurter, J., concurring). Reid Skibell, Article, Separation-of-Powers and the Commander in Chief: Congress’s Authority to Override Presidential Decision in Crisis Situations, 13 GEO. MASON L. REV. 183 (2004).


25 For recent treatments of the Bush Administration’s initiatives in light of Youngstown, see, e.g., Joseph C. Hansen, Murder and the Military Commissions: Prohibiting the Executive’s Unauthorized Expansion of Jurisdiction, 93 MINN. L. REV. 1871 (2009); Kathryn L. Einspanier, Burlamaqui, the Constitution, and the Imperfect War on Terror, 96 Geo. L. REV. 985 (2008); Mark D. Rosen, Revisiting Youngstown: Against the View that Jackson’s Concurrence Resolves the Relation Between Congress and the Commander in Chief, 54 UCLA L. REV. 1703 (2007).

26 343 U.S. 579 (1952). Justice Jackson’s “zone of twilight” analysis has been recognized in other contexts, like that of the 1995 Mexican peso bail-out, as befitting the post-Cold War situation of Presidents who propose national security actions that licit neither clear authorization nor clear prohibition
Then, that Part goes into the background, much of which is little-known, of concurrent resolution mechanisms in war powers. The least obscure such mechanism, § 5(c) of the War Powers Resolution, has been included in the extensive discussion of the War Powers Resolution. However, the literature has paid little or no attention to how that § 5(c) of the War Powers Resolution followed many prior similar mechanisms, probably because there is no obvious trail leading back to these predecessor provisions, notwithstanding the provisions' importance.

Congress enacted § 5(c) at the end of the Vietnam War. Later, § 5(c) saw an important vote on invocation as to the Kosovo War of 1999. It draws strength from the concept that the House and Senate may anticipate ratification of a § 5(c) resolution in from a Congress, and a public, ambivalent about foreign involvements. See, e.g., Russell Covey, Adventures in the Zone of Twilight: Separated Powers and National Economic Security in the Mexican Bailout, 105 YALE L.J. (1996); James D. Humphrey II, Note, Foreign Affairs Powers and “The First Crisis of the 21st Century”: Congressional vs. Executive Authority and the Stabilization Plan for Mexico, 17 MICH. J. INT’L L. 181 (1995).


subsequent appropriations.  

This part continues with the subtle issue posed by the 2001 Authorization for the Use of Military Force ("AUMF"), as a decade-old, highly outdated enactment which prominently combines historically expansive Congressional initiation of war power for the President with no incorporated channel at all for fresh Congressional action during the 2000s and 2010s as to the Afghanistan war.  

Its enthusiasts focus on how broad and strong it was in 2001. However, the American military role morphed away from a short 2001-2002 war against an enemy national government susceptible to relatively straightforward ousting from power. The war became more than a decade-long counterinsurgency against an enemy not susceptible to relatively straightforward ousting – an enemy dispersed, resilient, feeding on the limited strength of the Afghan central government, and with refuges in Pakistan.  

Justice Souter raised questions about how long the AUMF’s effect lasts. The Framers did not intend Congress to lack authority to move away from full-scale counterinsurgency, merely because of such a decade-old authorization for the war.

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32 The AUMF is discussed infra. As to ratification, see Note, Recapturing the War Power, 119 Harv. L. Rev. 1815, 1820 (2006).
35 “Is it reasonable to think that the authorization was sufficient at the time that it was passed, but that at some point, it is a Constitutional responsibility, and ultimately a constitutional right on [Hamdi’s] part, for Congress to assess the situation and either pass a more specific continuing authorization or at least to come up with the conclusion that its prior authorization was good enough. Doesn’t Congress at some point have a responsibility to do more than pass that resolution? Transcript of Oral Argument at 32, Hamdi v. Rumsfeld, 542 U.S. 507 (2004), available at http://www.supremecourts.gov/oral_arguments/argument_transcripts/03-6696.pdf
36 “[A] presidential veto is used to entrench presidential policy, and a concurrent resolution should therefore be acknowledged as a check on that entrenchment.” Greene, supra, at 190.
37 For a treatment of real-world Congressional-Executive interactions defining war powers, see
The Conclusion treats how the issues for war powers analysis have changed from the classic ones to the new cutting-edge ones of the war in Afghanistan. It suggests the need for “suppleness” in war powers reasoning to keep up.

B. The Background about the Afghanistan War

In 2001, in response to the 9/11 terrorist attack Congress adopted the AUMF just three days later, without any way to foresee a full-scale counterinsurgency still facing a tough enemy over a decade later. In 2001-2002, the United States’ striking victories chased the Taliban leadership out of power in Afghanistan, although the chance to capture them was missed. At that date, a relatively limited American commitment could have rooted the base of the Taliban out, and made any comeback by them difficult if not impossible. However, the Bush Administration instead initiated a policy called “light footprint.” This meant deploying only about 8,000 troops who did not engage in peacekeeping. As Afghanistan expert Seth Jones writes, “‘light footprint’. . . would prove to be a serious misstep, that contributed to the collapse of governance in Afghanistan.” Moreover, the shift in resources and attention from Afghanistan to Iraq grew irreversible, as the insurgency there got going from 2003 on, and deprived the Afghan War of the means of success.

So, the Taliban came back. NATO tried a “clear, hold, and build” strategy, but “low levels of troops made it virtually impossible to hold territory in Afghanistan’s violent south.” The Bush Administration continued to take away all the key resources for use in the Iraq war. As late as 2008, only 30,000 American troops were deployed in

38 Jones at 97.
39 Jones at 115.
40 Jones at 115.
42 Jones at 254.
As a result, the Taliban grew in area of involvement, armed strength, and levels of violence. They were seen as winning.

Under the Obama Administration, a double infusion of troops took place. The military sought the forces needed for a *counterinsurgency* mission, with the goal of protecting the Afghan civilians to make the country strong and secure enough for the Taliban to lose their hold. The President ordered a first infusion in Spring 2009, fulfilling campaign promises to shift the focus from Iraq to Afghanistan.

An intense debate broke out over a military proposal for a second infusion to occur mostly during 2010. Strong forces within the Obama Administration opposed the enlarged commitment as did important figures in Congress. The “opposition” to the second infusion had become a core in the President’s own party led by Vice President Joe Biden, who had championed a different strategy called “counterterrorism-plus.” On the other side, supporters of a strong commitment included some military commanders and the Republican party in Congress, not yet in charge of either chamber. The White House ordered this second commitment, but with statements about a drawdown to begin in a small way in 2011 and to completely hand over the combat mission to the Afghans in 2014. Thereafter, the tension lay between Congressional (and military) “hawks” and Administration “doves.”

The arguments on both sides foreshadow the arguments thereafter about a faster and larger drawdown vis-à-vis a slower and smaller one. The side favoring more of a drawdown argued that “Rather than investing so many of our resources in Afghanistan,

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43 Jones at 301.
44 Woodward.
45 Woodward, 159-60, 234-35.
we should pursue a comprehensive, global counterterrorism strategy." \(^{46}\) A counterterrorism campaign, in this context, means using pilotless drones, Special Forces, and other specific resources to take down Al Qaeda leaders, and perhaps some of the Taliban leadership. The Air Force may use bases in the country or may augment these as the war goes on by more reliance on neighboring countries.

This strategy placed maximum emphasis on training Afghan army and police for an earlier turnover from the American forces of the struggle with the Taliban. Counterterrorism means not necessarily keeping more regular military forces for fighting, beyond what the specific missions need to hit terrorist figures and what is needed to secure bases within Afghanistan for those missions and to keep the Taliban from taking over the country. \(^{47}\)

Those favoring the earlier and larger drawdown (the counterterrorism-plus strategy) argue that the United States, with a high levels of debt and deficit inherited from the 2000s, cannot afford the cost; that the human cost, in killed and wounded, cannot be accepted; and that the American military cannot take the strain and distraction of this one long, large-scale war. In terms of local effects, \(^{48}\) they argue the war in the region acts to further destabilize, not bring stability. \(^{49}\) Some argue that a larger commitment is unsustainable, and, so, will not persuade others we intend to sustain it, with their expectations of our eventual total departure working against us. Robert Grenier, the former CIA station chief in Islamabad during the 2001 invasion of Pakistan, testified at a

\(^{46}\) "Bipartisan Group of Legislators Writes President to Oppose Afghanistan Troop Decrease," Lexis; Magazine Stories, Combined database; (Dec. 2, 2009).

\(^{47}\) Woodward at 234-35.

\(^{48}\) Material for all sides can be found in the tremendous study. AHMED RASHID, DESCENT INTO CHAOS: THE U.S. AND THE DISASTER IN PAKISTAN, AFGHANISTAN, AND CENTRAL ASIA (2009 ed.)

\(^{49}\) Id.
Senate hearing that “What we are currently doing I believe is not sustainable either by us or by the Afghans.”

On the other hand, the supporters of more gradual drawdown, and one without a definite schedule, note that the announcement of a drawdown schedule itself undermines our position, as the Afghan government and people, and neighboring states, treat us as short-termers and pay less heed to what we say or do. Moreover, such supporters of continued full commitment argue that the fresh doctrine of counterinsurgency implemented by General Petraeus gives confidence that they can do the job, as in Iraq in 2006-2008. Opponents of an early drawdown argue that, without it, only a few years of large military forces will be needed in Afghanistan.

II. Why Congress May Regulate a Drawdown Schedule

A. May Congress regulate a drawdown in an appropriation provision?

1. Arguments of drawdown critics

Challengers of the constitutionality of a drawdown provision argue, first, that Congress has no power, even as a condition in a defense appropriation, to regulate a drawdown. They place their reliance on the President’s general powers in an authorized, legal war, particularly as to matters in the “active theatre of war.”

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52 O’Hanlon & Sherjan at 74.
schedule, they argue, runs into one of the core Presidential concerns – disposition of forces reducing the capacity for campaigning. The author’s prior articles have treated the basic considerations of this issue and so, here, it need only be treated relatively briefly.

An analysis may group, loosely, those Commander-in-Chief concerns into three groups: command, disposition of forces, and military campaigns. In the drawdown context, the President’s relevant core concern consists of the disposition of forces, with effect on campaigning. This is the President’s power, without legislative interference, to decide where to employ the armed forces in wartime. Presidential power defenders emphasize that a provision regulating a drawdown does not make an all-or-nothing change in the uses of appropriations. Rather, a drawdown manages the reduction in the particular force in Afghanistan. This supervises Presidential discretion over a key part of the disposition of forces.

To put it another way, a Commander-in-Chief does lose some of his discretion if Congress cuts his budget or prescribes overall funding levels or force levels, or bars a drawdown in Afghanistan. Even such floors or ceilings keep Congress out of the role of

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54 For a different way of evaluating the extent of infringement of a provision on the Commander in Chief issues, see Tiefer, Appropriation Riders, supra, at 320-325.
55 Training of British Flying Students in the United States, 40 Op. Att’y Gen. 58, 61-62 (1941)(“the President’s responsibility as Commander in Chief embraces the authority to command and direct the armed forces in their immediate movements and operations. . . .”) In an apt distinction:
Congress . . . . also has a distinct enumerated power to provide for armies and navies, and to prescribe the uses to be made for them. There is nothing inconsistent between this proposition and another one, which arises from a combined reading of the declaration of war clause and the President’s power as Commander in Chief. This is the proposition that under those circumstances in which Congress has affirmatively embraced a commitment to belligerent activities overseas on a sustained basis, it may not presume to dictate the minute strategy and tactics of the President’s conduct of the authorized enterprise.

56 27 Op. Att’y. Gen. 259, 260 (1909)(upholding a provision that approved as constitutional a congressional provision that eight percent of detachments aboard naval vessels consist of marines).
micro-managing the disposition of forces. Conversely, the drawdown-regulating provision for Afghanistan prevents the President from satisfying his spending or force limits by shifting forces consistent with an overall floor or ceiling. Rather, it dictates the President shall adopt a series of dispositions of forces to the particular war in Afghanistan.

Presidential power defenders would cite the strongest Supreme Court comment on this subject, *Fleming v. Page*:

> As Commander in Chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy.\(^57\)

These general arguments would apply to any war, not just the Afghanistan war, but the Korean and Vietnam wars. However, for this particular war, critics of Congressional drawdown regulation have another specific argument. Presidents received relatively imperfect authorization for the Korean War -- no authorizing act of Congress, just military appropriations. On the same point, in the Indochina War, a very sore point consisted of how vague the authorization was -- the Tonkin Gulf Resolution -- and how it was obtained by misrepresentations to Congress about the other side’s naval “attack.”

By contrast, the 9/11 war authorization for Afghanistan (“AUMF”) provides a specific, strong, and straightforward Congressional authorization for war. The AUMF’s express language authorizes a conflict with Al Queda thereafter that might occur in many places by many means at many times. So Congressional regulation does not move into a

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vacuum. Rather, it displaces a strong and straightforward Congressional authorization of the President to wage war with a regulatory approach that renders the boundaries murky and disputed.

In the critics’ view, once the AUMF authorizes the war in Afghanistan on a broad basis, it establishes the Commander in Chief’s role. With the AUMF as his broad warrant, the Commander in Chief has little or no reason to seek fresh authorizations from Congress. Successive annual appropriations are not a place the Commander in Chief seeks dialogue and fresh or compromise empowerment, just funds for the war declared by Congress. Hence, any attempted Congressional instructions, short of a funding cut-off, as intrude on his AUMF authorization of war. In the critics’ view, the such attempted instructions violate the constitutional mechanism the use of military force activated in a classic and simple way by the AUMF.

2. Supporters of a drawdown

For Congress to regulate a drawdown derives strength from the potent “No Money” clause of the Constitution. The background of this clause sheds light on its reach and strength in wartime. Article I, § 9, cl. 7 provides that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”58 The Framers placed this clause with, and worded it sternly like, the other emphatic interdicts in Article I, § 9, rather than with the general affirmative powers in Article I, § 10. It is largely accepted that Congress can make pure, condition-free funding cut-offs even to an ongoing war.

A classic condition attaching to military appropriations occurred during the Indochina War in the 1970s that “none of the funds shall be used” for ground operations

across the borders in Laos and Cambodia. Note the distinction between air and ground operations. Later, Congress placed time limits on the Lebanon (1983) and Somalia (1993) interventions.

The Boland Amendments during President Reagan’s proxy war against Nicaragua in the 1980s by contras illustrate Congress’s flexibility in limiting wars in many respects. This episode concerns the contra conflict with its evolving set of conditions on the war (the “Boland Amendments”). With President Reagan’s acceptance and non-disputation on constitutional grounds (however much he disagreed with the provisions as not supporting his policy enough), Congress made controlling dispositions, again and again, of the funding for personnel and materiel for the contra war.

In 1982, the Boland amendment to an appropriation disapproved of funding to groups involved with overthrowing the Government of Nicaragua. However, the Administration viewed this as not precluding other roles, such as providing arms. In 1983, the next Boland Amendment included did not cut off all funding, but did establish further restrictions, including a cap of $24 million on all aid to the contras. In 1984,

59 LOUIS FISHER, PRESIDENTIAL WAR POWER 142-43 (2d ed. 2004).
63 Hayes at 1566; Coletta at 142-43.
64 Hayes at 1567; Coletta at 143-45.
Congress’s position hardened. Accordingly, Boland III made a complete funds cut-off.

Turning around, Boland IV began the consideration of restoring funding again. In 1985, Boland V provided “humanitarian” aid. Again, as with distinctions between “air” and “ground” war, the “humanitarian” aid prescription did not hold back funds in the Treasury. Rather, it enacted a control on operations in the war zone. Boland VI began the process for providing funding for war uses. In 1986, Congress provided $100 million in aid, of which $30 million in aid had to be humanitarian. Again the Congressional specification did not just amount to setting an overall amount, but made major distinctions among different wartime uses. The sequence from the early to the later 1980s reflected a broad-based acceptance that Congress could loosen or tighten the purse-string control over a particular war.

In light of all these considerations, a provision for drawdown of the troops in a war – the Afghanistan or other – touches on a concern of the Commander-in-Chief but does not amount to Congressional dictation at that concern’s core. Congress can put a floor or ceiling on how many troops to use in a war, in a troop drawdown schedule. Once Congress provides the sum of money or the number of troops, the Commander-in-Chief directs their command – by relations with the commanders – and directs their campaigning – by giving orders about their engaging with the enemy. Similarly, within

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65 This came after after the disclosure of CIA involvement in mining Nicaraguan harbors. Hayes at 1568; Coletta at 146.
66 Hayes at 1568; Coletta at 147.
67 Hayes at 1568-69; Coletta at 147-48.
68 Hayes at 1569; Coletta at 149-50
69 While it has been argued by Presidential power enthusiasts that the Boland Amendments were unconstitutional, the record suggests otherwise. President Reagan did not protest their constitutionality during their action. The Reagan Administration criticized the provisions’ “off again, on again” nature reflects faith in a policy argument, not an argument against their constitutionality. As for the policy argument, the events that moved the Congress during the 1980s, such as the mining of the Nicaraguan harbors, demonstrated a reason to keep Congress in the decision loop, given the dangers they posed of a larger war and a violation of international law.
that war, the Commander-in-Chief directs their disposition – by giving orders as to where each unit will be. But, Congress may set up a schedule that reduces or maintains the overall number of troops in the war, leaving it to the President to decide where to send that many troops and how to use them – the disposition of forces.

Now comes the other, more complex question about a compromise mechanism between the President and Congress: the validity of a concurrent resolution mechanism in war powers.

III Functionalism and Formalism

A. Functionalism

The functional arrangement of shared war powers means was most eloquently expounded by the greatest functionalist opinion on the subject, Justice Jackson’s concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*.\(^70\) His concurring opinion, joined by Justice Frankfurter, subsequently received authoritative acceptance from the Supreme Court as a whole in *Dames & Moore v. Regan*.\(^71\)

Justice Jackson’s opinion in *Youngstown* separated war actions that the President might propose into three categories: those clearly authorized by a law enacted by Congress, those clearly against such a Congressional enactment, and a middle category, the “zone of twilight.”\(^72\)

2. When the President acts in absence of either a congressional grant or

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\(^70\) Justice Jackson found that President Truman did not have authority, during the Korean War, to seize the nation’s steel mills in order to end a labor conflict. 343 U.S. 579 (1952).


\(^72\) *Dames & Moore* restated the same concept by saying that executive actions fall “along a spectrum running from explicit congressional authorization to explicit congressional prohibition.”
denial of authority . . . there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence, may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

Justice Jackson captures several functionalist themes about the nature of war powers in the “zone of twilight.” His opinion identifies the war powers as an issue “in which [the President] and Congress may have concurrent authority . . . .” Concurrent authority could mean than the elected branches of government share authority so that their interaction governs whether proposed action has been sufficiently and validly authorized.

Moreover, Justice Jackson comments that legal conclusions about war powers exercised in this zone turn on “the imperatives of events and contemporary imponderables.” Such factors have been cited to justify expansive Presidential power many wars. Yet, Justice Jackson wrote his opinion about unilateral war powers to explain, not that President Truman had expansive powers, but that he did not. The President lost Youngstown. This Jacksonian approach did not use “contemporary

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73 Id. The image of a “zone of twilight” itself betokens transition between day and night, shading between light and dark, or, in other words, an area of in-betweenness rather than a sharp division.
factors” to dispense with what Congress had decided, but rather, its “three zones” analysis turned precisely upon what Congress had done and not done.

B. Formalism

Fundamental Supreme Court decisions, both in the 1980s regarding separation of powers produced considerable analysis of the two distinct conceptual approaches, functionalism and formalism. Nowhere did the Supreme Court more firmly set forth a formalist position than in *INS v. Chadha*. *Chadha* invalidated a legislative veto in the immigration laws, a statutory provision by which the House or Senate, by resolution, could cancel administrative stays of deportation for certain aliens. The Court wrote the decision to apply broadly, not just to the type of provision at issue in the case. Arguably, *Chadha* applied to the entire realm of enactments (by the House and Senate) that did not go through the full enactment process of bicameralism (approval of one measure, in identical form, by both the House and Senate) and presentment (opportunity for the President to veto). Hence, *Chadha* would seem straightaway to deny legal effect to the concurrent resolutions of WPR § 5(c) or a hypothetical Afghan War mechanism.

However, *Chadha* by its language deals only with attempts by the House and Senate to take part in statutorily delegated powers. The decision speaks repeatedly about

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74 Moreover, Justice Jackson drew on his own extensive experience as Solicitor General for President Roosevelt in the lead-up to American involvement in World War II, when the President had limited the exercise of powers in light of the interactions with a more isolationist Congress. Solicitor General Jackson had helped President Roosevelt to find what authority Congress’s actions did grant the 1940s President. For all of President Roosevelt’s very considerable activism in the period 1940-41, ranging from the destroyer deal and the occupations of Greenland and Iceland to an undeclared naval war with Germany and a provocative embargo against Japan, President Roosevelt stayed out of World War II until Pearl Harbor. American ground forces were not committed to a Eurasian war zone without Congressional approval in 1940-41, as was the issue in Korea, Kuwait, and Bosnia.

75 Justice Jackson’s description of “congressional inertia, indifference or quiescence” reflects that when Congress has neither expressly authorized, nor expressly prohibited, a proposed action, there is still much to be learned from the exact record of Congressional action, as Justices Jackson and Frankfurter examined concretely in that case.

delegated powers, and how their exercise is restrained by judicial review and by the non-delegation doctrine.\textsuperscript{77} It does not purport to address constitutionally shared powers, such as powers for foreign affairs and for war. A description of the constitutional shared war power notes the various ways the United States has to take war actions, and how these call into play several constitutional capabilities.\textsuperscript{78}

IV. Analyzing a Concurrent Resolution Mechanism

The part goes further into the real world of war powers. In the course of exploring the roots of a concurrent resolution mechanism, it looks into the little-known roots of the War Powers Resolution. This takes us back to World War II and later conflicts, including the Vietnam War. Then this part looks at the War Powers Resolution’s invocation in 1999, during the start of the Kosovo-related NATO bombing campaign against Serbia. There is also a brief articulation of the concept that in the flexible world of shared war powers, it matters that the AUMF was enacted a decade ago. Those urging the significance of a new vote, even one pursuant to a concurrent resolution mechanism, may cite how long ago, and in the course of so different a conflict in Afghanistan, the original vote occurred.


\textsuperscript{78} These include Congress’s power to declare war, to take other steps regarding war such as providing funding, and to make or to share with the President other national security decisions like treaty ratification; and, the President’s power to negotiate with other nations, to command the military, and to make or to share with Congress other national security decisions like treaty ratification. The powers involved in taking war actions are not strictly separated and exercised pursuant to close judicial control, like domestic lawmaking powers, but shared powers. For discussions of war powers, see the sources cited in note 1 supra.
A. May Congress enact a Drawdown in Legislation (other than an Appropriation)?

A first step is to consider how Congress may enact a drawdown mechanism in legislation, and not necessarily in a military appropriation itself. Annual military appropriations create a background for all war powers actions. On the one hand, Congress can enact “Restrictive Appropriations,” which stop or limit war action. On the other hand, Congress can enact “Legitimating Appropriations,” which approve or ratify war action.

Any argument that legislation cannot accomplish what an annual military appropriation provision would, has not been much developed. For example, of the Boland Amendments, some conditioned appropriations, others did not, and that distinction did not receive argument. On the one side, Presidential power defenders might urge that nothing may cut off appropriations except what is in an appropriation. The Constitution uses the term “appropriations” in Article I, § 9. In a word, appropriations are different.

On the other hand, “legislation” (i.e., provisions not on an appropriation) can amend appropriations. In two centuries, no pronounced distinction has developed in this

79 That background has received extensive discussion from Professors Raven-Hansen and Banks in National Security Law and the Power of the Purse. Two chapters in the book deal with opposite ways that Congressional intent, regarding uses of military appropriations, regulates war powers. Banks & Raven-Hansen, supra note 92, and other sources cited in that footnote.
80 Marked recent examples of this include the Boland Amendments that ended (for their duration) legitimate American government spending in support of the contra war in Nicaragua, and the funding cut-off provisions that ended American involvement in the Indochina War. Id. at 137-157.
81 Banks & Raven-Hansen, supra note 92.
82 The power of a spending bill to bring an Executive to heel goes back in England to the Tudors and Stuarts, and in America to colonial battles with royal governors. The spending bills of those eras underlie the Constitution, and the whole tradition carries forward to the appropriations of today.
regard. \(^{83}\) So, it is hard to see why they cannot impose a condition on previously enacted spending for a war. Legislation has the same overall enactment process as appropriations — approval by the House and Senate and the presentment to the President for signature or veto.

The particular strength of a mechanism for action by the House and Senate by concurrent resolution draws upon the key concept of “ratification,” \(^{84}\) both generally and in particular relation to wartime appropriations. Ratification has played an enormous role in war powers and foreign affairs. The Louisiana Purchase consisted of an unauthorized action by President Jefferson followed by ratification by Congress, particularly by appropriations paying for the purchase. \(^{85}\) At the start of the Civil War, President Lincoln took a series of major and vital unauthorized actions followed by ratification by Congress. This led to a Supreme Court opinion, the *Prize Cases*, \(^{86}\) solidly behind the theory that unauthorized actions about war powers could receive ratification by Congress.

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\(^{83}\) The floor procedures of the House and Senate create barriers against appropriations on a legislative bill. However, these have to do with the desirability, in budget terms, to funnel spending provisions through the appropriation committees. These floor procedures do not have constitutional dimensions. Moreover, there might not even be a point of order against a provision on a legislative bill that provided for a drawdown. It presumably would add language at the end of the previously enacted appropriation law, not change any numbers in the appropriation. Such language, which neither adds nor deletes spending figures, might not be classified as an “appropriation” provision in the sense of the Congressional rules, even though it would become an amendment to the appropriation law for any difference that makes constitutionally.

\(^{84}\) This theory explains that under some circumstances Presidents can legitimately take military actions not previously authorized by Congress, in the good-faith expectation that Congress will soon legislatively approve the action retroactively. In fact, there are powerful examples of the ratification theory in operation. Ratification by legislation, after the fact of war powers exercise, is well established in Supreme Court case law, and Congress’s enactment of appropriations for the Vietnam War in the late 1960s and early 1970s, it has been argued, constituted ratification for the expansion of that war. \(\text{Id.}\); Ely, *supra* note , at 27-30; see note *supra* (ratification case law).


In 1803, President Jefferson understood that he needed the support of both Houses to implement the treaty he entered into with France for the Louisiana Purchase. Because Congress would have to ratify and pay for the treaty it “[had to] be laid before both Houses, because both have important functions to exercise respecting it.”

\(^{86}\) 67 U.S. (2 Black) 635, 671 (1862).
Key opinions in *Youngstown* recalled the *Prize Cases* to discuss the strong relevance of the ratification issue to the core inquiry of a functional analysis of war powers.\(^{87}\) A Court of Appeals decision during the Indochina War discussed whether Congress had ratified the war in Cambodia.\(^{88}\) Last but not least, a key recent opinion under the AUMF itself which authorized the Afghan War, played out against the background that Congress had ratified military commissions after the Court had decided against them earlier.\(^{89}\)

So going through the steps, the ratification involves, first, an early action, which assertedly lacks the force of an appropriation (“cut-off”). While taking that early action, the actors usually deem it their intent to submit the matter for consideration by Congress, with reason to think Congress will back the action.\(^{90}\) In the Afghan instance, the analyst could take the position that the Congress enacts the drawdown provision at a time when no defense appropriation may be handy. But, Congress knows that the next time such an appropriation comes to hand, it will ratify the earlier drawdown provision.

A. War Powers Resolution § 5(c): Background and Application re: Bosnia and Kosovo

The War Powers resolution had several very important sections. Most attention goes to a provision not relevant here, the provision that limits how long a President may

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\(^{87}\) 343 U.S. at 631 & n.1 (Douglas, J., concurring); 343 U.S. at 611 (Frankfurter, J., concurring).

\(^{88}\) *Orlando v. Laird*, 443 F.2d 1039, 1043 (2d Cir. 1971). The Court of Appeals decided the issue of ratification was a political question.

\(^{89}\) *Hamdan or Bousmedienne*.

\(^{90}\) For example, President Lincoln thought rightly that the incoming Congress, which would have a strong pro-Union majority, would buck his actions.
continue a conflict without a Congressional authorization. In this discussion, we focus on
the provision, § 5(c) that created a concurrent resolution mechanism by which Congress,
by a vote of the House and Senate (not presented to the President), may terminate
American involvement in a war.

1. Section 5(c) and its Background

In considering the War Powers resolution, Congress expressly considered the
constitutionality of the provision that became § 5(c). The House bill had a provision for
termination of conflicts by concurrent resolution; the Senate bill did not.

Justice White’s dissenting opinion in Chadha, in its broad sweep, discussed war
powers and other national security legislation, which the majority opinion did not touch.
The opinion showed § 5(c)’s roots in Congress conditioning grants of power during
World War II:

World War II occasioned the need to transfer greater authority to the
President in these areas. [This way,] Congress could confer additional authority
while preserving its own constitutional role. During World War II, Congress
enacted over thirty statutes conferring powers on the Executive with legislative
veto provisions. President Roosevelt accepted the veto as the necessary price for

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91 Section 5(c) has drawn extensive commentary. Most commentators have distinguished § 5(c)
from Chadha. However, the debate has been sprawling and loose enough that some who take it as
unconstitutional appear quite unaware that others do not. The provision receives useful illuminations from
study of its little-known yet striking background in thirty years of similar prior provisions.

92 On the basis of an opinion of constitutionality from Professor Paul A. Freund,
one of the leading scholars on this subject, the conference committee and the two
chambers adopted the concurrent resolution mechanism.

Supplemental Brief on Reargument of the United States Senate, Appellee-Petitioner, Immigration
and Naturalization Service v. Chadha. (“Senate Chadha brief”) (a copy will be on file at the law review).
The author is named on the brief, and was the chief drafter of the sections in question, under the invaluable
supervision of the Senate Legal Counsel, Michael Davidson, and the Deputy Senate Legal Counsel, M.
Elizabeth Culbreth, and with the help of the current Senate Legal Counsel, Morgan J. Frankel.
obtaining exceptional authority.\textsuperscript{93}

Between World War II, provisions with similar mechanisms\textsuperscript{94} served crucial roles in legislation addressing the Truman Doctrine, the Korean War, the Middle East Crisis of 1957, and the Vietnam War.\textsuperscript{95} For example, the original Tonkin Gulf Resolution, the authorization President Johnson obtained from Congress for the Vietnam War, had in it one of these provisions.\textsuperscript{96} Justice White sums up well when he says “Congress could confer additional authority while preserving its own constitutional role,” and “[the President] accepted the [legislative] veto as the necessary price for obtaining exceptional authority.”

Usefully, Justice White’s comments distinguish the concurrent resolution mechanisms in the Middle East crisis of 1957 and the Vietnam War from the many “legislative veto” provisions regarding domestic regulatory and energy actions. War powers are shared by the President and Congress, not separated like the powers of enactment (Congress) and administration (Executive). A mechanism like the one in the Tonkin Gulf Resolution or the War Powers Resolution has nothing to do with the delegations in laws like regulatory or criminal provisions. Rather, it provides a flexible way Congress and the President share their war powers.

\textit{Chadha} did not make such mechanisms go away. Louis Fisher, scholar at the Library of Congress, has counted hundreds of legislative veto mechanisms enacted

\textsuperscript{93} Justice White’s opinion at 969 (footnotes omitted).
\textsuperscript{94} Bracknell, \textit{supra}, at n.112.
\textsuperscript{95} Senate \textit{Chadha} brief at 20 & note 44.
\textsuperscript{96} H.R.J. Res. 1145, 88th Cong., 2d Sess., Pub. L. No. 88-408, § 3, 78 Stat. 384, 385 (1964)(Tonkin Gulf Resolution). The Tonkin Gulf Resolution was repealed by statute. By this time, President Nixon asserted powers that the repeal did not affect, such as approval of the war by voting its appropriations, and his own powers as Commander-in-Chief.
since Chadha. He traces how Congress considered repealing § 5(c) but instead merely supplemented it without a repeal:97

Congress continues mechanisms of diverse kinds in war powers, that dovetails with the discussion about the Boland Amendments. As Fisher notes:

Another type of informal arrangement is reflected in the “Baker Accord” of 1989. In the early months of the George H. W. Bush Administration, Secretary of State James A. Baker III decided to give four committees of Congress and certain party leaders a veto power over the divisive issue of funding the Nicaraguan Contras. In return for receiving $50 million in humanitarian aid for the Contras, Baker agreed that a portion of the funds could be released only with the approval of certain committees and party leaders.98

2. Application re Bosnia and Kosovo

Beside the brief Persian Gulf War, the United States committed its armed forces into one major substantial conflict between the War Powers Resolution of 1974 and 9/11/2001. Namely, in 1995 the United States sent ground forces to keep peace in Bosnia, and then, more important, in 2000 engaged in a massive bombing campaign

97 After Chadha, some Members of Congress introduced legislation to change the War Powers Resolution, which contains a provision that allows Congress to pass a concurrent resolution to order the President to withdraw troops engaged in combat. 87 Stat. 556-57, § 5(c) (1973). These lawmakers suggested that the concurrent resolution be replaced by a joint resolution of disapproval. 129 Cong. Rec. 28406-08, 28673-74, 28683-84, 28686-89 (1983). As finally enacted, however, the procedure for a joint resolution was not added to the War Powers Resolution. It became a freestanding legislative procedure that is available to force a vote to order the withdrawal of troops. 97 Stat. 1062, § 1013(1983); 50 U.S.C. § 1546a (2000). Louis Fisher, Legislative Vetoes After Chadha, Con. Research Serv., May 2, 2005, at 2. The Fisher memo does distinguish between committee-level ones, which have continued, with those at the level of one- and two-chamber action (i.e., concurrent resolution mechanisms), which have not. 98 Fisher, supra, at 5.
against Serbia to force an end to Serbia’s actions against Kosovo. That makes this conflict the best to see the use of § 5(c). WPR’s role in one large matter, like Kosovo, outweighs any number of Presidential responses in relatively minor situations.

To give an account in abbreviated chronology, in late 1995 President Clinton sought Congressional support for a Bosnia deployment. He dropped his objection to $7 billion Congress wanted for defense beyond the budget, and the defense appropriation he needed for the deployment became law. Separately, after major debates on the commitment, the Senate voted support for the deployment. A strong majority of House Republicans opposed the deployment. Yet, at the key point, the House defeated a cut-off of funds for the deployment, by the close vote of 210-218. Thus, although the votes of the Senate and House had not occurred by affirmation of a single vehicle as sought by Chadha, the President could, and did, take the votes in the realm of shared real war powers as support for the deployment.

The Kosovo activity mattered even more, as the United States employed a massive and economically devastating bombing campaign – very much a war. Early on, the Senate passed a resolution stating that the President was authorized to conduct air strikes in the region. The House voted against American combat “ground elements,” although none were contemplated. Most interestingly, the House considered a resolution expressly pursuant to § 5(c) to withdraw all armed forces from the operations, but, voted it down.

Some would review this record and see only that the chambers had acted

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inconsistently, or had not followed the WPR plan, or the President had not shown clear submission to the WPR plan. Those who can think functionally about the point of a Congressional role do not lose faith at the messiness of the operation in action. There is little reason to think that the House of Commons under the Stuart monarchs, or the colonial legislatures under English governors, acted strictly according to rules, either. A shared power means the political branches may work matters out by rough-hewn methods.

The Kosovo elements showed that the Congress had debated the issue paid it much attention. Had the House and Senate possessed a determination to block the war action, they had the opportunities to do so. Particularly, the House’s opportunity did not come from general legislation or general appropriation channels, but specifically from § 5(c). This provides all the more reason to consider such a mechanism to be a legitimate part of the sharing of war powers.

B. The AUMF Against the Background of Appropriations

Those who would bar a concurrent resolution mechanism prefer a rigid model of war powers in which very little is “shared.” In their view, Congress enacted the AUMF in three days in 2001 and that ended Congress’s role. The President took over (except for fund cut-offs). It does not matter whether the war lasted three months, or three years, or thirteen years. By contrast, a more flexible view of war powers raises greatly the value of a mechanism, like a concurrent resolution mechanism, by which fresh contemporaneous Congressional decisions, reflecting contemporary views of the
1. The Framers’ Bias Against Letting Wars Get “Longer”

The Framers had a bias against letting wars get longer without fresh Congressional authorization – or to put it differently, would favor drawdown mechanisms that gave Congress a role. This has a historic context in the steps leading up to the English Civil War. The constitutional text for Congress’s spending power provisions, against the background of English and colonial traditions, vests the power of the purse in the legislature for specific reasons. Spending control aimed to keep the control of war in the people’s representative bodies. Parliament moved in that direction in the Tudor and early Stuart years. The English Bill of Rights of 1689 memorialized the Commons’ victory, and anticipated the U.S. Constitution. The 1689 measure provided, “[t]he raising or keeping a standing army within the kingdome in time of peace unlesse it be with consent of parliament, is against law.”

More significantly for this article, the English Bill of Rights of 1689 worded its power of the military purse in a way that prefigured the “No Appropriations” clause. The English charter said that “levying money for or to the use of the Crowne by prentice of

100 George, supra, at 953-60.
101 The historic conflict in England between the Stuart monarchs and the House of Commons led to these clauses specifically established the legislative power to dictate the terms and conditions for spending revenue upon shaping the initiation of war. Gerhard Casper, Appropriations of Power, 13 U. OF ARK. AT LITTLE ROCK L.J. 1, 3-5 (1990), and in the steps leading up to the English Civil War. Meanwhile, the same era laid the foundation for the modest original intent of the Commander in Chief Clause. In 1641, Parliament had brought on the English Civil War by conferring control of the standing army on the Earl of Essex, who was under its authority, rather than leaving it with Charles I. Id. at 9.
prerogative without grant of Parlyament *for longr time* or in other manner then the same is or shall be granted is illegal.”  

104 This language speaks potently about the origins of the Constitution’s “No Appropriations” clause. The language realized a strong desire for means, through temporal limitation, to restrain the Executive.

In particular, the Framers did not want appropriations to become a mechanism for Presidents to lengthen wars. Since a mechanism like § 5(c) provides a way to draw down a war, it would accord with the Framers’ desire not to have war “for longr time . . . than the same is or shall be granted. . . .”

2. Mechanisms Against the Backdrop of Not Wanting a “Longr” War

The discussion above noted that § 5(c) of the War Powers Resolution provided the mechanism for the House to vote about the Serbian bombing campaign. This provides a useful way to understand how such votes might have legitimate war powers significance, say, as a drawdown in Afghanistan.

One way consists of the impact of Congressional decision-voting on Presidential position-taking. Very simply, by the President pledging that he would abide by a decision of the House and Senate, he shares war powers. A formalist would argue that this, like any other way to accord the House and Senate a role, is just politics; the President would not be legally bound to do this, or, having said he would, to do what he had said. Yet, the context for this is not like the context of a presidential pledge to the Republican or Democratic national committee, nor like an oral presidential consultation with other heads of state in Europe. It has more than political significance because the

House and Senate are more than just political entities. The Constitution gives them a shared role in war powers, a role that is flexible, and a Presidential pledge fits with that.

Additionally, both the Congress and the President could look at a concurrent resolution as the ultimate of all harbingers of ratification by appropriations. Focusing on this aspect, the steps by Congress in December 1995 arguably had legal significance. The steps occurred against the background that President Clinton could have, or not have, good-faith expectations about provisions in the next supplemental appropriations law. 105

If the House and Senate had voted against the Bosnia commitment, even though they did not enact a prohibition by a bill sent to the President for signature, he could not gone ahead with a good-faith expectation of approval in the next supplemental. 106 Because the Senate and House voted favorably to him, he could, and did, go ahead. The machinery of military appropriations proceeds very much on the expectation of imminent Congressional enactments of funding laws that could ratify major military steps. 107

The nature of war powers presents a situational mix of authorizing and non-authorizing aspects. The Afghanistan War evolved greatly in the decade after 2001. It started as a war against an enemy sovereign. It might have ended with the thorough


106 For example, the appropriations for 1984 limited aid to the contras to a low rate, which “would require the Administration to soon ask Congress for more, thus keeping the Administration’s policy on a very short leash.” Hayes, supra, at 1567. From Congress’s condemnatory reaction after public disclosure of the mining of the Nicaraguan harbors, id., it was obvious that the Administration could not have any good-faith belief thereafter that Congress would ratify its drawing upon funds when the 1984 limit was reached. That funding shortage led to the search for alternative funding sources that became the Iran-contra affair.

107 This theory explains that under some circumstances Presidents can legitimately take military actions not previously authorized by Congress, in the good-faith expectation that Congress will soon legislatively approve the action retroactively. In fact, there are powerful examples of the ratification theory in operation. Ratification by legislation, after the fact of war powers exercise, is well established in Supreme Court case law, and Congress’s enactment of appropriations for the Vietnam War in the late 1960s and early 1970s, it has been argued, constituted ratification for the expansion of that war. Id.; Ely, supra, at 27-30; see note supra (ratification case law).
defeat of that enemy sovereign, especially with a replacement government. As noted above, however, the Secretary Rumsfeld’s “light footprint” doctrine left the way open for the return of the Taliban as an insurgency. That insurgency, being too much neglected during the Bush Administration, took deep root.

As presented in the 2010s, the war had entered its second decade, now cast as a long-term counterinsurgency – not what the public and Congress could have expected during the three days of the AUMF’s consideration in 2001. If Congress sought, and the President supported, a drawdown schedule and/or a concurrent resolution mechanism, they used their shared war powers in a way the Framers would have approved.

The decisions on what to do about a war can be hard to analyze in a simple way. But, the constitutional analysis about how Congress and the President cannot retreat, by formalist simplicity, from detailed analysis of such decisions. The mechanisms that the elected branches may establish for such decisions deserve scholarly acceptance.

V. CONCLUSION: Need for “Suppleness” in Understanding War Powers

Does this article point to yet another respect in which war powers law and national security law have entered a new situation since 9/11?

Try this way of looking at it. From the War Powers Resolution, enacted in 1974, until 9/11, the United States had no long wars. It most certainly had very real wars. It had the Persian Gulf War, a very real war, in terms of casualties, stakes, cost, forces on each side, and so on. It had the bombing campaign as to Kosovo, which certainly had,

for the other side, casualties, and for our side, massive use of the air forces although without use of ground forces. Thus, the United States had real wars, but it did not have long wars, with both Persian Gulf and Kosovo wars ending in a couple of months.

Hence, the landscape of war powers law in that period 1974-2001 kept at the forefront the kind of issues bequeathed by the Vietnam era, but not exactly the kind of issues that have arisen of late. That 1974-2001 period started, following the Vietnam War, with a strong restrospective national look at how the war in Indochina had been so wrongly initiated. The War Powers Resolution came out of concern that another President would again make a unilateral war commitment like Vietnam, with Congress unable to deal itself in at the beginning.\footnote{The biggest clash over war powers, combined with separation of powers, in the era of 1974-2001, may well have been the one about the Boland Amendments in the 1980s, precisely because it again seemed, as in Vietnam, that the President might make a unilateral war commitment (against Nicaragua) without a real Congressional authorization at the beginning.}

Then, starting with 9/11, and joined soon by the Iraq war vote in 2002 and intervention in 2003, suddenly the United States had what turned out to be two wars – two bloody, costly wars. And, not just two wars, but two wars such as the United States had not conducted in 1974-2001: long wars. Some of the issues from 1974-2001 continue, in the past decade, war powers law and national security law have increasingly addressed the issues not found in those initial stages of wars or in short wars, as in the era of 1974-2001, but rather, these new issues as to the wars in Iraq and Afghanistan.

Now, we can, and should use analysis of war powers issues not found in those initial stages of the Vietnam War nor in the Boland Amendments. Issues have come to the fore about different kinds of Congressional input over time, about whether drawdowns can be worked out between the branches; about Congressional mechanisms
for compromising with a President; and, so on. These are issues of long wars, and this is an article about long wars.

These kinds of issues suggest a need for suppleness, rather than reasoning built on old patterns or formal grounds. Flexible concerns suffuse the world of long wars.

Historical background always helps a great deal, as it has here. This article and the other two in this trilogy depend upon the rich vein of historical insight in the work of Professors Barron and Lederman, and Professor Lobel.

Their history raises the right kinds of questions. Of course great Presidents facing great crises from Washington to Lincoln to Franklin Roosevelt acted flexibly, without taking their signals from some rigidly-defined-in-law office. However, the answers they worked out live on as precedents, to suggest and to illuminate. As for this article’s discussion, it draws on how President Franklin Roosevelt went with dozens of post-enactment mechanisms to get through World War II. Congress imposed one on President Nixon, in the War Powers Resolution, in reaction to the experience of Presidential dragging-on of a long war.

Suppleness does not involve embracing every innovation that comes along. President George Bush110 wrote an unusual number of signing statements, and this innovation, by and large, received strong criticism from a constitutional perspective. Many other unilateral innovations also occurred, some unwelcome.111 The reader is merely invited to accept the invitation to think with suppleness of war powers in terms of

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110 Most readers will assume this is a reference to President George W. Bush of 2001-2008. To be sure, it would be most true of him. However, it was also somewhat true of President George H.W. Bush of 1989-1992. TIEFER, THE SEMI-SOVEREIGN PRESIDENCY, 31-60.

111 In 2002, President Bush went beyond merely declining to submit the Rome Treaty on the International Criminal Court to the Senate for ratification. He took an unprecedented step of “withdrawing” significance from the previous signature on it – a previous signature which did not ratify it unless and until the Senate did so – a step dubbed by the press the “unsigning” of the instrument.
the flexibility of the real world.

(THE END)